



European Securities and
Markets Authority

Reply form for the Addendum Consultation Paper on MiFID II/MiFIR



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Addendum Consultation Paper on MiFID II/MiFIR, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_TR_ORK_CS_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_CP_TR_ORK_CS_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA_CP_TR_ORK_CS_XXXX_REPLYFORM or

ESMA_CP_TR_ORK_CS_XXXX_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Deadline

Responses must reach us by **23 March 2016**.

All contributions should be submitted online at <https://www.esma.europa.eu/> under the heading ‘Your input/Consultations’.



Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.



Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_TR_ORK_CS_1>

The Federation of European Securities Exchanges (FESE) represents 41 exchanges active in equities, bonds, derivatives and commodities through 21 full members from 30 countries, as well as 2 Observer Members from European emerging markets. FESE represents public Regulated Markets (RMs), which provide both institutional and retail investors with transparent and neutral price-formation.

At the end of 2014, FESE members had up to 9,051 companies listed on their markets, of which 7% are foreign companies contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organise specialised markets that allow small and medium sized companies across Europe to access the capital markets; 1,442 companies were listed in these specialised markets/segments in equity, increasing choice for investors and issuers. Through their RM and MTF operations, FESE members are keen to support the European Commission's objective of creating a single market in capital markets.

FESE is registered in the European Union Transparency Register with number 71488206456-23.

Summary of response

In addition to our responses to the questions set by ESMA, below, FESE would like to highlight a couple of concerns on the publication of reference data by ESMA:

In the context of MiFID II, ESMA will collect an extensive amount of instrument reference data from trading venues via national competent authorities (RTS 23). Pursuant to MiFIR Article 27(1), ESMA is required to make some of that data publicly available in order to enable market participants to comply with their trade reporting obligations.

We raise below a number of **implementation concerns**:

1. Data Usage Rights for ISINs

While we understand that ESMA is required to publish the ISIN codes of all the instruments in scope of the reporting obligation, we would like to highlight that **ISIN codes are the intellectual property of national numbering agencies and are subject to rights for republication**. In order to make that data freely available on its website (i.e. republish it), ESMA would need to obtain permission from each national numbering agency. Pre-existing arrangements between trading venues and national numbering agencies to use ISINs would not extend to ESMA.

While some national numbering agencies allow the publication of their ISINs free of charge, others may **charge substantial fees for redistribution**. In the case of US ISINs – which will be needed for instruments listed in the US but traded in Europe – the European Commission issued an antitrust ruling in 2011 limiting the fees for ISIN distribution in Europe by the US national numbering agency following concerns that it had been charging unfairly high prices.¹

We would like to bring this issue to ESMA's attention as trading venues will not be able to transfer the publication rights they acquired on to ESMA.

2. Access Requirements

As ESMA pointed out in its letter from 2 October 2015 to Olivier Guersent, there are major concerns around the availability of reference data and the design of corresponding IT systems. Detailed information on **more**

¹ See Commission Decision in Case COMP/39.592 and press release available [here](#)



than 15 million instruments will have to be made available to a considerable number of market participants in a suitable timeframe.

Although a delay in the implementation of MiFID II seems increasingly likely, we are concerned that due to the **considerable IT costs and developments** needed, the wide publication of a large instrument reference database will remain a challenge for regulators. In addition, the **maintenance** of such a database would prove extremely challenging as well considering the fact that mechanisms would need to be built-in to address any issues linked to misreporting, double-entry, errors and omissions.

Last but not least, we are unsure of how ESMA plans to give **access** to that database and the extent to which many **market participants will be able to access it at the same time**. We anticipate that the database will need to be updated on a daily basis and, therefore, will need to be made available and accessed by a large range of market participants every night in view of the next day's trading. <ESMA_COMMENT_CP_TR_ORK_CS_1>



Q1: Are there any other scenarios which you think should be covered?

<ESMA_QUESTION_CP_TR_ORK_CS_1>

Analysing the current ESMA CP, we welcome the inclusion of separate values for:

- Dealing on own account (DEAL); and,
- Trading in a matched principle capacity (MTCH).

In our response to the previous ESMA CP on the draft RTS, we stated that we strongly disagreed with the proposals that 'Matched principal capacity' [Article 4(1)(38) of Directive 2014/65/EU] would be cross referenced with 'dealing on own account' [Article 4(1)(6) of Directive 2014/65/EU]. Indeed, we stated that for the purposes of clarifying reporting obligations under MiFIR Article 26, we believe that the reference to matched principal trading should only refer back to the definition in the Level 1 text.

This is important in the sense that it respects the definitions established in Article 4 regarding the systematic internaliser. Article 4(1)(20) defines an SI as: 'systematic internaliser' means an investment firm which, on an organised, frequent systematic and substantial basis, deals on own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system'.

