Reply form for the 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 Consultation Paper on MiFID II / MiFIR (reference ESMA/2014/1570), 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. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

i. use this form and send your responses in Word format (do not send pdf files except for annexes);

ii. do not remove the tags of type <ESMA_QUESTION_CP_MIFID_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. 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:

i. if they respond to the question stated;

ii. contain a clear rationale, and

iii. describe any alternatives that ESMA should consider.

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

Naming protocol:

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

E.g. if the respondent were ESMA, the name of the reply form would be ESMA_CP_MIFID_ESMA_REPLYFORM or ESMA_CP_MIFID_ESMA_ANNEX1

Deadline

Responses must reach us by 2 March 2015.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your in-put/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’.
General information about respondent

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Introduction

*Please make your introductory comments below, if any:*

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TYPE YOUR TEXT HERE

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\(^1\) The field will used for consistency checks. If its value is different from the value indicated during submission on the website form, the latest one will be taken into account.
2. Investor protection

Q1. Do you agree with the list of information set out in draft RTS to be provided to the competent authority of the home Member State? If not, what other information should ESMA consider?

Yes. In principle we agree with ESMA proposal. However we would like to point out:

- The information requirements, foreseen in the RTS 1, article 4, regarding the management body and persons who direct the business, are very detailed and may raise concerns over data privacy issues. In particular, information regarding address and contact details is very personal and requires continuous updating, and (2) information requirements regarding the non-financial interests (RTS 1, article 4(1)(f)(v)) - including child or other relation with whom the person shares living accommodations - are very intrusive.

- The information requirements, foreseen in the RTS 1, article 6, regarding the firm’s organisation, in some circumstances, for example in newly established companies, are difficult to meet. In particular, the personal details of the heads of internal functions should be provided only when available at the time of application for authorisation and point c (ii) - requiring information about the resources allocated to the various planned activities - should take into account either the resources allocated or intended to be allocated.

Q2. Do you agree with the conditions, set out in this CP, under which a firm that is a natural person or a legal person managed by a single natural person can be authorised? If no, which criteria should be added or deleted?

Q3. Do you agree with the criteria proposed by ESMA on the topic of the requirements applicable to shareholders and members with qualifying holdings? If no, which criteria should be added or deleted?

Q4. Do you agree with the approach proposed by ESMA on the topic of obstacles which may prevent effective exercise of the supervisory functions of the competent authority?
Q5. Do you consider that the format set out in the ITS allow for a correct transmission of the information requested from the applicant to the competent authority? If no, what modification do you propose?

Q6. Do you agree consider that the sending of an acknowledgement of receipt is useful, and do you agree with the proposed content of this document? If no, what changes do you proposed to this process?

Q7. Do you have any comment on the authorisation procedure proposed in the ITS included in Annex B?

Q8. Do you agree with the information required when an investment firm intends to provide investment services or activities within the territory of another Member State under the right of freedom to provide investment services or activities? Do you consider that additional information is required?

In paragraph 3 of Section 2.2 of the Consultation Paper, ESMA requires the branch to provide information on financial instruments provided in the host Member States in addition to the investment services and ancillary services to be provided. Requirement to specify the financial instruments does not derive from MiFID article 34. Providing information on the ever-changing variety of financial instruments provided would be very cumbersome and not appropriate from both the investment firm’s and the NCA’s view.

Q9. Do you agree with the content of information to be notified when an investment firm or credit institution intends to provide investment services or activities through the use of a tied agent located in the home Member State?

Q10. Do you consider useful to request additional information when an investment firm or market operator operating an MTF or an OTF intends to provide arrangements to another Member State as to facilitate access to and trading on the markets that it operates by remote users, members or participants established in their territory? If not which type of information do you consider useful to be notified?
According to MiFID II level 1 recital 38 authorised credit institutions should not need an authorisation as investment firms in order to provide investment services or perform investment activities. According to art 4(2) investment services and activities are defined as activities listed in Section A of Annex 1 which includes operation of an MTF and OTF. Never the less ITS 4, art.1 (scope/which articles apply to credit institutions) does not include art. 8-11 (MTF and OTF) as well as credit institutions are not explicitly mentioned in art 8-11.

In general art 1 in both RTS 3 and ITS 4 (scope/which articles apply to credit institutions) are incorrect, as not every article applying to credit institutions are mentioned in the scope. As an example could be mentioned that ITS 4 art. 20 is not included in art 1 (scope/which articles apply to credit institutions) even though "credit institutions" are explicitly mentioned in Art 20.

Q11. Do you agree with the content of information to be provided on a branch passport notification?

Q12. Do you find it useful that a separate passport notification to be submitted for each tied agent the branch intends to use?

Q13. Do you agree with the proposal to have same provisions on the information required for tied agents established in another Member State irrespective of the establishment or not of a branch?

Yes, we agree. This approach ensures an equality of treatment regard the information to be provided for a tied agent and the branch’s establishment.

Q14. Do you agree that any changes in the contact details of the investment firm that provides investment services under the right of establishment shall be notified as a change in the particulars of the branch passport notification or as a change of the tied agent passport notification under the right of establishment?

Q15. Do you agree that credit institutions needs to notify any changes in the particulars of the passport notifications already communicated?

Q16. Is there any other information which should be requested as part of the notification process either under the freedom to provide investment services or
activities or the right of establishment, or any information that is unnecessary, overly burdensome or duplicative?

Q17. Do you agree that common templates should be used in the passport notifications?

Yes. In principle we agree with ESMA proposal. However, we suggest modifying Part 4, in the Annex VI, to take into account a single passport notification for all tied agents that the branch intends to use.

Q18. Do you agree that common procedures and templates to be followed by both investment firms and credit institutions when changes in the particulars of passport notifications occur?

Q19. Do you agree that the deadline to forward to the competent authority of the host Member State the passport notification can commence only when the competent authority of the home Member States receives all the necessary information?

Q20. Do you agree with proposed means of transmission?

We find it should be mandatory to accept transmissions by electronic means in English. Seen in the light of the technological improvements and developments it would be outdated to make it optional to require transmission in paper. As regards the use of language, English is commonly accepted in the financial sector.

Q21. Do you find it useful that the competent authority of the host Member State acknowledge receipt of the branch passport notification and the tied agent passport notification under the right of establishment both to the competent authority and the investment firm?

Yes. This double notification is more accurate.

Q22. Do you agree with the proposal that a separate passport notification shall be submitted for each tied agent established in another Member State?
In the EBF’s opinion, the submission of a separate passport notification for each tied agent, established in another Member State, could be onerous. For each Member State in which the investment firm intends to passport, it should be possible to provide a single passport notification including the information about all tied agent established in each Member State.

**Q23.** Do you find it useful the investment firm to provide a separate passport notification for each tied agent its branch intends to use in accordance with Article 35(2)(c) of MiFID II? Changes in the particulars of passport notification

According to article 35(2)(c) of MiFID 2, investment firms should provide information on the branch’s organisational structure and, whether applicable, the identity of the tied agents that the branch intends to use. In this regard, we believe it is onerous and excessive to require a separate notification processes for each tied agent, because the information on the branch’s organizational structure is sufficient to notify the identity of such tied agents.

**Q24.** Do you agree to notify changes in the particulars of the initial passport notification using the same form, as the one of the initial notification, completing the new information only in the relevant fields to be amended?

**Q25.** Do you agree that all activities and financial instruments (current and intended) should be completed in the form, when changes in the investment services, activities, ancillary services or financial instruments are to be notified?

**Q26.** Do you agree to notify changes in the particulars of the initial notification for the provision of arrangements to facilitate access to an MTF or OTF?

**Q27.** Do you agree with the use of a separate form for the communication of the information on the termination of the operations of a branch or the cessation of the use of a tied agent established in another Member State?

**Q28.** Do you agree with the list of information to be requested by ESMA to apply to third country firms? If no, which items should be added or deleted. Please provide details on your answer.
Q29. Do you agree with ESMA’s proposal on the form of the information to provide to clients? Please provide details on your answer.

Q30. Do you agree with the approach taken by ESMA? Would a different period of measurement be more useful for the published reports?

No. It is problematic that execution venues include market maker and Liquidity Provider, since these cannot be considered as execution venues. Market Makers and liquidity providers (pls. note there is no definition of liquidity provider) trade on venues and therefore the relevant information will be published by the respective venues. Also requiring SIs to provide the same amount of information as trading venues is disproportionate not at least with respect of the very different execution models, where SIs deals on own account when executing clients’ orders. There should be a distinction between bilateral (SI) vs. multilateral venues.

Overall, ESMA is following a very prescriptive interpretation of how investment firms should comply with the illustration on whether best execution is achieved.

Q31. Do you agree that it is reasonable to split trades into ranges according to the nature of different classes of financial instruments? If not, why?

Q32. Are there other metrics that would be useful for measuring likelihood of execution?

No. And please note that for SIs it is essential that the firm requirements are only in relation to liquid instruments.

Q33. Are those metrics meaningful or are there any additional data or metrics that ESMA should consider?

No.

Q34. Do you agree with the proposed approach? If not, what other information should ESMA consider?
Q35. Do you agree with the proposed approach? If not, what other information should ESMA consider?

Yes. In principle we agree with ESMA’s proposal on the content of information on top five execution venues. However, we would like to point out that:

- It would be appropriate for investment firms to declare any interest in their top five venues. In this regard, we believe appropriate to disclose in the annual summary of execution quality assessment the existence of any close links (e.g. material shareholding that an investment firm holds in an execution venue). Instead, information on payments, discounts, rebates and non-monetary benefits received from execution venues (inducements) and the disclosure of conflicts of interest should be adequately addressed in other processes and procedures as already provided for in MiFID II.

- Calculating the monthly values on inducements and non-monetary benefits received from each execution venue and for each class of instrument can be very onerous. Moreover, monetary benefits cannot necessarily be allocated to a well-defined service or client.

- Given that some data are commercially sensitive, their public dissemination would compromise investment firms. Therefore, data should be made available only to the National Competent Authorities and to clients as per the core obligation in level 1 text.

