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 input/Consultations’.

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

**Data protection**

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

Please make your introductory comments below, if any:
<ESMA_COMMENT_CP_MIFID_1>

The German Banking Industry Committee represents more than 2,000 German banks. We have closely followed the legislative process to revise the Markets in Financial Instruments Directive (MiFID), which is intended to reorganise the European securities, derivatives and commodities markets and, not least, further enhance investor protection. We welcome the chance to respond to ESMA’s recent consultation on MiFID II/MiFIR – Level 2 measures. We would also, against this background, like to make some general, overarching comments about the consultation:

• Application of the proportionality principle

The proportionality principle enshrined in Article 5 (4) of the Treaty on European Union requires Level 2 measures to refrain from exceeding that what is necessary to achieve the objectives set at Level 1. The cost of Level 2 measures, moreover, should not be disproportionate to the intended benefits. Furthermore, proportionality is necessary to justify requirements with respect to data protection law.

With this in mind, a number of ESMA’s proposals need to be more targeted in scope. This applies, for example, to chapter 3.5 (Liquid market definition for non-equity financial instruments). It would be wrong to set the thresholds at a level which aims at a certain coverage ratio. It is true that MiFIR aims at increasing market transparency. However, it is equally true that MiFIR does not intend to create such transparency at the price of unreasonable risks, in particular for systematic internalisers. Defining a liquid market wrongly would result in the risk for systematic internalisers of such instruments becoming prohibitive. Liquidity would then dry up completely. This is not in the interest of issuers or investors. Other examples are ESMA’s proposals in chapters 2.4 (Information relating to the execution of orders), 3.7 (Post-trade transparency requirements for non-equity instruments) with regard to the thresholds of systematic internalisers, 4.1 (Organisational requirements for investment firms), 8.2 (Obligation to report transactions) and 8.5 (Synchronisation of business clocks) of the Consultation Paper.

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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.
• No exceeding of the Level 1 framework

Level 2 measures should not exceed the framework set at Level 1. The proposals and views set out by ESMA in its Consultation Paper do not always reflect this principle. The proposed measures on reporting are an example (chapter 8.2 of the Consultation Paper). The planned extension of reporting obligations to include positions, position changes or exercises of existing rights lacks a legal basis on Level 1 of MiFIR. The same goes for the proposed additional information concerning client’s identity and the proposed designation and additional information concerning decision makers. ESMA’s proposals in this area need to be revised. Further examples of proposed measures which in our view exceed the Level 1 framework can be found in chapters 2.4 (Information relating to execution of orders) and 3.7 (Post-trade transparency requirements for non-equity instruments).

<ESMA_COMMENT_CP_MIFID_1>
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?

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?

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?

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?

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?

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?

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?
Q22. Do you agree with the proposal that a separate passport notification shall be submitted for each tied agent established in another 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

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?

Preliminary, the German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, considers it extremely bizarre to include systematic internalisers and market makers in the definition of execution venue and believes their inclusion potentially goes too far for the purposes of evaluating the execution quality of possible venues.

The thresholds proposed by ESMA in the Final Report, Section 3.3., are extremely low. Thus, almost all German Banks would result being defined as systematic internalisers in bonds. This does not correspond to the purpose of evaluating the execution quality of possible venues. Only venues which execute a substantial volume of trades are of interest to investment firms when evaluating execution quality in the context of their best execution obligation. We see no need to burden a systematic internaliser of an illiquid instrument with only a few trades per year or a market maker in a similar position with the significant cost of producing a detailed report for individual financial instruments. We therefore advocate confining the requirement to execution venues which have a significant market share and which execute a substantial volume of trades.

The extension in the definition of an "execution venue" in Article 2(3) draft RTS 6 on systematic internalisers should therefore be combined with the requirement of a significant market share and the execution of a substantial volume of shares. Market makers and liquidity providers should be deleted. In addition, GBIC points out there has been no request and no legal basis for ESMA to define (and extend) the term execution venue.

The GBIC does not agree with the approach taken by ESMA. We consider the broad based duty of systematic internalisers and market makers to provide the market with granular data concerning execution volumes and execution quality as not appropriate to the purposes of evaluating the execution quality of possible venues. The approach is not compliant with the principle of proportionality.

The Regulation intends to ensure transparency and consideration in the best-execution policies of executing institutions for those market segments that do not have to qualify as trading platforms, but nevertheless represent a significant liquidity pool in an instrument. Minor turnover generated with a specific asset is insignificant for the drafting process of a policy. Thus, it appears inappropriate to oblige systematic internalisers and other participants of the OTC market, which could be qualified as “market makers” in a broad interpretation despite
generating relatively small turnover figures (e.g. trading in illiquid assets once per week), to produce and disclose comprehensive documentation.

We therefore recommend applying the proposed requirements exclusively to systematic internalisers with significant market shares. We do not consider it necessary to establish a percentage-based threshold, since market participants have an interest in presenting themselves as an execution venue with significant market share. The extension in the definition of an "execution venue" in Article 2(3) draft RTS 6 on systematic internalisers should therefore be combined with the requirement of a significant market share and the execution of a substantial volume of shares.

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?

GBIC sees no need for a further split of trades. The existing MiFID I Best Execution Regime practically already divides the distribution into several ranges. An implementation of further ranges could lead to a disproportionate increase of ranges, not reflecting liquidity. It should be possible the handle different classes of financial instruments in specific ways. At least for the investor's view it is quite important not to display high quality measures where rarely no real data is available. Therefore it should further possible to define relative thresholds.

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

No, GBIC sees no other useful metrics.