<ESMA_QUESTION_CP_TR_ORK_CS_1>

Q2: Are there any areas in Part I covered above that require further clarity? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_2>

We note that most of the examples of trades that take place on a venue (e.g. 1.1.2) shows the CCP of the trading venue as the counterparty. For completeness we believe it would be useful to also include examples where trading takes place on a venue in securities which are not CCP eligible.

<ESMA_QUESTION_CP_TR_ORK_CS_2>

Q3: Are there any other situations on reportable transactions or exclusions from transactions where you require further clarity?

<ESMA_QUESTION_CP_TR_ORK_CS_3>

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Q4: Are there any specific areas covered by the mechanics section where you require further clarity? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_4>

In general, FESE agrees with ESMA's approach with respect to how the transaction reports should be submitted to competent authorities. However, we have some specific comments on the operation of ARMs, particularly where they have close links with trading venues obliged to report transactions executed on their platforms by a person who is not subject to Article 26 MiFIR.

In these circumstances, the operator of the trading venue is not providing 'services to an investment firm in order for it [i.e. the investment firm] to meet its obligations under Article 26 of MiFIR' as per the definition of an ARM. The obligation to report data to the national competent authority is with the trading venue itself. Whilst the trading venue in this instance can choose to connect directly to the regulator in order to report data, it should also be free to utilize an ARM for this purpose. This is particularly relevant where a trading venue has close links with an approved reporting mechanism provider, which it can utilise for its set up to minimise cost and maximise efficiencies.



FESE therefore recommends that ESMA extend its Guidelines to clarify that trading venues are indeed permitted to use ARMs to fulfil their reporting obligations under Article 26 MiFIR. This would ensure consistency in relation to the use of ARMs by trading venues across all the EU Member States. It would also be consistent with implementation of other EU data reporting requirements such as the Regulation (EU) No 1227/2011 of the European Parliament and the Council on wholesale energy market integrity and transparency (REMIT).

We recommend the following changes to the proposed Guidelines text:

‘Section 1.1.8.5

(...)

Transaction reports are submitted to competent authorities by: a) Investment firms which execute transactions in financial instruments; b) ARMs acting on behalf of investment firms or trading venues; c) Operators of trading venues through whose system the transaction was completed.

<ESMA_QUESTION_CP_TR_ORK_CS_4>

Q5: Do you require further clarity on the content of Article 1 of RTS 22? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_5>

TYPE YOUR TEXT HERE

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Q6: Do you require further clarity on the content of Article 2 of RTS 22? Please elaborate.

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Q7: Do you require further clarity on the content of Article 3 of RTS 22? Please elaborate.

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Q8: Do you require further clarity on the content of Article 4 of RTS 22? Please elaborate.

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Q9: Do you require further clarity on the content of Article 5 of RTS 22? Please elaborate.

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Q10: Do you require further clarity on the content of Article 6 of RTS 22? Please elaborate.

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Q11: Do you require further clarity on the content of Article 7 of RTS 22? Please elaborate.



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Q12: Do you require further clarity on the content of Article 8 of RTS 22? Please elaborate.

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Q13: Do you require further clarity on the content of Article 9 of RTS 22? Please elaborate.

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Q14: Do you require further clarity on the content of Article 10 of RTS 22? Please elaborate.

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Q15: Do you require further clarity on the content of Article 11 of RTS 22? Please elaborate.

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Q16: Do you require further clarity on the content of Article 12 of RTS 22? Please elaborate.

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Q17: Do you require further clarity on the content of Article 13 of RTS 22? Please elaborate.

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Q18: Do you require further clarity on the content of Article 14 of RTS 22? Please elaborate.

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Q19: Do you require further clarity on the content of Article 15 of RTS 22? Please elaborate.

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Q20: Do you require further clarity on the content of Article 16 of RTS 22? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_20>
We are concerned that Article 16 of RTS 22 does not take into account situations where a security is dual-listed on admission e.g. admitted to trading to two markets on the first day. We believe this should be addressed in order to ensure a consistent implementation of the requirements. We note that Art 16(3) refers to using the registered office of the issuer. We would suggest using this as the next criterion i.e. Art 16(2) is maintained but is expanded so that where a security is first admitted to more than one market, the most relevant market shall then be determined as the Member State where the registered office of the issuer is situated.

<ESMA_QUESTION_CP_TR_ORK_CS_20>

Q21: Do you require further clarity or examples for population of the fields covered in Block 1? Please elaborate.

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Q22: Do you require further clarity or examples for population of the fields covered in Block 2? Please elaborate.

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Q23: Do you require further clarity or examples for population of the fields covered in Block 3? Please elaborate.

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Q24: Do you require further clarity or examples for population of the fields covered in Block 4? Please elaborate.

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Q25: Do you require further clarity or examples for population of the fields covered in Block 5? Please elaborate.



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Q26: Do you require further clarity or examples for population of the fields covered in Block 7? Please elaborate.