However, the EBF reiterates that the proposed template to report on top five execution venues is of little use in the context of firms executing predominantly or exclusively OTC transactions, particularly in the case of transactions such as portfolio trades, SFTs, and other trades not contributing to the ordinary price formation. For these transactions it would be problematic to format the required data as required. For these types of transactions it is also questionable that the required data would in fact bring any benefit to the investor, as the criteria defining execution quality are often different than those applicable to ordinary transactions of purchase and sale. In the specific case of SFTs, such as securities lending, execution quality would be expressed predominantly as the performance of the lendable portfolio over a given period of time, considering factors such as duration of the trade, collateral quality, and counterparty rating, and would not be measured on a transaction by transaction basis. Firms executing the aforementioned transactions on OTC basis should be excluded from the application of RTS 7. Despite the definition of what should be considered “execution venue” for the purpose of best execution quality reporting is large (Art. 2(1) of the raft RTS 7), this definition remains nonetheless confusing, particularly concerning the use of the terms “market makers, or liquidity providers”. According to the ESMA proposal, “[...] where client orders that are executed OTC are reported to a third party, the identity of the firm submitting the trade report (which is the firm executing the order OTC) should be included as a venue in the list of top five venues, where relevant.” This approach blurs the definition between order execution and order transmission, as well as between facilitation of the execution (agency) and execution (principal). It would also distort the picture of how the
execution is obtained, as the firms executing OTC transactions are not necessarily liquidity providers nor market makers, and often don’t assume any risk position on the trade executed for the client.

Q36. Do you agree with the proposed approach? If not, what other information should ESMA consider?

No, we do not fully agree. Not all firms distinguish between different categories of clients and will therefore not make such distinction in their reporting.

However, the requirement to publish details in paragraph 35 seems to be going much above the level 1 mandate of MiFID.

In addition, EBF also believes RTS 7 Article 6 goes beyond the Level 1 text. Article 6 should only apply to the quality of execution obtained in relation to the five execution venues (and not the quality of execution obtained by an investment firm more broadly on all execution venues).

The EBF believes that it should be subject to competition to develop the detailed information/feedback to clients. ESMA should just require the information under the first four columns in Annex 1 to draft RTS 7, meaning:

• Volume of orders executed on this as percentage of total
• Numbers of orders executed on this execution venue
• Percentage of passive orders executed on execution venue
• Percentage of aggressive orders executed on execution venue

In addition, for OTC transactions in general:

EBF considers that for OTC transactions that are considered non-price forming firms should not be submitted to the obligations of the proposed RTS 7. The proposed regime is not relevant in the context of such transactions when they are executed on the OTC basis. The proposed template for the reporting on the top five execution venues is not relevant in the context of such transactions when they are executed on the OTC basis.

The proposed extension of the term “execution venue” to liquidity providers and market makers would not always be applicable. We fear that firms executing orders would have to report themselves as the execution venue although they wouldn’t take any position or assume any risk. Also the fields about “closed ties” would be problematic to complete in such case, and the information about execution costs would reveal commercially sensitive information about fees and service costs.

The terms of passive and aggressive orders are generally difficult to contextualise in the OTC trading environment. They are pertinent in the context of an order book. Attempts can be made to adapt them to the context of voice trading, particularly RFQ, however it is questionable that the data on such type of execution would render any useful information in terms of execution quality once they are reformatted to fit into template modelled on order-book trading environment. We therefore consider that applying the information about top five
execution venues in the proposed format would not provide any truly useful information to the investor and would even likely distort the picture of the execution obtained OTC.
<ESMA_QUESTION_CP_MIFID_36>
3. Transparency

Q37. Do you agree with the proposal to add to the current table a definition of request for quote trading systems and to establish precise pre-trade transparency requirements for trading venues operating those systems? Please provide reasons for your answers.

Yes, this suggestion makes good sense and provides a general standard to be used by the venues in question. However, for equities, the Request for Quotes description is meaningless since the equity markets are order-driven and not price-driven.

Q38. Do you agree with the proposal to determine on an annual basis the most relevant market in terms of liquidity as the trading venue with the highest turnover in the relevant financial instrument by excluding transactions executed under some pre-trade transparency waivers? Please provide reasons for your answers.

Yes. In case the relevant market in terms of liquidity is the market with the highest turnover, EBF agrees with an annual revision and that calculation does not include transactions executed under some pre-trade waivers since these waivers (i.e. negotiated trade) are not order book trades.

Q39. Do you agree with the proposed exhaustive list of negotiated transactions not contributing to the price formation process? What is your view on including non-standard or special settlement trades in the list? Would you support including non-standard settlement transactions only for managing settlement failures? Please provide reasons for your answers.

First of all, the EBF assumes that price conditions for negotiated transactions in liquid instruments should be understood as at or within the Volume Weighted Average Spread (VWAS).

Secondly, EBF assumes that a transaction in a liquid share at or above Large-in-Scale which is concluded as a negotiated transaction and thereby within the rules of the relevant trading venue in question, must not be included in the calculation of the volume cap for NTW, but instead reported under the LIS pre-trade waiver.

Thirdly, the list of negotiated transactions not contributing to the price formation process should not be exhaustive as market evolves. However, if the list is deemed exhaustive, it must be subject to e.g. annual review since we do not share ESMAs view that the list is sufficient flexible as it stands now. It is important that the list can be reviewed on a continuously basis as markets evolve.

Q40. Do you agree with ESMA’s definition of the key characteristics of orders held on order management facilities? Do you agree with the proposed minimum sizes? Please provide reasons for your answers.
EBF does not see a need for a minimum size on orders under the order management facility waiver. ESMAs suggestion lacks justification and we find the present approach with no minimum size well-functioning.

Q41. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for shares and depositary receipts? Please provide reasons for your answers.

Yes, since it is a harmonised approach throughout EU, EBF can accept this.

Q42. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for ETFs? Would you support an alternative approach based on a single large in scale threshold of €1 million to apply to all ETFs regardless of their liquidity? Please provide reasons for your answers.

Yes, since it is a harmonised approach throughout EU, EBF can accept this.

Q43. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for certificates? Please provide reasons for your answers.

Yes, since it is a harmonised approach throughout EU, EBF can accept this.

Q44. Do you agree with the proposed approach on stubs? Please provide reasons for your answers.

Yes, since it is a harmonised approach throughout EU, EBF can accept this.

Q45. Do you agree with the proposed conditions and standards that the publication arrangements used by systematic internalisers should comply with? Should systematic internalisers be required to publish with each quote the publication of the time the quote has been entered or updated? Please provide reasons for your answers.
First of all, it needs to be clarified that when we are talking of SI’s, clients do not provide orders to SIs’. The SI provides firm quotes up to standard market size, which the client can accept. In that sense, we do not understand ESMA’s explanation on page 69, no. 5, since the SIs’ prices on equities are valid until changed by the SI.

It should be voluntary whether an SI chooses to publish timestamp and not a requirement. By making this requirement, ESMA would go beyond level 1 and more importantly a new unnecessary rule would be created.

Q46. Do you agree with the proposed definition of when a price reflects prevailing conditions? Please provide reasons for your answers.

As for the question on when a price reflects prevailing conditions, we accept the proposed definition. The importance of being able to change the quotes cannot be underestimated.

Q47. Do you agree with the proposed classes by average value of transactions and applicable standard market size? Please provide reasons for your answers.

Yes, the EBF agrees with the proposed classes by average value of transactions and applicable standard market size since these are workable sizes which do reflect retail client orders sizes.

We urge ESMA to develop a similar approach for non-equities which also reflect retail clients order sizes.

Q48. Do you agree with the proposed list of transactions not contributing to the price discovery process in the context of the trading obligation for shares? Do you agree that the list should be exhaustive? Please provide reasons for your answers.

Yes, at present, the list reflects the relevant transactions. However, EBF does not support an exhaustive list since markets evolve. In case ESMA insist to keep an exhaustive list, there must be an annual review of the list, in order to ensure that the list at all times reflect the relevant transactions that do not contribute to the price discovery process in the context of the trading obligation for shares.

With regard to "iv transactions executed in the context of an investment firm that provides portfolio management services and transfers the beneficial ownership of a share from one fund to another and where no other investment firm is involved", it is unclear what the word "fund" entails. Should fund be understood in its generic context "funds", so that it covers all portfolio management clients and their funds in their customer accounts, no matter the client’s legal status? Or is it limited to entities which legally are determined as a fund, such as an AIF or UCITS? The exception only provides a level playing field, if it the generic understanding, and then we will suggest to use the words "customer account" instead of
We agree that this exception does not contribute to price discovery, and is to the benefit of portfolio management clients.

Q49. Do you agree with the proposed list of information that trading venues and investment firms shall made public? Please provide reasons for your answers.

Yes.

Q50. Do you consider that it is necessary to include the date and time of publication among the fields included in Table 1 Annex 1 of Draft RTS 8? Please provide reasons for your answer.

No.

Q51. Do you agree with the proposed list of flags that trading venues and investment firms shall made public? Please provide reasons for your answers.

ESMA must be aware of the operational risk since the requirements for some transactions will include manual procedures when choosing the right flag(s) which must be handled within the time limit of 1 minute. This could e.g. be the case for “special dividend trades”. An additional risk is if several flags are required for one transaction and this cannot be handled automatically.

In short, at least the B, X, G, S, T and P must be specified by the investment firm in question can therefore be subject to manual procedures, which require longer reporting time than 1 minute, i.e. 3 minutes as already in place. If the longer reporting time is implemented, all these flags can be published without exposing the investment firm to undue risk.

The L (Large-in-Scale) must not be published for the same reason as ESMA has approved “stubs”, i.e. publishing for part execution would lead to longer execution times and expose the investor to undue risk for the execution and more specifically price. In addition, the H (algorithmic trades) should not be public either, since this could create an incentive to try to game the algo.

Overall, the EBF urges ESMA to develop guidelines with more in-depth information on how and in which situations the flags apply (with relevant examples).

Q52. Do you agree with the proposed definitions of normal trading hours for market operators and for OTC? Do you agree with shortening the maximum possible delay to one minute? Do you think some types of transactions, such as portfolio trades should benefit from longer delays? Please provide reasons for your answers.