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

GBIC generally sees no need to consider additional data. Only, in order to avoid a misleading of the investor, the reporting of trading data should address the type of the trading mechanism. E.g. in purely quote driven instrument types like warrants, figures like turnover volume will give no real information to the retail client while other measures like bid/ask-spreads or quote volumes are much more relevant. Therefore, the information guidelines should be clearly addressing instruments and market features. Due to the fact that in such instruments classes the counterpart either on exchanges, on MTFs or OTC is nearly in any case the issuer of the instrument, the entire turnover information of the different venues would give deep insight in the exposures of the issuers, which cannot be accepted by the market participants.

The data, although measured on a daily basis, should be aggregated and published on a higher basis (e.g. monthly basis). In addition some KPIs should be defined which are quality measure which are not based on a single instrument level but rather on a certain group of instruments (like index member).

Q34. Do you agree with the proposed approach? If not, what other information should ESMA consider?
No, GBIC does not agree with ESMA’s approach. For market makers as well as liquidity providers (in particular the latter, who lack a formal definition) it is not practicable to have the same reporting requirement and equal publication frequencies as a trading venue. So both parties, market makers and liquidity providers should be deleted in the definition of an "execution venue" in Article 2(3) draft RTS 6. In addition, there has been no request for ESMA to define (and extend) the term execution venue.

We strongly believe that the introduction of the term “execution venue” in the level 1 text was meant by the standard setter as a convenient way to cover trading venues and systematic internalisers with one term. Concerning systematic internalisers, we reiterate that the extension in the definition of an "execution venue" in Article 2(3) draft RTS 6 on systematic internalisers should be combined with the requirement of a significant market share and the execution of a substantial volume of shares (see Q30 above).

An extension to market makers, except in the very narrow context of the definition of execution policies, is not supported by level 1. While the existing MiFID Implementation Directive 2006/73/EC provides a definition of “execution venue” which includes market-makers, this applies only to a very narrow scope of application (Articles 44 and 46) and does not address such “execution venues” directly. It seems highly problematic to recycle this definition in a completely different context.

The extension to “market makers” and “liquidity providers” directly results in a number of highly negative consequences of the proposed reporting framework, which result in disproportionate costs for the suggested producers of reports and a drastic drop in the usability of any such reports provided. Since the best execution report would apply to all instruments quoted by a liquidity provider, and investment firms would have to provide information on up to several hundred thousands of instruments, given the number of bonds available in the market, and the potentially infinite number of derivatives on which a quote could be given. We refer to the list of “liquid” financial instruments published by ESMA in its consultation papers which already stretches over several hundred pages.

In most of these instruments, most of the time no transactions take place, a fact that ESMA should be aware of from the analysis it carried out on liquidity of financial instruments. Firstly, the result is, that reports with several hundred thousand records will be produced, but most numbers will actually be zero. While it already seems highly unlikely that any client of an investment firm would download reports from several dozens of investment firms’ webpages, having to process large data files like this actually exceeds the capability of many standard data access tools and will therefore make these reports even more difficult to use for any potentially interested user. Secondly, due the low number of transactions in the majority of financial instruments, these execution reports would actually contain nearly 100% of transactions of a given financial institution in most asset classes. Also, there is no distinction in reporting requirements between orders / executions for which actually a best execution requirement applies, and those where this is not the case, including proprietary transactions.
undertaken for hedging. This creates serious concerns regarding disclosure of commercially sensitive information.

The result of unmanageably large and largely meaningless reports could be very easily avoided by constraining the definition of “execution venues” to the scope covered by level 1, i.e. trading venues and systematic internalisers under the above mentioned requirements. This will result automatically in a reduction of the reports to a size manageable for both producers and users, with a known universe of instruments (for SIs: those instruments for which an SI status has been assumed).

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

The GBIC does not agree with ESMA’s approach. For market makers as well as liquidity providers (in particular the latter, who lack a formal definition) it is not practicable to have the same reporting requirement as a trading venue. So both parties, market makers and liquidity providers, should be deleted in the definition of an “execution venue” in Article 2(3) draft RTS 6. In addition, there has been no request for ESMA to define (and extend) the term execution venue.

Where there is a requirement, it seems sensible it should apply to "liquid" (to be defined in more detail) instruments only. Providing data for illiquid instruments would be meaningless, in particular for most fixed-income instruments, and could be misused by participants instead of them making a proper determination of how to meet best execution requirements.

Other asset classes: While this might be more feasible for equities, it is questionable, whether for other asset classes, that generating this data would seem at best irrelevant and at worst confusing. Many other asset classes are not easily comparable so it is not clear what this would achieve.

While on the one hand standardization is good, clients have different needs and those needs are better provided for by customized TCA reports.

Publication of requests for quotes is not a good indicator or basis for comparison on best execution

Some investment firms serving not only retail clients but also professional clients and eligible counterparties have different best execution policies for each client group. Therefore, it should be expressly permitted by ESMA to provide the required trade data/execution information for each execution policy in a segregated manner. Otherwise (in case of a consolidation of these data), the high volumes of institutional clients’ trades would lead to a distortion of the mingled data and would be rather misleading for either client group, in particular for retail clients. The same approach should expressly be applicable country-by-country as there may be local variations in the execution of orders.

It needs to be clarified by ESMA that self-directed, non-advised (execution only) trades shall not be included in the relevant trade data for the three client groups (retail, professional, eligible
counterparties). As any self-directed orders encompassing client instructions as to the execution venues are not being executed by the investment firm according to its best execution principles it would be misleading to include them in the required trade data for the three client groups (retail, professional, eligible counterparties) to be published by the investment firm. Would execution data for such trades be included, this could influence who are the top five execution venues of the investment firm. As a result, the data where orders are executed in the best interest of the client would be distorted. Instead, the directed orders should exclusively be shown in the column “Percentage of orders at execution venue that are directed orders” and not in one of the three client columns.