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Q27: Do you require further clarity or examples for population of the fields covered in Block 8? Please elaborate.

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Q28: Do you require further clarity or examples for population of the fields covered in Block 10? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_28>
We believe the application of 'LRGS' is unclear and could lead to confusion. In particular, RTS 1, Annex I, Table 4 defines the "LRGS" flag as "Post-trade large in scale transaction flag", with the description "Transactions that are large in scale compared with normal market size for which deferred publication is permitted under Article 14".

Example 1 in section 1.2.9.1 of the CP uses 'LRGS' for the OTC post-trade indicator (field 63) for the sell to the client which is "Large in scale" in accordance with Article 20(3)(a) of MiFIR. However we don't believe it is clear in the example that the sell to the client is with deferred publication, and it could be questioned if it is referring to use of the pre-trade large-in-scale waiver, particularly since 'LRGS' is available for use in both field 61 (when using it under the pre-trade waiver) and field 63 (when using it for deferred publication).

<ESMA_QUESTION_CP_TR_ORK_CS_28>

Q29: Do you require further clarity or examples for population of the fields covered in Block 11? Please elaborate.

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Q30: Do you require further clarity or examples for population of the fields covered in Block 12? Please elaborate.

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Q31: Do you require further clarity or examples for the scenarios in section 1.3.1? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_31>



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Q32: Do you require further clarity or examples for the scenarios in section 1.3.2? Please elaborate.

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Q33: Do you require further clarity or examples for the scenarios in section 1.3.3? Please elaborate.

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Q34: Do you require further clarity or examples for the scenarios in section 1.3.4? Please elaborate.

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Q35: Do you require further clarity or examples for the scenarios in section 1.3.5? Please elaborate.

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Q36: Do you require further clarity or examples for the scenarios in sections 1.3.6 and 1.3.7? Please elaborate.

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Q37: Do you require further clarity or examples for the scenarios in section 1.3.8? Please elaborate.

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Q38: Do you require further clarity or examples for the scenario in section 1.3.9? Please elaborate.

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Q39: Do you require further clarity or examples for the scenario in section 1.3.10? Please elaborate.

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Q40: Do you require further clarity or examples for the scenario in section 1.3.11? Please elaborate.

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Q41: Do you require further clarity or examples for the scenarios in sections 1.3.12 and 1.3.13? Please elaborate.

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Q42: Are there any other equity or equity like instruments scenarios which require further clarification?

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Q43: Are there any other bonds or other form of securitised debt scenarios which require further clarification?

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Q44: Are there any other options scenarios which require further clarification?

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Q45: Are there any other contract for difference or spreadbet scenarios which require further clarification?

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Q46: Are there any other credit default swaps scenarios which require further clarification?

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Q47: Are there any other swap scenarios which require further clarification?

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Q48: Are there any other commodities based derivatives scenarios which require further clarification?

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Q49: Are there any other strategy trades scenarios which require further clarification?

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Q50: Is the difference between aggregated orders and pending allocations sufficiently clear?

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Q51: Do you require further clarity on the proposals made in sections 2.1 to 2.11? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_51>
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Q52: Do you agree require further clarity on the proposals made in section 2.12? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_52>
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Q53: Do you require further clarity on the proposals made in section 2.13? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_53>
We have comments on the following subsections of 2.12:



- 2.12.5: The order is described as having a validity period of “Good-Till-Cancelled”, however in the Event 1 table, Field 10 ‘Validity Period’ is given as “IOCA”, Immediate-Or-Cancel”.

- 2.12.8.1: The order of 50 shares has order identification code of 123456789ABC on order entry (Event 1), however after it has been modified the order identification code is shown as 45533343 (Event 3). However, in example 2.12.1.2, the order identification code doesn’t change when the order is modified.

<ESMA_QUESTION_CP_TR_ORK_CS_53>

Q54: Are there any further clarifications required on the concept of ‘reportable event’? If yes, please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_54>

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Q55: Is it sufficiently clear at what point OTC transactions shall be time-stamped? If not, please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_55>

TYPE YOUR TEXT HERE

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Q56: Do you require further clarity on the content of Article 4 of RTS 25? Please elaborate.

<ESMA_QUESTION_CP_TR_ORK_CS_56>

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Q57: Do you agree with the proposals made in sections 3.2 to 3.4? Please elaborate. Are there any further clarifications required?

<ESMA_QUESTION_CP_TR_ORK_CS_57>

FESE supports that ESMA has included the 99th percentile in the consultation paper. However, FESE asks ESMA to also introduce an acceptance level that allows for a temporal divergence, for example when assessing the maximum divergence measurements, a 95% acceptance level shall be used, meaning that 95% of all reportable event timestamps shall satisfy the maximum divergence requirements under this regulation.

<ESMA_QUESTION_CP_TR_ORK_CS_57>