EBF does not agree that the proposed definition of normal trading hours should include auctions since SIs will face considerable pricing risk during auctions due to the uncertainty of the market pricing during these phases. Auctions should be excluded. This definition would
also be in line with the definition used for RTS 15 on market making. EBF urges for a consistent approach.

EBF can accept the shortening of the maximum possible delay to one minute if other trades such as portfolio trades could benefit from longer demands due to the manual procedures. In addition, we question why transactions like portfolio trades, which do not contribute to the price discovery process, should be published at all?

EBF would like to support the opinion that shortening the maximum possible delay to one minute will create significant challenge in the systems of banks which rely on manual processing. The intention to impose fully automated systems does not take into account differences in market participants’ scale, thus imposing disproportionally higher burden on smaller-scale participants.

Q53. Do you agree that securities financing transactions and other types of transactions subject to conditions other than the current market valuation of the financial instrument should be exempt from the reporting requirement under article 20? Do you think other types of transactions should be included? Please provide reasons for your answers.

Yes, however, as for other lists made by ESMA, we do not support an exhaustive list, since markets evolve. However, if it is decided to continue with an exhaustive list, there should be a review clause included in order to ensuring that the list reflects the right transaction types at all times as markets evolve. And yes, transactions, which do not contributed to the price discovery process, should also be excluded from the reporting requirements, as also described in Q52.

Q54. Do you agree with the proposed classes and thresholds for large in scale transactions in shares and depositary receipts? Please provide reasons for your answers.

Yes.

Q55. Do you agree with the proposed classes and thresholds for large in scale transactions in ETFs? Should instead a single large in scale threshold and deferral period apply to all ETFs regardless of the liquidity of the financial instrument as described in the alternative approach above? Please provide reasons for your answers.

Yes.

Q56. Do you agree with the proposed classes and thresholds for large in scale transactions in certificates? Please provide reasons for your answers
Q57. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer for SFPs and for each of type of bonds identified (European Sovereign Bonds, Non-European Sovereign Bonds, Other European Public Bonds, Financial Convertible Bonds, Non-Financial Convertible Bonds, Covered Bonds, Senior Corporate Bonds-Financial, Senior Corporate Bonds Non-Financial, Subordinated Corporate Bonds-Financial, Subordinated Corporate Bonds Non-Financial) addressing the following points:

(1) Would you use different qualitative criteria to define the sub-classes with respect to those selected (i.e. bond type, debt seniority, issuer sub-type and issuance size)?

(2) Would you use different parameters (different from average number of trades per day, average nominal amount per day and number of days traded) or the same parameters but different thresholds in order to define a bond or a SFP as liquid?

(3) Would you define classes declared as liquid in ESMA’s proposal as illiquid (or viceversa)? Please provide reasons for your answer.
No, the EBF does not support ESMA's proposal for determining liquid market. The COFIA model used (with issue size as sole proxy) leads to suboptimal results, i.e. a lot of instruments are classified as liquid when they are really not. For example, ESMA thinks that a bond is liquid if it trades twice per day for 200 days of the year. This brings inappropriate instruments within the scope of the pre-trade/SI obligations and reduces the availability of the deferral regime for post trade. The results are particularly shrewd for covered bonds and corporate bonds (See page 104 table 5 in the Consultation Paper).

The table shows that in every proposed sub-class at least 40% of the financial instruments classified as liquid are false positives! In other words the best hit ratio that ESMA’s proposal delivers is 60%. For other categories this ratio is only 33%. This result is by no means acceptable. It is imperative to ensure that illiquid instruments are not classified as liquid. If instruments were classified incorrectly, certain illiquid financial instruments would also be subject to transparency obligations and obligations to publish firm quotes. This would impose prohibitive risks on systematic internalisers and cause the market to dry up.

As stated in the EBF’s reply to the Discussion Paper, it is essential that financial instruments are correctly classified as either “liquid” or “non-liquid”. Therefore the EBF supported the IBIA model for bonds (but agreed that COFIA model was more suitable for derivatives). However a COFIA model for bonds can only be accepted if the sub-classes are created so as to reflect instruments true liquidity. This model also presupposes regular re-assessment of both liquidity thresholds and classification of instruments.

The EBF fears that unless the model for determining liquidity is changed, the regulation will have very negative effects on the liquidity of European bond markets which is hardly the intention. This risk is increased even more when combined with the very high levels of LIS and SSTI proposed by ESMA.

In relation to the SSTI and LIS there is also a problem with the methodology that ESMA has used for determining the thresholds. A trade count approach has been adopted to determine LIS, but trades under a threshold have been excluded, which is problematic (e.g. for bonds ESMA has not counted trades with ticket size less than 100k, which is a high number of trades and thus skews the results – especially given the median trade size of corporate bonds is EUR 150k.).

Moreover, the EBF wants to underline that the SSTI intends to protect liquidity providers from undue risk enabling them to hedge their positions and, for markets where retail investors are present, taking into account average retail size of transactions (Art. 9 MiFIR). However, the proposed SSTI thresholds (50% of LIS) are much too high achieve this goal and will in fact have the effect of discouraging market makers/SIs from providing liquidity to the market. This is true across all asset classes and all sub-classes. In the opinion of EBF, the SSTI levels proposed by ESMA are therefore not fit for purpose and must be significantly lowered.

We also note that ESMA does not motivate why it has proposed such a high percentage as 50% of SSTI.
If ESMA insists on a fixed threshold for SSTI that is linked to LIS, the percentage should be very low, i.e. a one digit number, maybe even below 1% should be chosen. This would be more in line with the wording and spirit of level 1. (For corporate bonds a more appropriate size specific to the instrument might be in the region of €150k - €250k and for sovereign bonds SSTI could be €1m. The ESMA proposal has SSTI for sovereign bonds at €5m and for corporate bonds €750k–€2.5m depending on the type.)

Q58. Do you agree with the definitions of the bond classes provided in ESMA’s proposal (please refer to Annex III of RTS 9)? Please provide reasons for your answer.

Yes, we agree with the definitions.

Q59. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer per asset class identified (investment certificates, plain vanilla covered warrants, leverage certificates, exotic covered warrants, exchange-traded-commodities, exchange-traded notes, negotiable rights, structured medium-term-notes and other warrants) addressing the following points:

1. Would you use additional qualitative criteria to define the sub-classes?
2. Would you use different parameters or the same parameters (i.e. average daily volume and number of trades per day) but different thresholds in order to define a sub-class as liquid?
3. Would you qualify certain sub-classes as illiquid? Please provide reasons for your answer.

No, we do not agree. The existence of a market-maker for securitised derivatives is not a proxy for liquidity. Maker-makers for securitised derivatives are there to ensure that investors can hand back instruments bought. The market-makers’ role is not comparable with market-makers at regulated markets. Eligible criteria for defining whether securitised derivatives are liquid are (1) trading does occur and (2) time since issuance.

Q60. Do you agree with the definition of securitised derivatives provided in ESMA’s proposal (please refer to Annex III of the RTS)? Please provide reasons for your answer.

As stated in our reply to the Discussion Paper, the EBF takes the view that securitised derivatives which have features of bonds should be treated as such.

Q61. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer for each of the asset classes identified (FRA, Swaptions, Fixed-to-Fixed single currency swaps, Fixed-to-Float single currency swaps, Float-to-Float single currency swaps, OIS single currency swaps, Inflation single currency swaps, Fixed-to-Fixed multi-currency swaps, Fixed-to-Float multi-currency swaps, Float-to-Float multi-currency swaps, OIS multi-currency swaps, bond options, bond futures, interest rate options, interest rate futures) addressing the following points:
(1) Would you use different criteria to define the sub-classes (e.g. currency, tenor, etc.)?

(2) Would you use different parameters (among those provided by Level 1, i.e. the average frequency and size of transactions, the number and type of market participants, the average size of spreads, where available) or the same parameters but different thresholds in order to define a sub-class as liquid (state also your preference for option 1 vs. option 2, i.e. application of the tenor criteria as a range as in ESMA’s preferred option or taking into account broken dates. In the latter case please also provide suggestions regarding what should be set as the non-broken dates)?

(3) Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

Q62. Do you agree with the definitions of the interest rate derivatives classes provided in ESMA’s proposal (please refer to Annex III of draft RTS 9)? Please provide reasons for your answer.

Q63. With regard to the definition of liquid classes for equity derivatives, which one is your preferred option? Please be specific in relation to each of the asset classes identified and provide a reason for your answer.

Q64. If you do not agree with ESMA’s proposal for the definition of a liquid market, please specify for each of the asset classes identified (stock options, stock futures, index options, index futures, dividend index options, dividend index futures, stock dividend options, stock dividend futures, options on a basket or portfolio of shares, futures on a basket or portfolio of shares, options on other underlying values (i.e. volatility index or ETFs), futures on other underlying values (i.e. volatility index or ETFs):

(1) your alternative proposal

(2) which qualitative criteria would you use to define the sub-classes

(3) which parameters and related threshold values would you use in order to define a sub-class as liquid.
Q65. Do you agree with the definitions of the equity derivatives classes provided in ESMA’s proposal (please refer to Annex III of draft RTS 9)? Please provide reasons for your answer.

Q66. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:

1. Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criterion to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?

2. Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?

3. Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

Q67. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:

1. Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criterion to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?

2. Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?

3. Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

Q68. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer detailed per contract type and underlying identified addressing the following points:

1. Would you use different qualitative criteria to define the sub-classes?
(2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?

(3) Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

Q69. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer per asset class identified (EUA, CER, EUAA, ERU) addressing the following points:

(1) Would you use additional qualitative criteria to define the sub-classes?

(2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average number of tons of carbon dioxide traded per day) but different thresholds in order to define a sub-class as liquid?

(3) Would you qualify as liquid certain sub-classes qualified as illiquid (or vice versa)? Please provide reasons for your answer.

Q70. Do you agree with ESMA’s proposal with regard to the content of pre-trade transparency? Please provide reasons for your answer.

Q71. Do you agree with ESMA’s proposal with regard to the order management facilities waiver? Please provide reasons for your answer.