Likewise, the designation of counterparty order flows seems redundant to us. An inappropriate differentiation does not result in any advantage on the part of the average retail client, and professional clients may retrieve the data in the form needed. We believe it would be excessive to designate eligible counterparties as proposed in Article 5(6) draft RTS 7. ESMA itself has determined in section 2.4, recital 29 iii of the Discussion Paper that the differentiation of customer orders shall only comprise retail clients and professional clients, but not eligible counterparties. In addition, such a differentiation would enlarge the requirements as set out in the Directive. Disclosures of this kind would allow for conclusions on the structure of order flows of the respective institution, and could thus distort competition. The same applies to the whole of Article 5 of draft RTS 7, which clearly reaches too far from our perspective. Furthermore, we would like to stress that the proposed reporting/disclosure of trade information might be disadvantageous for retail clients as institutional clients could use the information to direct their trades in a beneficial manner if the information is made public on a website. The detailed information duties seem to apply to those institutions with a clear focus on retail business, or even those with retail business only. Regarding the customer base, such detailed information does not only appear exaggerated, but could have a misinforming character for retail customers, unable to comprehend the information provided. This might not be in line with the rationale of the directive as being consumer-protective.

Referring to Article 4 in conjunction with recital 2 draft RTS 7: the classification of shares into volume categories cannot be used to represent national markets, the inclusion of which is, however, in the explicit interest of the customer. A classification according to index categories or tradeability at different stock exchanges has been successfully proven since the implementation of MiFID I and should be allowed, besides the exclusive consideration of volume categories alone.

ESMA proposes that investment firms be required to disclose the absolute number of transactions as well as the percentage ratio regarding all transactions executed at the five main execution venues (No. 29 of CP; recital 3 as well as Article 5(4) draft RTS 7). We expressly disagree with this proposal. The absolute number of transactions must be kept confidential since a public disclosure of this information could be disadvantageous for the respective institution in terms of free competition. In addition, we believe that appropriate transparency for investors is achieved by disclosing the percentage ratios alone: additional disclosure of the absolute number of transactions would provide no additional transparency for investors.

Moreover, the information demanded in Article 5(6), (7), and (10) draft RTS 7 would allow for unwanted conclusions on the structure of order flows of the respective institution and could
thus distort competition. We therefore reject the obligation to disclose such information. The same applies to the information demanded under Article 6, No. 1 (b) (ii-iii and v) of draft RTS 7.

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

The GBIC does not agree with the proposed approach. Please see our answer to Q35.

Moreover, it is not clear to us what is meant by “representative sample of client orders” in para. 35 sentence 1 of the Consultation Paper. We believe that every institution should be allowed to establish its own standards, which it considers adequate according to its order flow structure. Besides, in a number of EU authorities, compulsory backtesting was introduced some time ago (at least in Germany); the respective quality standards have been subject to numerous external audits.

The information on the five main execution venues (on a single-institution level) is of little benefit to clients, due to the heterogeneous order flow structures. It is only through aggregation of the order flow data by the central securities services provider designated by an individual institution for a specific product cluster that the client receives meaningful information on the order flow structure and the routing behaviour of the respective financial services network regarding the five main execution venues.

Referring to the information on the Best-Execution-Policy’s annual review, institutions which have reviewed, considered appropriate and adopted the policy of their central service provider, should be allowed to adopt, in standardised form, the central service provider’s working result of his Policy review and to report on the results of such reviews.
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.

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.

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.

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.

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.

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.

Q43. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for certificates? Please provide reasons for your answers.
Q44. Do you agree with the proposed approach on stubs? Please provide reasons for your answers.

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.

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

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

In the view of the German Banking Industry Committee, which represents more than 2,000 banks in Germany, we reject Option 2 as inappropriate. We like to refer to table 14 on page 97 of the Discussion Paper which showed that around 95% of all trades have a volume of up to EUR 10,000. The introduction of a class with an AVT of up to EUR 20,000 and a Standard Market Size (SMS) of EUR 10,000 would have the result that almost every trade would fall within the SMS. This would indeed lead to increased transparency but, as ESMA rightly points out, the goal of increased transparency through the SI regime must be weighed against the protection of SIs against unreasonable risks. The right equilibrium cannot be achieved if nearly all trades are below the SMS. Therefore, either Option 1 or 3 is preferable.

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.

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, welcomes ESMA’s intention to exempt so-called “significant distribution transactions" from the trading obligation. Having said that, we do not consider an abstract regulation to be sufficient, since this would fail to create the necessary reliability. ESMA should rather publish a non-conclusive list of exempt transactions. Examples that should be included are: (primary market) transactions in connection with the issuance of shares, including the underwriting of an issue; large-scale acquisitions/sales by an investment firm on the secondary
market on behalf of an investor for the purpose of acquiring/selling a large block of shares; transactions to implement other corporate actions, including share buybacks. These transactions are not covered by any of the exemptions set out in Article 2 of draft RTS 8. Since these transactions do not contribute to the price discovery process, they should not be covered by the trading obligation.

Furthermore, transactions that are traded on a risk-free principal basis should be exempt. Risk-free principal transactions are transactions commissioned by asset managers on behalf of their clients to investment firms. These individual transactions will be executed by the investment firm on aggregate, as a total order, on a trading venue. Following execution of the [aggregate] order on a trading venue, the total order will be split and allocated to the asset manager's individual clients. Accordingly, these transactions will be concluded between the investment firm and clients on an over-the-counter basis. These OTC transactions entered into with clients should not be subject to the trading obligation, since the investment firm will have already satisfied this requirement by virtue of its activity at the trading venue.