Q72. ESMA seeks further input on how to frame the obligation to make indicative prices public for the purpose of the Technical Standards. Which methodology do you prefer? Do you have other proposals?

Q73. Do you consider it necessary to include the date and time of publication among the fields included in Annex II, Table 1 of RTS 9? Do you consider that other relevant fields should be added to such a list? Please provide reasons for your answer.
No, the EBF does not consider it necessary to include the date and time of publication. In fact, this would be rather harmful.

The EBF welcomes proposal by ESMA not to include SI-identification.

Q74. Do you agree with ESMA’s proposal on the applicable flags in the context of post-trade transparency? Please provide reasons for your answer.

In the opinion of EBF, ESMA proposes too many flags which do not provide added value to the market, are costly to implement and some may even create unnecessary operational risks. In particular the LIS flag and algo flag should be deleted as they could also expose liquidity provider to undue risk.

Q75. Do you agree with ESMA’s proposal? Please specify in your answer if you agree with:

(1) a 3-year initial implementation period
(2) a maximum delay of 15 minutes during this period
(3) a maximum delay of 5 minutes thereafter. Please provide reasons for your answer.

The EBF would suggest to set the time limit for reporting of OTC derivatives at 30 minutes until the end of 2017 and 15 minutes thereafter. Existing reporting mechanisms of trading platforms, infrastructure providers and back-offices are geared towards the US reporting timelines which have been in effect since 2012 (cf Part 45.12 section b-1 Dodd-Frank Act). Considering that in particular for OTC derivatives traded on voice trading systems a certain minimum time is required to verify trade details, and set up of trades in systems can take some time, the limits set by US CFTC standards of 15 minutes have proven to be ambitious but achievable. Shorter timeframes would likely result in operational issues like mis-reporting of trades. We consider it in the common interest of markets, infrastructure and regulators to aim at a maximum of international harmonisation, in particular in the case of OTC derivatives, which is a global rather than a regional market.

Q76. Do you agree that securities financing transactions and other types of transactions subject to conditions other than the current market valuation of the financial instrument should be exempt from the reporting requirement under article 21? Do you think other types of transactions should be included? Please provide reasons for your answers.

Yes, we agree that such transactions should be exempt. SFT are not primarily based on the market price of the respective instrument, but on the rates that apply in the respective repo or securities lending market. These are therefore transactions within the meaning of Article
21(5)(b) of MiFIR whose price is determined by factors other than the current market valuation of the instrument.

Q77. Do you agree with ESMA’s proposal for bonds and SFPs? Please specify, for each type of bonds identified, if you agree on the following points, providing reasons for your answer and if you disagree providing ESMA with your alternative proposal:

1. deferral period set to 48 hours
2. size specific to the instrument threshold set as 50% of the large in scale threshold
3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
4. pre-trade and post-trade thresholds set at the same size
5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.
Regarding the deferral period set to 48 hours, we welcome ESMA’s intention to provide for a longer deferral period compared to the proposal in the Discussion Paper. However, we still think that a 48 hours period is too short. For bonds, deferral periods of at least two weeks are necessary, for structured finance products at least for four weeks. The SI often has to unwind large-volume transactions over a period of several days, especially in illiquid bonds. ESMA’s data show that the bulk of the financial instruments in question trade less than twice a week. If the market gains knowledge of the transaction after two trading days (or even less, if the 48 hours period covers a weekend or bank holiday), the SI would face unacceptable risks that it would not be able to hedge adequately. Other market participants could use the information against the SI. There would also be disadvantages for the client, as the SI would have to pass on the risks in the form of less favourable prices. The less liquid an instrument is, the greater are these risks. More granular deferral periods are necessary, in particular given that the post trade transparency regime also applies to illiquid instruments. For some instruments, deferral periods of several weeks would be appropriate.

Moreover, the 48 hours should be changed to T + 2 (otherwise there will be problems with week-ends).

The EBF does not support the very high levels of SSTI proposed by ESMA (see also Q 77). The SSTI intends to protect liquidity providers from undue risk enabling them to hedge their positions (art 9 MiFIR). However, the proposed SSTI thresholds (50 % of LIS) are much too high achieve this goal – across all asset classes and sub-classes. We therefore question whether the proposal is in line with the political agreement on level 1. In the opinion of EBF, a one-digit percentage, maybe even below 1% of LIS would be more appropriate and in line with the intentions of level 1.

Q78. Do you agree with ESMA’s proposal for interest rate derivatives? Please specify, for each sub-class (FRA, Swaptions, Fixed-to-Fixed single currency swaps, Fixed-to-Float single currency swaps, Float -to- Float single currency swaps, OIS single currency swaps, Inflation single currency swaps, Fixed-to-Fixed multi-currency swaps, Fixed-to-Float multi-currency swaps, Float -to- Float multi-currency swaps, OIS multi-currency swaps, bond options, bond futures, interest rate options, interest rate futures) if you agree on the following points providing reasons for your answer and, if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours
(2) size specific to the instrument threshold set as 50% of the large in scale threshold
(3) volume measure used to set the large in scale and size specific to the instrument threshold as specified in Annex II, Table 3 of draft RTS 9
(4) pre-trade and post-trade thresholds set at the same size
(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1), provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2), provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the
thresholds from 2018 onwards including the level of granularity of the classes on which the recalculation will be performed (c) irrespective of your preference for option 1 or 2 and, with particular reference to OTC traded interest rates derivatives, provide feedback on the granularity of the tenor buckets defined. In other words, would you use a different level of granularity for maturities shorter than 1 year with respect to those set which are: 1 day- 1.5 months, 1.5-3 months, 3-6 months, 6 months – 1 year? Would you group maturities longer than 1 year into buckets (e.g. 1-2 years, 2-5 years, 5-10 years, 10-30 years and above 30 years)?

Q79. Do you agree with ESMA’s proposal for commodity derivatives? Please specify, for each type of commodity derivatives, i.e. agricultural, metals and energy, if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculation will be performed.

Q80. Do you agree with ESMA’s proposal for equity derivatives? Please specify, for each type of equity derivatives [stock options, stock futures, index options, index futures, dividend index options, dividend index futures, stock dividend options, stock dividend futures, options on a basket or portfolio of shares, futures on a basket or portfolio of shares, options on other underlying values (i.e. volatility index or ETFs), futures on other underlying values (i.e. volatility index or ETFs)], if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size
Q81. Do you agree with ESMA’s proposal for securitised derivatives? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

1. deferral period set to 48 hours
2. size specific to the instrument threshold set as 50% of the large in scale threshold
3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
4. pre-trade and post-trade thresholds set at the same size
5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

Q82. Do you agree with ESMA’s proposal for emission allowances? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

1. deferral period set to 48 hours
2. size specific to the instrument threshold set as 50% of the large in scale threshold
3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
4. pre-trade and post-trade thresholds set at the same size
5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.
thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

Q83. Do you agree with ESMA’s proposal in relation to the supplementary deferral regime at the discretion of the NCA? Please provide reasons for your answer.

We strongly disagree with ESMA’s proposal as set out in Art. 10(1)(a)(i) of the draft RTS, i.e. that if exercising the right pursuant to Article 11(3)(a) of MiFIR, all the details of a transaction except for those relating to volume, namely quantity and quantity notation should be published. In our view, not just the volume of a transaction but in principle the entire transaction should be subject to deferred publication. The point of deferred publication is to protect SIs and other investment firms against the risks associated with the market knowing that they have taken on a large position in financial instruments. For this reason, the deferral should cover all the transaction details.

A requirement to immediately publish all the details of a transaction except its volume would not be in line with the wording of Article 11(3) of MiFIR, which merely stipulates that competent authorities may request deferred publication of “limited details of a transaction”. Only where an extended deferral period is granted does Article 11(3)(b) of MiFIR allow (only) the deferred publication of the volume of a transaction. ESMA’s proposal that in every case of deferred publication all the details of a transaction except its volume should be published thus not only contradicts the regulatory purpose but also the wording and systematic approach of Article 11(3) of MiFIR. ESMA’s proposal would thus be generally incompatible with Article 11(3) of MiFIR.

Q84. Do you agree with ESMA’s proposal with regard to the temporary suspension of transparency requirements? Please provide feedback on the following points:

1. the measure used to calculate the volume as specified in Annex II, Table 3
2. the methodology as to assess a drop in liquidity
3. the percentages determined for liquid and illiquid instruments to assess the drop in liquidity. Please provide reasons for your answer.

Q85. Do you agree with ESMA’s proposal with regard to the exemptions from transparency requirements in respect of transactions executed by a member of the ESCB? Please provide reasons for your answer.

Q86. Do you agree with the articles on the double volume cap mechanism in the proposed draft RTS 10? Please provide reasons to support your answer.
EBF does not have any comments to the methodology.

However, as specified in Q39, EBF assumes that a transaction in a liquid share at or above Large-in-Scale which is concluded as a negotiated transaction and thereby within the rules of the relevant trading venue in question, may not be included in the calculation of the volume cap for NTW, but instead reported under the LIS pre-trade waiver.

Q87. Do you agree with the proposed draft RTS in respect of implementing Article 22 MiFIR? Please provide reasons to support your answer.

Q88. Are there any other criteria that ESMA should take into account when assessing whether there are sufficient third-party buying and selling interest in the class of derivatives or subset so that such a class of derivatives is considered sufficiently liquid to trade only on venues?

Q89. Do you have any other comments on ESMA’s proposed overall approach?

Q90. Do you agree with the proposed draft RTS in relation to the criteria for determining whether derivatives have a direct, substantial and foreseeable effect within the EU?

Q91. Should the scope of the draft RTS be expanded to contracts involving European branches of non-EU non-financial counterparties?

Q92. Please indicate what are the main costs and benefits that you envisage in implementing of the proposal.
4. Microstructural issues

Q93. Should the list of disruptive scenarios to be considered for the business continuity arrangements expanded or reduced? Please elaborate.

<ESMA_QUESTION_CP_MIFID_93>
Draft RTS 13 Art. 17 (1); Art. 20 (2) (h): We welcome that ESMA has clarified in the proposed RTS that kill switches are to be used as an emergency measure, i.e. only when absolutely necessary. However, we would like to point out that such a “kill switch” can lead to more risks because of its interconnectedness. Since it would be applied to e.g. equity trading and bond trading new and unwanted exposures might be created. This might result in risks for market integrity and stability. We ask ESMA to reconsider its approach.
<ESMA_QUESTION_CP_MIFID_93>

Q94. With respect to the section on Testing of algorithms and systems and change management, do you need clarification or have any suggestions on how testing scenarios can be improved?

<ESMA_QUESTION_CP_MIFID_94>
First of all, EBF request that firms only should apply to one set of rules, i.e. the ESMA present guidelines Systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities are workable and should be implemented unchanged and serve as the only standard for testing and control as also indicated in the consultation paper page 347, no. 1. However, it is not exactly clear to which extend and where there have been any changes (ESMA only writes that “. ESMA has expanded on the guidelines by further specifying that compliance staff need to be in close contact with relevant trading personnel”) and we believe it is a fair requirement that ESMA specifies the changes in more detail (a delta review) in order for firms to assess the additional requirements relatively easy.
<ESMA_QUESTION_CP_MIFID_94>

Q95. Do you have any further suggestions or comments on the pre-trade and post-trade controls as proposed above?

<ESMA_QUESTION_CP_MIFID_95>
We welcome that all trading venues also are required to implement mandatory pre-trade control of orders since this is the crucial last “line of defence” in case investment firms’ own pre-trade control fails.
<ESMA_QUESTION_CP_MIFID_95>

Q96. In particular, do you agree with including “market impact assessment” as a pre-trade control that investment firms should have in place?

<ESMA_QUESTION_CP_MIFID_96>
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Q97. Do you agree with the proposal regarding monitoring for the prevention and identification of potential market abuse?
Q98. Do you have any comments on Organisational Requirements for Investment Firms as set out above?

The EBF welcomes ESMA’s clarification in Art. 1 (1) Draft RTS specifying that investment firms in the sense of this RTS are only investment firms engaged in algorithmic trading. The EBF urges ESMA to add an analogous clarification concerning DEA clients.

Recital 9 Draft RTS 13 and Art. 24 (i) Draft RTS 13 should be deleted. It is not possible to check clients’ disciplinary history.

Art. 8 Draft RTS 13 calls for a segregation of software, hardware and network infrastructure. Since the network infrastructure is part of the software or the hardware this is not possible. The word “network infrastructure” should be deleted.

The requirement in Art. 13 Draft RTS 13 to conduct testing with at least as many algorithms as the firm used on its most active day of trading over the past 6 month period should be amended. What matters in a stress test is not the number of algorithms but the number of orders generated by them. A stress test in which a small number of algorithms generates a large number of orders is more meaningful than a stress test in which a large number of algorithms generates a relatively small number of orders.

Q99. Do you have any additional comments or questions that need to be raised with regards to the Consultation Paper?

The EBF is very concerned with article 27, 1, 3 section in MIFID which is further specified in ESMA’s Technical Advice since the wording indicates that investments firms’ costs - when routing orders to different venues - should be included in the cost element in the best execution requirement. Is this correctly understood?

If so, as we do agree to transparency on various cost, we do believe that including venue cost when determining best execution could imply an element of conflict of interest, since the investment firm will have an incentive to route to venues with the lowest costs and these are not necessarily the venues where clients get the best execution in respect of i.e. price, time and market impact. The investment firm should always focus on the best interest of clients.

We therefore request ESMA to elaborate on this requirement with respect of the considerations listed above.

Q100. Do you have any comments on Organisational Requirements for trading venues as set out above? Is there any element that should be clarified? Please provide reasons for your answer.
Q101. Is there any element in particular that should be clarified with respect to the outsourcing obligations for trading venues?

Q102. Is there any additional element to be addressed with respect to the testing obligations?

Q103. In particular, do you agree with the proposals regarding the conditions to provide DEA?

Q104. Do you agree with the proposed draft RTS? Please provide reasons for your answer.

No. The Market Making requirements will be counterproductive for on-venue trading and liquidity.

ESMA proposes that firms will be deemed market marker and must comply with certain binding agreements and commercial terms set by a trading venue, if they are posting firm, simultaneous two-way quotes of comparable size and at competitive prices for at least one instrument in no less than 30% of the daily trading hours. However, these requirements will capture the traditional investment firms and leave behind the firms that should be captured, i.e., firms posting non-firm, one-way quotes etc. The proposal is not in line with the intention of the directive and will imply that investment firms will do what they can to avoid being captured, meaning less “firm, simultaneous two-way quotes of comparable size and at competitive prices” on the trading venues and much more SI trading. EBF does not believe this is a wanted outcome.

In addition, with the lower tick sizes, as ESMA also proposes, market makers as a whole will face a decrease in the payment the risk they are taking, which will accelerate this inappropriate development.

This is not in the interest of neither investors, trading venues, investment firms nor the community as a whole.

However, since the requirements on “two-way quotes ...” are set at level 1, the only option seem to be to increase the 30% threshold considerably to i.e. 80%-90% before the market maker are forced into binding, written agreements. Then the additional requirement for how
long time the Market maker must provide firm quotes can be increased correspondingly.

Q105. Should an investment firm pursuing a market making strategy for 30% of the daily trading hours during one trading day be subject to the obligation to sign a market making agreement? Please give reasons for your answer.

No – see response to Q104. The threshold should be much higher in order not to force flow away from the trading venues, i.e. 80%-90%.

Q106. Should a market maker be obliged to remain present in the market for higher or lower than the proposed 50% of trading hours? Please specify in your response the type of instrument/s to which you refer.

No – must correspond to the increased threshold on i.e. 80-90% before investment firms are forced to enter into binding written agreements.

Q107. Do you agree with the proposed circumstances included as “exceptional circumstances”? Please provide reasons for your answer.

Yes.

Q108. Have you any additional proposal to ensure that market making schemes are fair and non-discriminatory? Please provide reasons for your answer.

No.

Q109. Do you agree with the proposed regulatory technical standards? Please provide reasons for your answer.

Yes, we agree with the RTS. It makes very good sense that the calculations of the thresholds are based on the same formula. However, EBF finds it strange that ESMA has not the mandate to set any thresholds or sanctions for the OTR. ESMA should be aware that this may result in very different threshold and sanctions across Europe. In other words, venues may have an incentive to compete on this parameter, which is not in the interest of well-functioning markets. ESMA should consider to develop guidelines on adequate thresholds, which support genuine orders.

Q110. Do you agree with the counting methodology proposed in the Annex in relation to the various order types? Please provide reasons for your answer.
Q111. Is the definition of “orders” sufficiently precise or does it need to be further supplemented? Please provide reasons for your answer.

The definition is ok.

Q112. Is more clarification needed with respect to the calculation method in terms of volume?

No.

Q113. Do you agree that the determination of the maximum OTR should be made at least once a year? Please specify the arguments for your view.

Yes.

Q114. Should the monitoring of the ratio of unexecuted orders to transactions by the trading venue cover all trading phases of the trading session including auctions, or just the continuous phase? Should the monitoring take place on at least a monthly basis? Please provide reasons for your answer.

In order to ensure consistency, auctions should be excluded, cf. Q52.

Q115. Do you agree with the proposal included in the Technical Annex regarding the different order types? Is there any other type of order that should be reflected? Please provide reasons for your answer.

Q116. Do you agree with the proposed draft RTS with respect to co-location services? Please provide reasons for your answer.

Q117. Do you agree with the proposed draft RTS with respect to fee structures? Please provide reasons for your answer.

Q118. At which point rebates would be high enough to encourage improper trading? Please elaborate.
Q119. Is there any other type of incentives that should be described in the draft RTS?

Not at present.

Q120. Can you provide further evidence about fee structures supporting payments for an “early look”? In particular, do you agree with ESMA’s preliminary view regarding the differentiation between that activity and the provision of data feeds at different latencies?

Q121. Can you provide examples of fee structures that would support non-genuine orders, payments for uneven access to market data or any other type of abusive behaviour? Please provide reasons for your answer.

Q122. Is the distinction between volume discounts and cliff edge type fee structures in this RTS sufficiently clear? Please elaborate

First of all, ESMA should use turnover as an indicator of liquidity since this is a much more correct proxy.

Secondly, ESMA should choose the most relevant market in terms of liquidity since this cover the most liquid market and apply a consistent approach throughout the level 2 rules, as also previously stated.

Q123. Do you agree that the average number of trades per day should be considered on the most relevant market in terms of liquidity? Or should it be considered on another market such as the primary listing market (the trading venue where the financial instrument was originally listed)? Please provide reasons for your answer.

First of all, ESMA should use turnover as an indicator of liquidity since this is a much more correct proxy.

Secondly, ESMA should choose the most relevant market in terms of liquidity since this cover the most liquid market and apply a consistent approach throughout the level 2 rules, as also previously stated.

Q124. Do you believe a more granular approach (i.e. additional liquidity bands) would be more suitable for very liquid stocks and/or for poorly liquid stocks? Do you consider the proposed tick sizes adequate in particular with respect to the smaller price ranges and less liquid instruments as well as higher price ranges and highly liquid instruments? Please provide reasons for your answer.
ESMA’s proposal for tick sizes needs further adjustments since it will reduce tick sizes too much in liquid/less liquid shares and increase tick sizes too much in super liquid shares compared to the present situation.

Q125. Do you agree with the approach regarding instruments admitted to trading in fixing segments and shares newly admitted to trading? Please provide reasons for your answer.

Q126. Do you agree with the proposed approach regarding corporate actions? Please provide reasons for your answer.

Q127. In your view, are there any other particular or exceptional circumstances for which the tick size may have to be specifically adjusted? Please provide reasons for your answer.

Q128. In your view, should other equity-like financial instruments be considered for the purpose of the new tick size regime? If yes, which ones and how should their tick size regime be determined? Please provide reasons for your answer.

Q129. To what extent does an annual revision of the liquidity bands (number and bounds) allow interacting efficiently with the market microstructure? Can you propose other way to interact efficiently with the market microstructure? Please provide reasons for your answer.