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.

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.

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.

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.

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.
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.

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.

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 vice versa)? Please provide reasons for your answer.

General response:
The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, strongly disagrees with ESMA’s proposal. As a general remark, we urge ESMA to take adequate account of market realities when setting the thresholds. It would be wrong to set the thresholds at a level which aims at a certain coverage ratio (i.e. to set the threshold with the aim of having a certain percentage of bonds above the threshold). It is true that MiFIR aims at increasing market transparency in the non-equity market. However, it is equally true that MiFIR does not intend to create such transparency at the price of unreasonable risks, in
particular for systematic internalisers. Defining a liquid market wrongly would result in the risk for systematic internalisers of such instruments becoming prohibitive. Liquidity would then dry up completely. This is not in the interest of issuers or clients.

We understand that ESMA decided to consider a bond or SFP as liquid if it trades at least on 200 days a year, it records at least 400 trades a year and EUR 100,000 of nominal is traded per day. These thresholds are clearly too low. In particular, a bond that is not traded (at least almost) on a daily basis on at least one venue in the EU cannot be regarded as “liquid”.

We urge ESMA to take into consideration that a key feature of the life cycle of bonds is that trading takes place – if at all – in the first four weeks after issuance. To take this into account in the liquidity criteria, these first four weeks should be excluded when calculating the thresholds. The same goes for the “number of trading days” and the “average daily volume” criteria. This will ensure that only permanently liquid bonds are deemed liquid. We note that with respect to the liquidity criteria for derivatives, ESMA has also taken into account the life-cycle by referring to the time to maturity.

The graphics on pages 105 et seq. of the Consultation Paper suffer from the fundamental flaw that they do not take into account the life cycle. If the first four weeks after the issuance were disregarded, these graphics would show a completely different picture.

In detail:

(1) Although we basically agree with the sub-classes proposed by ESMA, there should be a more granular approach for non EU sovereigns and corporate bonds. Under the current approach, US treasuries and Argentinian sovereigns would both fall under a non EU sovereign although the liquidity of both FIs is completely different. Corporate bonds issued in FX also show a very different degree of liquidity from those issued in euros.

(2) It is crucial that ESMA sets parameters that enable a correct classification of each financial instrument. According to the CP, page 103, para. 49, even ESMA itself is aware that the chosen methodology implies that there will be some bonds belonging to a liquid class that are illiquid in reality. This is not 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. This would impose prohibitive risks on systematic internalisers and cause the market to dry up. Such a market reaction – which would ultimately prevent efficient trading – should definitely be avoided.

The calculations made by ESMA show very clearly that the parameters and/or the threshold values selected do not provide acceptable results: a hit rate of correctly classified “liquid” instruments of between 33.05% and a maximum of 60.00% is not good enough. Looking at it from the other side, this means that between 40.00% and 66.95% of financial instruments are being classified as liquid even though they are not!

In the most important asset class of EU sovereign bonds, this means specifically that 42.43% of all issues with a volume of more than EUR 2 billion are classified as liquid even though they are not (false positives). The result is even worse for covered bonds, with 73.55% of all issues wrongly classified as liquid. The presumption that wrong classification can be mitigated by the LIS and SSTI waivers/deferrals (para. 49) is
wrong. It therefore remains crucial to categorise financial instruments in accordance with their actual liquidity.

We therefore call on ESMA to calibrate the parameters in such a way as to aim for a correct classification of at least 95% of all issues. We would suggest that in addition to the parameter "size of issuance", the "time since issuance" be included as a parameter. This would take account of the fact that the immediate period after issuance is marked by a particularly high level of volatility, which subsequently decreases sharply. This simple criterion, which does not require any calculations, can increase the hit rate substantially. Since we do not have access to the ESMA database we are unfortunately not able to make specific suggestions for the parameter "time since issuance". ESMA will have to look into for itself how the parameters might be adjusted to achieve a hit rate of at least 95% in all bond classes. This is all the more important as the liquidity classes determined by ESMA are to remain fixed until the RTS is reviewed. A lower hit rate would not be acceptable from a quality point of view, either.

(3) Yes. Please see our answer to Q57 (2) above.

**Covered Bonds:**
As far as establishing the liquidity of covered bonds in the context of the MiFID is concerned, the German banking industry sees further need for clarification. In chapter 3.5 (page 102, para. 48) ESMA suggests as a result of its own calculations that covered bonds with an issuance volume of EUR 750 million be classified as liquid. This assumption does not, however, tally with the liquidity classification of covered bonds in accordance with Regulation (EU) No. 575/2013 (CRR) in the context of the LCR (Liquidity Coverage Ratio). According to Article 11 (1) (f) (iv) of the Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No. 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions, covered bonds within the context of the CRR are classified as liquid from an issuance volume of EUR 250 million and up. This assumption is based on an analysis by the European Banking Authority. A statement in the RTS to the effect that the liquidity requirements pursuant to MiFID and CRR are based on different assumptions and calculation methods and are therefore different, would be required.

In addition, we wish to point out that the MiFID assumptions regarding the liquidity classification of covered bonds are higher than the assumptions for other bonds (corporate bonds issued by financials), which are classified as liquid from an issuance volume of EUR 500 million onwards. The assumption that such bonds are more liquid than covered bonds does not correspond to the general market perception.

<ESMA_QUESTION_CP_MIFID_57>

**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.**
The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, basically agrees, but ESMA has to keep in mind that the category of corporate bonds does not include the Societas Europaea.

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.