Q130. Do you envisage any short-term impacts following the implementation of the new regime that might need technical adjustments? Please provide reasons for your answer.

Q131. Do you agree with the definition of the “corporate action”? Please provide reasons for your answer.
Q132. Do you agree with the proposed regulatory technical standards?

Q133. Which would be an adequate threshold in terms of turnover for the purposes of considering a market as “material in terms of liquidity”?
5. Data publication and access

Q134. Do you agree with ESMA’s proposal to allow the competent authority to whom the ARM submitted the transaction report to request the ARM to undertake periodic reconciliations? Please provide reasons.

Q135. Do you agree with ESMA’s proposal to establish maximum recovery times for DRSPs? Do you agree with the time periods proposed by ESMA for APAs and CTPs (six hours) and ARMs (close of next working day)? Please provide reasons.

Q136. Do you agree with the proposal to permit DRSPs to be able to establish their own operational hours provided they pre-establish their hours and make their operational hours public? Please provide reasons. Alternatively, please suggest an alternative method for setting operating hours.

Q137. Do you agree with the draft technical standards in relation to data reporting services providers? Please provide reasons.

Q138. Do you agree with ESMA’s proposal?

Q139. Do you agree with this definition of machine-readable format, especially with respect to the requirement for data to be accessible using free open source software, and the 1-month notice prior to any change in the instructions?

Q140. Do you agree with the draft RTS’s treatment of this issue?

Q141. Do you agree that CTPs should assign trade IDs and add them to trade reports? Do you consider necessary to introduce a similar requirement for APAs?
Q142. Do you agree with ESMA’s proposal? In particular, do you consider it appropriate to require for trades taking place on a trading venue the publication time as assigned by the trading venue or would you recommend another timestamp (e.g. CTP timestamp), and if yes why?

Q143. Do you agree with ESMA’s suggestions on timestamp accuracy required of APAs? What alternative would you recommend for the timestamp accuracy of APAs?

Q144. Do you agree with ESMA’s proposal? Do you think that the CTP should identify the original APA collecting the information form the investment firm or the last source reporting it to the CTP? Please explain your rationale.

Q145. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that you envisage in case of implementation of the proposal.

No. The data disaggregation should not be divided into two levels (article 1 and 2 in RTS 22), where article 2 is not mandatory, due to article 3. The venues have the data and should be required to offer the unbundling as described in both articles since market participant need the information and should not dependent on an arbitrary evaluation by the venues. We all know that art. 2 and 3 will result in a battle to get the venues to provide the requested information.

In case ESMA insist on a mandatory (art. 1) and a voluntary section (art. 2), we request that art. 2, a) and b) are moved to mandatory disaggregation (art. 1) AND that the article 3 is expanded with concrete measures to determine when there is “insufficient demand for additional disaggregation”. EBF urges that if 10% or more of the members of a venue or 10% or more of the market share in a given financial instrument request additional disaggregation according to art. 2 in RTS 22, this must be accommodated within 30 business days from the request is made. These thresholds must be included in the RTS.

Q146. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that you envisage in case of implementation of the proposal.
Q147. With the exception of transaction with SIs, do you agree that the obligation to publish the transaction should always fall on the seller? Are there circumstances under which the buyer should be allowed to publish the transaction?

Q148. Do you agree with the elements of the draft RTS that cover a CCP’s ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

Q149. Do you agree with the elements of the draft RTS that cover a trading venue’s ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

Q150. In particular, do you agree with ESMA’s assessment that the inability to acquire the necessary human resources in due time should not have the same relevance for trading venues as it has regarding CCPs?

Q151. Do you agree with the elements of the draft RTS that cover an CA’s ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

Q152. Do you agree with the elements of the draft RTS that cover the conditions under which access is granted? If not, please explain why and, where possible, propose an alternative approach.

Q153. Do you agree with the elements of the draft RTS that cover fees? If not, please explain why and, where possible, propose an alternative approach.
Q154. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that do you envisage in case of implementation of the proposal.

Q155. Do you agree with the elements of the draft RTS specified in Annex X that cover notification procedures? If not, please explain why and, where possible, propose an alternative approach.

Q156. Do you agree with the elements of the draft RTS specified in Annex X that cover the calculation of notional amount? If not, please explain why and, where possible, propose an alternative approach.

Q157. Do you agree with the elements of the draft RTS that cover relevant benchmark information? If not, please explain why and, where possible, propose an alternative approach. In particular, how could information requirements reflect the different nature and characteristics of benchmarks?

Q158. Do you agree with the elements of the draft RTS that cover licensing conditions? If not, please explain why and, where possible, propose an alternative approach.

Q159. Do you agree with the elements of the draft RTS that cover new benchmarks? If not, please explain why and, where possible, propose an alternative approach.
6. Requirements applying on and to trading venues

Q160. Do you agree with the attached draft technical standard on admission to trading?
<ESMA_QUESTION_CP_MIFID_160>
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Q161. In particular, do you agree with the arrangements proposed by ESMA for verifying compliance by issuers with obligations under Union law?
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TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_161>

Q162. Do you agree with the arrangements proposed by ESMA for facilitating access to information published under Union law for members and participants of a regulated market?
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Q163. Do you agree with the proposed RTS? What and how should it be changed?
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Q164. Do you agree with the approach of providing an exhaustive list of details that the MTF/OTF should fulfil?
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Q165. Do you agree with the proposed list? Are there any other factors that should be considered?
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Q166. Do you think that there should be one standard format to provide the information to the competent authority? Do you agree with the proposed format?
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Q167. Do you think that there should be one standard format to notify to ESMA the authorisation of an investment firm or market operator as an MTF or an OTF? Do you agree with the proposed format?
7. Commodity derivatives

Q168. Do you agree with the approach suggested by ESMA in relation to the overall application of the thresholds? If you do not agree please provide reasons.

Q169. Do you agree with ESMA’s approach to include non-EU activities with regard to the scope of the main business?

Q170. Do you consider the revised method of calculation for the first test (i.e. capital employed for ancillary activity relative to capital employed for main business) as being appropriate? Please provide reasons if you do not agree with the revised approach.

Q171. With regard to trading activity undertaken by a MiFID licensed subsidiary of the group, do you agree that this activity should be deducted from the ancillary activity (i.e. the numerator)?

Q172. ESMA suggests that in relation to the ancillary activity (numerator) the calculation should be done on the basis of the group rather than on the basis of the person. What are the advantages or disadvantages in relation to this approach? Do you think that it would be preferable to do the calculation on the basis of the person? Please provide reasons. (Please note that altering the suggested approach may also have an impact on the threshold suggested further below).

Q173. Do you consider that a threshold of 5% in relation to the first test is appropriate? Please provide reasons and alternative proposals if you do not agree.

Q174. Do you agree with ESMA’s intention to use an accounting capital measure?
Q175. Do you agree that the term capital should encompass equity, current debt and non-current debt? If you see a need for further clarification of the term capital, please provide concrete suggestions.

Q176. Do you agree with the proposal to use the gross notional value of contracts? Please provide reasons if you do not agree.

Q177. Do you agree that the calculation in relation to the size of the trading activity (numerator) should be done on the basis of the group rather than on the basis of the person? (Please note that that altering the suggested approach may also have an impact on the threshold suggested further below)

Q178. Do you agree with the introduction of a separate asset class for commodities referred to in Section C 10 of Annex I and subsuming freight under this new asset class?

Q179. Do you agree with the threshold of 0.5% proposed by ESMA for all asset classes? If you do not agree please provide reasons and alternative proposals.

Q180. Do you think that the introduction of a de minimis threshold on the basis of a limited scope as described above is useful?

Q181. Do you agree with the conclusions drawn by ESMA in relation to the privileged transactions?
Q182. Do you agree with ESMA’s conclusions in relation to the period for the calculation of the thresholds? Do you agree with the calculation approach in the initial period suggested by ESMA? If you do not agree, please provide reasons and alternative proposals.

Q183. Do you have any comments on the proposed framework of the methodology for calculating position limits?

Q184. Would a baseline of 25% of deliverable supply be suitable for all commodity derivatives to meet position limit objectives? For which commodity derivatives would 25% not be suitable and why? What baseline would be suitable and why?

Q185. Would a maximum of 40% position limit be suitable for all commodity derivatives to meet position limit objectives. For which commodity derivatives would 40% not be suitable and why? What maximum position limit would be suitable and why?

Q186. Are +/- 15% parameters for altering the baseline position limit suitable for all commodity derivatives? For which commodity derivatives would such parameters not be suitable and why? What parameters would be suitable and why?

Q187. Are +/- 15% parameters suitable for all the factors being considered? For which factors should such parameters be changed, what to, and why?

Q188. Do you consider the methodology for setting the spot month position limit should differ in any way from the methodology for setting the other months position limit? If so, in what way?
Q189. How do you suggest establishing a methodology that balances providing greater flexibility for new and illiquid contracts whilst still providing a level of constraint in a clear and quantifiable way? What limit would you consider as appropriate per product class? Could the assessment of whether a contract is illiquid, triggering a potential wider limit, be based on the technical standard ESMA is proposing for non-equity transparency?

Q190. What wider factors should competent authorities consider for specific commodity markets for adjusting the level of deliverable supply calculated by trading venues?

Q191. What are the specific features of certain commodity derivatives which might impact on deliverable supply?

Q192. How should ‘less-liquid’ be considered and defined in the context of position limits and meeting the position limit objectives?

Q193. What participation features in specific commodity markets around the organisation, structure, or behaviour should competent authorities take into account?

Q194. How could the calculation methodology enable competent authorities to more accurately take into account specific factors or characteristics of commodity derivatives, their underlying markets and commodities?

Q195. For what time period can a contract be considered as “new” and therefore benefit from higher position limits?
Q196. Should the application of less-liquid parameters be based on the age of the commodity derivative or the ongoing liquidity of that contract.

Q197. Do you have any further comments regarding the above proposals on how the factors will be taken into account for the position limit calculation methodology?

Q198. Do you agree with ESMA’s proposal to not include asset-class specific elements in the methodology?

Q199. How are the seven factors (listed under Article 57(3)(a) to (g) and discussed above) currently taken into account in the setting and management of existing position limits?

Q200. Do you agree with the proposed draft RTS regarding risk reducing positions?

Q201. Do you have any comments regarding ESMA’s proposal regarding what is a non-financial entity?

Q202. Do you agree with the proposed draft RTS regarding the aggregation of a person’s positions?

Q203. Do you agree with ESMA’s proposal that a person’s position in a commodity derivative should be aggregated on a ‘whole’ position basis with those that are under the beneficial ownership of the position holder? If not, please provide reasons.
Q204. Do you agree with the proposed draft RTS regarding the criteria for determining whether a contract is an economically equivalent OTC contract?

Q205. Do you agree with the proposed draft RTS regarding the definition of same derivative contract?

Q206. Do you agree with the proposed draft RTS regarding the definition of significant volume for the purpose of article 57(6)?

Q207. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

Q208. Do you agree with the proposed draft RTS regarding the procedure for the application for exemption from the Article 57 position limits regime?

Q209. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

Q210. Do you agree with the reporting format for CoT reports?

Q211. Do you agree with the reporting format for the daily Position Reports?
Q212. What other reporting arrangements should ESMA consider specifying to facilitate position reporting arrangements?
8. Market data reporting

Q213. Which of the formats specified in paragraph 2 would pose you the most substantial implementation challenge from technical and compliance point of view for transaction and/or reference data reporting? Please explain.

ESMA QUESTION_CP_MIFID_213

EBF favours an approach which enables investment firms to choose the suitable format themselves. If that is not possible, the formats FpML and XML should be available since they enable firms to report all transactions that will be reportable in future.

Under the current MiFID 1 regime some firms with an obligation to report do so using the services of an Approved Reporting Mechanism (ARM). It is assumed that the ARMS will continue to take transaction data from their client firms using the messaging standards currently in place albeit extended to cater for the additional data elements that are required under MiFIR (EU) 600/2014.

Where new messaging requirements arise under MiFIR then firms would prefer to use standardised formats and not proprietary or customised formats allowing them to leverage existing technical capabilities and infrastructure.

ESMA QUESTION_CP_MIFID_213

Q214. Do you anticipate any difficulties with the proposed definition for a transaction and execution?

ESMA QUESTION_CP_MIFID_214

TYPE YOUR TEXT HERE Firms welcome ESMA’s efforts to define what constitutes a ‘transaction’ and ‘execution’ for the purposes of transaction reporting. We also welcome clarity on the activities that are not included in the definition. However, firms have the following comments with regards to the definition:

With regards to the merger of funds and/or other financial instruments, EBF members consider it important that ESMA clarifies whether these are excluded from the scope of the definition of ‘transaction’ as well as of ‘execution’, for the purposes of transaction reporting. ESMA should also provide important clarification on the exclusion of ‘redenomination’, ‘redetermination’ and/or ‘conversions’ of shares and other financial instruments.

With regards to transaction for clearing and settlement purposes, ESMA states in Article 3(3)(b) of the draft RTS Article 32 that that contracts arising solely and exclusively for clearing or settlement purposes are excluded from the definition of a transaction. However in the consultation paper (footnote 62), ESMA notes that where only the clearing broker has the client information then he will also have a transaction reporting obligation (although the only thing that the clearing broker does is clear the trade). Firms are therefore concerned of the possible contradiction between footnote 6, conferring the transaction reporting obligation on the clearing brokers, yet specifically excluding clearing and settlement transactions in Article 3 (3)(b).

Ref 22 i: We interpret the wording so that it relates primarily to derivative transactions considered on the view of a client who has an interest and his agreement with his counterpart. However, the transaction cannot be simplified classified as either buying or
selling, see also Q217. It must be described how the decrease/increase should be reported when using the modification of contract –field in combination with seller/buyer info.

Ref 22 II: The text should be read in conjunction with 26 and is thus difficult to understand.

Ref 22 iii: It is unclear what is a transaction. Is it the execution or the purchase/sale or both? Or should it be expressed "a purchase or a sale that follows the exercise of options. “

Ref 22 iv: If the rights are financial instruments they are reportable. If they are not financial instruments they are not reportable

Ref 22 v: It is unclear what transfers between “funds” means. Does this refer specifically to investment funds or to other types of funds? ESMA should also provide clarity on what is meant by ‘transfer’. Does this include switches between funds?

Ref 22 vi: The example raises many questions. What is meant by “in specie”?

An interpretation of the wording of the sentence could be that in principle all forms of changes of ownership whether with or without payment are transactions and should as such be reported. Question arises then, who should be reported as buyer and who is the seller?

According to the wording gifts and pledges with transfer of ownership shall be considered as transactions also means departing from it to be a the commercial transaction in which one party sells and the other party buys and instead focuses on the actual transfer of ownership - which is an entirely different thing. You could even raise the question if this should be interpreted as, besides the regular transaction report you should also report when the actual change of ownership takes place meaning that even the custody bank should report, what is already reported, with the risk of double reporting?

It is also questionable whether information on gifts and transfers may represent the information necessary to prevent market abuse, which is one of the main purposes of the TRS reporting.

In a direct holding CSD, an investment firm may from time to time receive an order from an investor to transfer securities from one account to another. The investor have no obligation to inform the investment firm of the reason behind the transfer (gift, private contract note, private option exercise etc.), and the transfer is executed directly in the CSD’s register, so the investment firm will have no record to base a transaction report on.

Information about trading time is another example of information that is not available when reporting gifts or transfers. There are also different regulations in the various jurisdictions in relation to ownership which needs to be taken into account.

Q215. In your view, is there any other outcome or activity that should be excluded from the definition of transaction or execution? Please justify.

Firms welcome ESMA’s efforts to define what constitutes a ‘transaction’ and ‘execution’ for the purposes of transaction reporting. We also welcome clarity on the activities that are not included in the definition. However, firms have the following comments with regards to the definition:
With regards to transaction for clearing and settlement purposes, ESMA states in Article 3(3)(b) of the draft RTS Article 32 that that contracts arising solely and exclusively for clearing or settlement purposes are excluded from the definition of a transaction. However in the consultation paper (footnote 62), ESMA notes that where only the clearing broker has the client information then he will also have a transaction reporting obligation (although the only thing that the clearing broker does is clear the trade). Firms are therefore concerned of the possible contradiction between footnote 6, conferring the transaction reporting obligation on the clearing brokers, yet specifically excluding clearing and settlement transactions in Article 3(3)(b).

Ambiguities in the "Clarification or issues raised on inclusion of specific activity" especially 22-27 raises many question rather than clarifies. See also the comments to Q 214

It is also questionable whether information on gifts and transfers may represent the information necessary to prevent market abuse, which is one of the main purposes of the TRS reporting. Suspected AML behaviour should be reported but in another regulated way.

Q216. Do you foresee any difficulties with the suggested approach? Please justify.

Member firms see both advantages and weaknesses of the proposal.

Firms would appreciate clarification on the inclusion/ exclusion of activities described as “issuance, allotment, subscriptions and placements” which appears to describe the outcome of primary market activities and are typically publically announced. These activities would appear to meet the criteria specified in under paragraph 26 for exclusion in that dates are generally known in advance, investors elect to participate in book building in advance of the primary issue and prices are standard across all investors. Inclusion of grey market and secondary trading should continue to be reported for identification of market abuse.

Q217. Do you agree with ESMA’s proposed approach to simplify transaction reporting? Please provide details of your reasons.

Yes. To ensure consistent population of these new fields, ESMA might wish to consider how these fields will be required to be populated in the case of certain classes of OTC derivative transactions where there are two legs to the transaction and where one leg is reportable (e.g. the equity leg of an OTC Equity Swap) and where the other leg isn’t reportable (e.g. the Interest Rate leg of an OTC swap).

However the changes must be supplemented with rules where transaction could not be classified as “Buyer” or “Seller” (e.g. derivatives, gifts etc.) and must be clarified with examples. In this respect, the EBF urges ESMA to consult the industry on any level 3 measures.

Q218. We invite your comments on the proposed fields and population of the fields. Please provide specific references to the fields which you are discussing in your response.
In general, firms believe that, in order to achieve clarity as to the population of each transaction reporting fields, this will require detailed scenarios to be analysed and examples on how fields are expected to be populated for each of the scenarios. We will therefore encourage ESMA to work with the industry to put in place a transaction reporting guide, which will assist firms in achieving accurate reporting. In this respect the EBF urges ESMA to consult the industry on any level 3 measures. In the absence of such a guide, investment firms might end up interpreting the population of each field differently. Firms suggest that ESMA clearly identifies where fields are Mandatory / Optional and what values ESMA expects in the fields where data is applicable or does not exist for a specific transaction report.

Firms would welcome consistency of reference data requirements between orders and transaction reports so that storage of information can be centralised and not duplicated as this will increase costs to firms. This is especially the case where the additional instrument data required by the NCAs would have been provided by the venues and available to NCAs already.

Field 11, 26, Country of residence. Where a natural person is a national of more than one EEA country, the country code of the first nationality when sorted alphabetically by its ISO 3166-1 2 character code and the highest priority identifier obtainable related to the first nationality shall be used. It is not uncommon that clients have multiple citizenships. However this is more seldom known by the investment firm. We assume that by the client supplied citizenship, previously certified by license or passport should not have to be ever questioned as the only one.

We would also point to the challenge and cost of continually updating information of identifiers in other countries. Tasks are usually not readily available. Usually, the data is highly classified. To check and update the data is thus a costly and administratively a heavy burden. We would also like to point out that one of the main objectives of the Financial EU directives and regulations is that the investment firms in Europe will compete among themselves throughout Europe and it should be easy for customers to purchase financial services from the investment firm of choice in all of Europe. The proposed regulation risks counteract this.