The GBIC does not agree with ESMA’s proposal. The existence of a market maker is not a suitable criterion for establishing liquidity when trading in securitised derivatives (certificates). This is because the market-maker model in securitised derivatives differs substantially from the market-maker model in a regulated market. In actual fact, the market maker in certificates is a market model designed to ensure that an investor can return the purchased financial instrument to the issuer. It therefore does not amount to active trading such as would be characteristic of systematic internalisation. At the same time, it should be noted that no other market participant apart from the issuer would repurchase these financial instruments.

Rather, the following parameters should be used as the criterion to determine which instruments are actually liquid:

- whether actual trading takes place
- the 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.

The GBIC agrees with the definitions in section 2 of Annex III of RTS 9.

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.

<ESMA_QUESTION_CP_MIFID_61>
The GBIC does not agree with ESMA's proposals. We think that it is necessary to distinguish between exchange traded and non-exchange traded derivatives.

Re (1)
The methodology proposed to determine which classes of interest rate derivatives are classified as liquid results in a definition of the liquid market which is too broad. The methodology used assumes that, for example, euro-denominated swaps with payment swap fixed against variable are always plain vanilla transactions. However, a large number of transactions are structured to specific client or hedging requirements, and therefore it would be wrong to talk about liquidity with regard to these transactions (further criteria would need to be added, for example: different rollover dates, broken dates, amortising nominal, ascending/descending coupon, interest phases, cancellation rights, spreads on the variable side, upfront payments).

Re (2)
We consider average frequency and size of transactions as useful indications, while size of spreads, which for derivatives often strongly depends on their respective risk sensitivities and is therefore not in a linear and simple relationship to notional, is generally not a useful parameter for the definition of liquidity of derivatives. This is particularly true for OTC derivatives, where many other factors besides liquidity determine bid-ask spreads.

In the analysis of frequency and size, it is crucial to correctly group instruments. Often, there are relatively standardised and frequently reasonably liquid "plain vanilla" derivatives (e.g. FX forwards or interest rate swaps at standard tenors) which, using the criteria employed by ESMA, would be indistinguishable from highly customised transactions.

Re 3)
Cf. also Q62 – we consider interest rate derivatives with standard tenors in the major currencies (EUR, USD) as reasonably liquid. In most other currencies, for intermediate tenors ("broken dates") or deviating structural features we only see limited liquidity in a few well-defined parts of a yield curve (e.g. 5 years, but not 4 years). We believe that an analysis taking into account the difference outlined in Q61 (2) and Q62 will clearly show this.

<ESMA_QUESTION_CP_MIFID_61>
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.
Interest derivatives are regularly quoted for standard tenors (e.g. 5 years). Most trading takes place at these standard tenors. The stratification undertaken by ESMA in buckets [of x years to x+1 years] results in operational difficulties, as depending on day-count conventions, holidays etc. standard transactions may not be consistently attributed by counterparties to buckets, resulting in the application of wrong thresholds, and mis-reporting.

We would ask ESMA to utilise their available data to validate the assertion that the vast majority of IRD transactions takes place at standard tenors.

This issue is aggravated should the same classes be utilised for determining trading obligations, since liquidity in intermediate tenors (e.g. 3.342 years) is usually not available and often linked to issuance activity, where issuers could suffer significant disadvantages if such hedging requirements were to go through trading platforms or be subject to pre-trade transparency requirements.

We would therefore suggest distinguishing in the liquidity analysis between “standard tenors” (i.e. full years +/- 3 business days, and including standard dates agreed under “market agreed coupon” terms) and non-standard tenors (most other dates).

For interest rate derivatives whose underlying is denominated in a foreign currency, threshold values in this foreign currency are required. Only this approach ensures that the threshold figures can be taken into account in operating terms whereas conversion would not be a practical approach.

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.

GBIC believes that neither option 1 nor option 2 are supported sufficiently by the statistical survey presented by ESMA. ESMA’s survey refers solely to listed futures and options and consequently does not include OTC-traded equity derivatives, which account for approx. 40% of the total nominal volume. If all equity derivatives with a tenor of up to six months were categorised as liquid, the illiquidity of OTC equity options with this tenor would be disregarded; consequently option 1 cannot be followed. The maturity-independent categorisation of all equity derivatives traded on venue as liquid, as suggested by option 2, would contradict ESMA’s findings in charts 12-15 (pp. 129 CP), according to which most trading is accounted for by products with a tenor of up to three months. Against this backdrop, we support a differentiated approach based on the data collected by ESMA. Only listed futures and options with a tenor of no more than six months can thus be considered as liquid.

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.

GBIC considers that the ESMA survey only examined the data of listed derivatives (CP p. 127, para. 83). This approach makes sense for standardised listed equity derivatives. It is not clear why ESMA has only looked at the data of listed equity derivatives and then transferred the results to all equity derivatives. For example, the hedging of certificates requires individual equity derivatives that are not traded on the stock market and are only available OTC. ESMA must therefore differentiate between standardised equity derivatives (e.g. specific maturities, at present every third Friday of the month for equities and every Friday for indices) and non-standardised equity derivatives ("uneven" tenor, Asian option, barrier option...). Non-standardised equity derivatives should be classified as illiquid for the above-mentioned reasons and lower LIS/SSTI limits applied.

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.

GBIC considers that there should be a definition for “option” in Section 4 para. (1) Annex III of draft RTS 9 so that only the standard options (European, American, call, put) are covered and not e.g. exotic options.

Para. (12) and (13) of Section 4 Annex III of draft RTS 9 should both be split up into sub-sections for “volatility index” and “ETF” since these are completely different asset classes with different investors and should not be placed together in one category.

Example:
Para. (12) (a) “Option on a volatility index” means an option whose underlying is a volatility index.
Para. (12) (b) “Option on an ETF” means an option on an ETF.

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 criteria 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, EUU) 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?

With regard to pre-trade transparency of the SI, the German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, underlines the need to have a specific SSTI and objects to the 50% LIS-solution because of being unspecific. For an explanation in detail, we refer to our answer to Q77 (2).

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.

The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany believes that it is not necessary to include the date and time of publication among the fields included in Annex II, Table 1 of RTS 9. It is not clear what additional benefit market participants would have from this information. In fact, we note from ESMA’s summary of responses received on the Discussion Paper that the publication of time and date was not proposed by market participants.

All relevant information is included in Annex II Table 1 of RTS 9, no more fields should be added.

In addition, we strongly welcome ESMA’s proposal not to require an SI to disclose its identity. Such disclosure would indeed, as ESMA concludes, expose the SI to unacceptable risks. In addition, such disclosure is not necessary to achieve market transparency.

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.

GBIC considers that the proposed table is superfluous to a great extent and too detailed. Identifiers should be restricted to the essential information, i.e. identifiers for transactions which were subject to waivers or which benefitted from the use of deferrals. Moreover, a single category of deferred publication could replace the flags for post-trade LIS (“L”), illiquid instrument trade (“I”) and post-trade size specific (“S”).

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.

<ESMA_QUESTION_CP_MIFID_75>
The German Banking Industrie does not think that ESMA should shorten the maximum time limit for reporting of 15 minutes after 3 years.
A maximum delay of 15 minutes is actually in line with the requirements under the TRACE regime in the US (level playing field) and less susceptible to arbitrage or booking errors. We suggest that ESMA either sets a permanent maximum reporting period of 15 minutes or observes how the market develops under the new transparency regime and, based on the information gained from such observance, takes a decision after a new consultation.

Moreover, we would suggest setting the time limit for the 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 the setting 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 to be 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.

<ESMA_QUESTION_CP_MIFID_75>
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.

<ESMA_QUESTION_CP_MIFID_76>
GBIC agrees 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) MiFIR whose price is determined by factors other than the current market valuation of the instrument.

Furthermore, portfolio compression trades should also be included in the list of the exempt trades because their price is not determined by current market valuation either.

In our view, the RTS should provide that competent authorities may grant a waiver with respect to any type of transaction, if the price is determined by factors other than the current market valuation of the instrument. In particular, the RTS should not provide for an exhaustive list of such types of transactions. Even if it were possible to include all relevant types of transaction where the price is determined by factors other than the current market valuation and which are
market practice today, an exhaustive list of transaction types would not take into account future market developments. Thus, transactions types which may be developed in the future would still be covered by the transparency requirement, even though their price would not be determined by market valuation.

With regard to all types of financial instruments a general problem arises by the fact that there are certain types of transaction existing where the volume, but not the price (or vice versa), is fixed upon the execution of the transaction (for example, counterparties may execute a transaction in the morning under which the number of financial instruments to be delivered is determined according to the closing price of the relevant financial instrument). A publication of these trades with incomplete message fields would invite market abuse by other market participants. Only when all details to be published have been determined, should the trade be published. A special regulation to this effect is needed in Article 7 (5) draft RTS 9.

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.

The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, considers:

1. Regarding the setting of the deferral period 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 hour period is too short. For bonds, deferral periods of at least two weeks are necessary, for structured finance products at least four weeks. The SI often has to unwind large-volume transactions over a period of several days, esp. 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.

In addition, the deferral period should take normal trading hours into account. Otherwise, a 48 hour deferral period which would commence on Friday evening would expire on Sunday evening. This would obviously not provide sufficient time for the SI to unwind large-volume transactions, in particular in less liquid instruments. We suggest using TARGET days as a reference for calculating the deferral period. A minimum deferral period of t+2 (resp. more for illiquid instruments) in TARGET days would provide for a practicable solution.

(2) With regard to the determination of the SSTI threshold, we disagree with ESMA’s approach under which ESMA would determine the LIS threshold and subsequently set the SSTI at 50% of the LIS. This approach disregards the wording of the level 1 text. In particular, when determining the SSTI pursuant to Article 9 (1) (b) MiFIR, Article 9 (5) (d) (ii) MiFIR requires ESMA to take into account, where “a market in the financial instrument, or a class of financial instruments, consists in part of retail investors, the average value of transactions undertaken by those investors” (a similar wording is contained in Article 11 (1) (c) MiFIR). We do not think that setting the SSTI at 50% of the LIS takes this into account. For example, in Table 1 of Annex 3 draft RTS 9, ESMA suggests setting the SSTI for European Sovereign Bonds at EUR 5 million. However, European Sovereign Bonds are a class of financial instrument which “consists in part of retail investors”. ESMA is therefore required to take into account the average value of transactions undertaken by those investors. Even though under the level 1 text, ESMA may also take into account other criteria, an SSTI of EUR 5 million clearly disregards the level 1 requirement of taking into account the average size of transactions entered into by retail investors. Therefore we argue in favour of an independent regulation of the SSTI. In its deliberations on Article 18 (2) MiFIR, the European Parliament once took EUR 100,000 as a typical volume for these kinds of trades (draft version of 27 September 2012), which would be also in line with the distinction already made in Article 3 (2) (c) - (e) Directive 2003/71/EC (Prospectus Directive) between retail and wholesale trades. Additionally (and this also applies to the determination of the LIS), it would be wrong to set the thresholds at a level which aims at a certain coverage ratio (i.e. to set the threshold with the aim of having a certain percentage of bonds covered above the threshold). This approach would disregard the level 1 requirement that the aim of providing transparency in non-equities has to be balanced with the risks arising from such transparency for investment firms and does not reflect ESMA’s mandate to set the SSTI in accordance with Article 9 (5) (d) (ii) MiFIR.