Fields 8 – 19 Firms would like to reiterate their concern with amount of personal data that ESMA is suggesting to include in each transaction report. We believe that for natural persons the national ID number uniquely identifies each person and we therefore do not agree that additional information in order for competent authorities to monitor for market abuse. Additional information might only add noise to the reports as it leaves more room for errors. For example, we question how including the date of birth of an individual in the reports is considered as an essential piece of information for market abuse purposes when that person is already uniquely identified by a national ID number. In addition, ESMA also requires the post code of the client to be identified in the reports. As ESMA is aware individuals can change addresses very often and could also have several addresses. We therefore think that requiring firms to include this additional information in the transaction reports is unreasonable and disproportionate.

In additions, these fields appear to only apply where the BUYING client of a Reporting Investment Firm is a natural person and not where the client of a Reporting Investment firm is another Investment Firm.
Fields 21 – 34 appear to apply only where the SELLING client of a Reporting Investment Firm is a natural person and not where the client of a Reporting Investment firm is another Investment firm.

Field 41: Guidance will be necessary on how to treat average price transactions with regard to the trading time. We suggest to quote the booking time of the average price transaction and would ask ESMA to include this clarification in its Final Advice.

In general, firms believe that, in order to achieve clarity as to the population of each transaction reporting fields, this will require detailed scenarios to be analysed and examples on how fields are expected to be populated for each of the scenarios. We will therefore encourage ESMA to work with the industry to put in place a transaction reporting guide, which will assist firms in achieving accurate reporting. In the absence of such a guide, investment firms might end up interpreting the population of each field differently. Firms suggest that ESMA clearly identifies where fields are Mandatory / Optional and what values ESMA expects in the fields where data is applicable or does not exist for a specific transaction report.

Fields 68-75: We would ask ESMA to clarify at which level it expects a decision maker to be, i.e. whether the respective desk head should be identified or more senior decision makers like board members.

Field 76: It is our understanding that information received from the trading concerning waivers may be used for reporting purposes without further verification. We would ask ESMA to confirm.

The content of field 77, Shirt selling indicator, is interpreted so that when the investment firm transmits an order to a broker the short sale indicator will be omitted. We support this approach as it is important to not forward the information of the seller’s position to anyone else but the client’s investment firm.

Field 77, Short selling indicator: – Firms continue to determine ways of populating this field that will contain meaningful and useful information for NCAs when analysing transaction reports.

When reporting were the clients is short selling then Firms will have to rely on the clients accurately informing them of the fact that they are short selling. ESMA SSR regulations are specific to certain assets and market maker exemption. Firms recognise that they must retain sequencing information on orders and that this may inform when a short sell is being conducted by a particular trader but given the requirement to identify at an entity level and when MM exemption is/ is not applied, there are challenges where firms may have many orders happening across different trading desks/ locations that are over-riding each other with regards to short selling at an entity level especially when using a systemic approach such as a VWAP model.

For firms own short selling there are practical difficulties with the firm to calculating continuously across the trading day whether a particular transaction was / was not short, whether a borrow is in place or whether a borrow that was in place has had to be returned or where settlement has failed. Additionally firms may hold assets in fungible lines for example global bonds that have Euroclear and DTC lines. Firms risk management systems and the issuer would see these as the same line of stock with a common ISIN but without clear guidance firms may under or over-disclose as a short sell.
Q219. Do you agree with the proposed approach to flag trading capacities?

Yes, we foresee problems. The information on waivers will have to be fed into the reports from databases of the front and middle office. This will cause time delays at least.

Q220. Do you foresee any problem with identifying the specific waiver(s) under which the trade took place in a transaction report? If so, please provide details

Yes, we foresee problems. The information on waivers will have to be fed into the reports from databases of the front and middle office. This will cause time delays at least.

Q221. Do you agree with ESMA’s approach for deciding whether financial instruments based on baskets or indices are reportable?

The EBF agrees with the approach stated in Article 11. However, we would ask that Article 3 (3) (h) is amended to ensure that changes in compositions of baskets are also not reportable after a transaction has occurred:
“A change in the composition of an index or basket or sector after a transaction occurred”

Q222. Do you agree with the proposed standards for identifying these instruments in the transaction reports?

As per the comments made for Question 218

Field 58 does pose problems in terms of the potential large number of underlying ISINs that it might be feasible to populate in this field.

For example an Equity Swap on a bespoke basked of the FTSE250 index with the banking stocks removed – would result in a repeating group population of in excess of 200 lines.

Firms suggest that where ISINs are available to identify Baskets/Sectors/Indexes then these should be used as opposed to free form text which is likely to be widely different amongst firms.

Q223. Do you foresee any difficulties applying the criteria to determine whether a branch is responsible for the specified activity? If so, do you have any alternative proposals?

Firms believe that this applies to where the Sales activity is centred in a branch yet the trading activity is centred at an alternative location. We suggest to connect the responsibility of a branch to the order book where the client order has been executed.

Q224. Do you anticipate any significant difficulties related to the implementation of LEI validation?
The EBF agrees with the concerns expressed in the former consultation round regarding mandatory use of LEI code for legal persons. Obtaining LEI number and its maintenance is related with additional costs and time, which could impose disproportional burden to investment firm’s clients who are small-scale companies with small-scale transactions, thus limiting the ability of respective companies to enter into the transactions subject to reporting requirements. The requirement also disregards national company registration process that for the company so registered should give sufficient legal ability to enter into the contract.

LEI code collection and validation requirement as well as the requirement that client can execute transaction only upon disclosure and authentication of the LEI not only impose additional burden on investment firm and increases costs, but could result in limited access to investment services for small-scale companies. The possibility to use national identifier should be re-considered.

Q225. Do you foresee any difficulties with the proposed requirements? Please elaborate.

Firms reiterate their response to question 214.

Firms welcome ESMA’s efforts to define ‘transaction’ and ‘execution of a transaction’ for transaction reporting purposes. As stated in the draft RTS 32 Article 3, not all actions and transactions are included in the transaction reporting scope. As not all actions/transactions are reportable it would be impossible for competent authorities to use transaction reports to calculate firms’ exact positions. However, the draft RTS 32 Article 14(5) (a), seem to require investment firms to have adequate arrangements in place to ensure that the transaction reports submitted by the firm accurately reflect the changes in position of the firm. Firms are concerned that compliance with Article 14 (5) (a) as currently written will not be possible. i.e. some of the excluded transactions although occurring for example solely as a result of external events do in themselves have an impact on the positions of the firm and/or its clients. ESMA further clarifies its rationale in excluding these transactions in Paragraphs 10 – 14 of the Consultation Paper.

Firms therefore suggest for Article 14 Paragraph (5)(a) to be redrafted in order to take into consideration the limitation implied by Article 3.

Firms also wish to reiterate that although best efforts will be made not to over-report; we do not think that over-reporting should be explicitly precluded in the RTS. When in doubt and will prefer to over-report instead of under-reporting. We do not think firms should be penalised (required to back report) for over-reporting as long as they make best efforts not to over-report and the information they send is complete and accurate.

In addition firms would like to reiterate that in the absence of a golden source of reportable products, firms would then report on a best endeavours basis and err on the side of caution and report transactions where there is an element of doubt.
In both cases there is therefore a risk of over reporting yet firms seek to assure ESMA that best efforts will be made not to do so.

Q226. Are there any cases other than the AGGREGATED scenario where the client ID information could not be submitted to the trading venue operator at the time of order submission? If yes, please elaborate.

Q227. Do you agree with the proposed approach to flag liquidity provision activity?

Q228. Do you foresee any difficulties with the proposed differentiation between electronic trading venues and voice trading venues for the purposes of time stamping? Do you believe that other criteria should be considered as a basis for differentiating between trading venues?

Q229. Is the approach taken, particularly in relation to maintaining prices of implied orders, in line with industry practice? Please describe any differences?

Q230. Do you agree on the proposed content and format for records of orders to be maintained proposed in this Consultation Paper? Please elaborate.

Q231. In your view, are there additional key pieces of information that an investment firm that engages in a high-frequency algorithmic trading technique has to maintain to comply with its record-keeping obligations under Article 17 of MiFID II? Please elaborate.

Q232. Do you agree with the proposed record-keeping period of five years?

Q233. Do you agree with the proposed criteria for calibrating the level of accuracy required for the purpose of clock synchronisation? Please elaborate.
Q234. Do you foresee any difficulties related to the requirement for members or participants of trading venues to ensure that they synchronise their clocks in a timely manner according to the same time accuracy applied by their trading venue? Please elaborate and suggest alternative criteria to ensure the timely synchronisation of members or participants clocks to the accuracy applied by their trading venue as well as a possible calibration of the requirement for investment firms operating at a high latency.

Q235. Do you agree with the proposed list of instrument reference data fields and population of the fields? Please provide specific references to the fields which you are discussing in your response.

Q236. Do you agree with ESMA's proposal to submit a single instrument reference data full file once per day? Please explain.

Q237. Do you agree that, where a specified list as defined in Article 2 [RTS on reference data] is not available for a given trading venue, instrument reference data is submitted when the first quote/order is placed or the first trade occurs on that venue? Please explain.

Q238. Do you agree with ESMA proposed approach to the use of instrument code types? If not, please elaborate on the possible alternative solutions for identification of new financial instruments.
9. Post-trading issues

Q239. What are your views on the pre-check to be performed by trading venues for orders related to derivative transactions subject to the clearing obligation and the proposed time frame?

Q240. What are your views on the categories of transactions and the proposed timeframe for submitting executed transactions to the CCP?

Q241. What are your views on the proposal that the clearing member should receive the information related to the bilateral derivative contracts submitted for clearing and the timeframe?

Q242. What are your views on having a common timeframe for all categories of derivative transactions? Do you agree with the proposed timeframe?

Q243. What are your views on the proposed treatment of rejected transactions?

Q244. Do you agree with the proposed draft RTS? Do you believe it addresses the stakeholders concerns on the lack of indirect clearing services offering? If not, please provide detailed explanations on the reasons why a particular provision would limit such a development as well as possible alternatives.

Q245. Do you believe that a gross omnibus account segregation, according to which the clearing member is required to record the collateral value of the assets, rather than the assets held for the benefit of indirect clients, achieves together with other requirements included in the draft RTS a protection of equivalent effect to the indirect clients as the one envisaged for clients under EMIR?
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