Moreover, this approach seems disproportionate when compared to that taken with equities (cf. draft RTS 8). For non-equities it would be appropriate to set the SSTI to a low single-digit percentage of the LIS threshold.

With respect to Article 11 (3) draft RTS 9, the threshold determined in accordance to paragraph (2) should be rounded down and not up to avoid the unintended consequence of non-legitimised higher threshold values.

(3) We agree with the proposed measures of volume for bonds and SFP, securitised derivatives, interest rate derivatives and foreign exchange derivatives. Concerning equity derivatives, ESMA’s proposal encompasses only options and futures. For these underlyings, the proposed volume makes sense, for other underlyings the volume should be measured by the notional amount or reference value.
(4) We reject the proposal to set identical thresholds for pre-trade and post-trade transparency. The risk incurred under the pre-trade transparency requirements is far higher than the post-trade requirements. Therefore the pre-trade threshold should be lower.

(5) Should ESMA decide in favour of Option 2 (system with recalculation), we would assume that all calculations are performed by ESMA itself.

<ESMA_QUESTION_CP_MIFID_77>

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 recalculations 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)?

<ESMA_QUESTION_CP_MIFID_78>

The response of the German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, to Q77, items (1) to (5) applies mutatis mutandis. Regarding the LIS thresholds, we agree with ESMA’s proposal except that the thresholds for swaptions (Tables 13 and 14 of Annex III draft RTS 9) should also take into account the time to maturity or tenor (as ESMA proposes with respect to the other interest derivative products).

<ESMA_QUESTION_CP_MIFID_78>

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:
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
(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.

The response of the German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, to Q77 applies mutatis mutandis.

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.

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.

GBIC strongly disagrees with ESMA’s proposal as set out in Article 10 (1) (a) (i) draft RTS 9, i.e. that if exercising the right pursuant to Article 11 (3) (a) 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 publish immediately all the details of a transaction, except its volume, would not be in line with the wording of Article 11 (3) 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 Article 11 (3) (b) MiFIR allows 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) MiFIR. ESMA’s proposal would thus be generally incompatible with Article 11 (3) 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.

The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, considers:

1. We agree with the proposed measures of volume for bonds and SFP, securitised derivatives, interest rate derivatives and foreign exchange derivatives. Concerning equity derivatives, ESMA’s proposal encompasses only options and futures. For these underlyings, the proposed volume makes sense, for other underlyings the volume should be measured by the notional amount or reference value.

2. We agree with using the reduction of the volume traded as the methodology to assess a drop in liquidity.

3. We strongly disagree with the percentages determined for liquid and illiquid instruments to assess the drop in liquidity. We note that these percentages have been reduced as compared to the proposal in the Discussion Paper, while the observation period has been extended from 20 to 30 days.

A decline in liquidity, as measured by the daily turnover and amounting to 40% for liquid instruments and 20% for illiquid instruments would have a dramatic impact on the risks associated with the obligations of systematic internalisers.

In addition, the proposed period of 30 trading days, during which the decline in liquidity is measured, is too long. A suspension of pre- and post-trade transparency would only apply after the expiry of this period, as well as after obtaining the necessary opinion of ESMA (Articles 9 (4), 11 (2) and 21 (4) MiFIR). This would mean that obligations applying to liquid instruments may still apply over a period of several weeks, even though these obligations may entail substantial risks for market participants due to the low liquidity.

We welcome ESMA’s proposal that the suspension of transparency requirements can also be based on qualitative criteria. We would like to ask ESMA for clarification that under such quantitative criteria, a temporary suspension of the transparency obligations should be possible immediately after the occurrence of an event that is expected to lead to a significant
drop in liquidity. Only in this way it can be prevented that market participants will not have to abide for a longer period by obligations whose fulfilment is no longer reasonable in view of the sudden decline in liquidity.

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.

The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, believes that in its analysis (para. 7) ESMA rightly points out that the requirement to provide prior notification concerning operations and transactions, for which the exemption in Article 1(6) MiFIR applies, rests only on the member of the ESCB. This clarification should become part of Article 12 draft RTS 9.

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.

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?

In general, the German Banking Industry Committee, which represents more than 2,000 banks in Germany, welcomes ESMA’s approach to determine the trading obligation on a case-by-case basis. However, the open wording regarding liquidity criteria in the consultation paper and the draft RTS leaves room for and bears the risk that the trading obligation will extend to such instruments that are not traded on the most common trading venues or only on very few trading venues. This may result in the fact, that market participants will have to connect to a number of trading venues – which is time consuming and costly – because the trading venue they are already connected with may not offer trading in all instruments subject to the trading obligation. In such cases where a trading obligation is imposed on products hitherto offered by only a small number of trading venues ESMA should provide for a sufficient phase-in period. Otherwise, market participants might find themselves captured in a bottleneck where they are not permitted to trade a product OTC anymore and cannot yet abide to the requirement of executing their orders on venue due to operational barriers.

Q89. Do you have any other comments on ESMA’s proposed overall approach?
The German Banking Industry Committee believes that Article 4 draft RTS 11 sets forth that ESMA shall take into account the number and type of market participants and provides that the total number of market participants should be "not lower than two". GBIC doubts that such a low number of market participants trading in an instrument can and should be an indication for the liquidity of a product. We believe that the minimum of market participants active in a market should be at least five. Additionally, in Article 4 draft RTS 11 it should be clarified which market participants are deemed as being "active" market participants.

Besides, ESMA has not yet taken up the issue of bundled transactions (e.g. asset swaps, interest-rate swaps in connection with the issue of a jumbo pfandbrief, etc.). Such transactions play an important role when it comes to managing proprietary investment portfolio (in Germany, "Depot A") risk and are concluded with virtually every bond issue. Should there be a trading obligation for their derivative components, these transactions can no longer be conducted on market terms. So either an exemption from the trading obligation has to be established or there must be the possibility to forward bilaterally negotiated derivatives contracts intended by the parties as part of a bundled transaction to a trading venue, e.g. an OTF, by means of a give-up, for instance. In the US, this possibility exists (cf. SEF Registration Requirements and Core Principle Rulemaking, Interpretation & Guidance, Final Rule 78 FR 36606 of 4 June 2013).

In addition, from an operational perspective, a sufficiently long transition period should be allowed for the introduction of the trading obligation, as both analysing a trading platform's general terms and conditions of business/rulebooks and connectivity will impose a considerable burden in terms of the time and manpower required. Furthermore, when setting the implementation periods, it should be remembered that any generally applicable connectivity requirement on a certain date may lead to bottlenecks at venues or platforms. The situation triggered by the mandatory onboarding to trade repositories on 12 February 2014 on occasion of the EMIR reporting requirement coming into force might serve as an example in this context. The transition period should therefore encompass at least twelve months and, as with the clearing obligation under Article 4 EMIR, should be staggered for different categories of market participants. Additionally, if ESMA, after the first types of derivatives have become subject to the trading obligation in early 2017, decides to introduce a trading obligation for further classes of derivatives, there must also be a sufficiently long transition period.

Direct access to trading venues requires considerable technical efforts (IT-Interfaces) and creates additional costs such as access fees and cost for technical equipment. Therefore, smaller or medium sized market participants may decide not to directly connect to a trading venue, but to use a broker instead. This may lead to a considerable price increase for certain products, with the result that smaller or medium sized market participants will not be able to provide their commercial clients with such products at competitive prices and thus may have to withdraw from certain markets. Currently it is not clear, whether commercial clients will be able to purchase such products from other market participants. Pursuant to Article 32 (3) MiFIR, the draft RTS must consider possible effects of the trading obligation on commercial
activities of non-financials. We ask ESMA to take such effects into consideration and include them in the draft RTS.

Finally, it is necessary to establish processes which allow for a quick “de-listing” of no longer liquid products. This issue could be addressed through a right to temporarily suspend the trading. It is of paramount importance that ESMA takes a clear position as to how to deal with this subject and that whatever approach ESMA chooses to follow, this decision should be made public in a way for market participants to rely on with legal certainty.

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?

GBIC agrees. The wording of draft RTS 12 now exactly corresponds to the wording of the Delegated Regulation 285/2014 (supplementing EMIR). The scope of the trading obligation should not be extended beyond the scope of the clearing obligation. However, it should be avoided that an equivalence decision under Article 13 (4) EMIR is taken according to which the clearing obligation does not apply, whereas the equivalence decision under Article 33 (3) MiFIR is not made at the same time (or prior to the decision under EMIR). Even though these are different decisions to be taken, their results will, in most cases, be aligned. Therefore, establishing a trading obligation only for an interim period does not seem reasonable. The draft RTS should therefore provide that only if ESMA deliberately chooses to adopt diverging equivalence decisions under EMIR and MiFIR, the trading obligation should apply, whereas the clearing obligation should not apply and vice versa.

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

The German Banking Industry Committee disagrees. Since these contracts were not identified or even discussed under EMIR as falling under the clearing obligation. Therefore, they should also not be covered by the trading obligation.

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

Due to the new rules, market participants will be required to set up the necessary infrastructure. Compared to the currently widely used telephone trading, extensive adaptions will be necessary with no noticeable upsides attached. The German Banking Industry Committee would estimate that EU-wide, 10,000 market participants will be affected, having to spend approximately EUR 0.5 Million each in order to comply with the new requirements. The estimated total investment value of EUR 5 Billion will probably result in a price increase of 10bp for each contract.

In addition, these costs will be borne by the individual market participants whereas the benefit is for the market as a whole.
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>

Re Article 17 (1); Article 20 (2) (h) draft RTS 13: The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, welcomes the fact that ESMA has clarified in the proposed draft RTS 13 that 'kill switches' are to be used as an emergency measure, i.e. only when absolutely necessary. Nonetheless, we would like to point out that making a kill switch available may involve significant risks – especially in respect to unrelated trading desks – e.g. equity or fixed-income trading – that would be affected by the use of a kill switch as well. This would lead to new risks affecting market integrity and stability, as well as create exposures – none of which were intended. Moreover, the kill functionality provided for in Article 17 (1) draft RTS 13 is not compatible with the principle of proportionality. We believe that in line with the principle of proportionality, any emergency measure should only affect the trading-channel, which has been identified as causing a problem. In fact, such a system already exists: the so-called 'kill-switch' ("Leitweg-Schließung") has proven itself in the market. This targeted emergency measure is just as suitable to achieve the desired objective – without having to cut trading-channels that are not exposed to any risks. Therefore, we would welcome a deletion of Article 17 (1) draft RTS 13 whilst preserving the kill switch specification outlined in Article 17 (2) draft RTS 3.

Re Article 20 (2) (i) draft RTS 13: The requirement cannot be implemented in practice, since it is not always possible to trade all existing orders manually in an emergency. Therefore we propose to replace the wording "trade all existing orders manually" by "manage all existing orders manually".

<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>

GBIC does not see a need for clarification.

<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>

Implementing general, real-time post-trade controls is considered by the GBIC to be excessive. Considering the principle of proportionality, timely controls of measures (beyond the required control of position limits) are deemed to be sufficient.

<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?
GBIC understands this question in a way that it refers to sections 41-43 of the consultation paper, however, draft RTS 13 does not include any concrete proposals. In para. 41 of the consultation paper, ESMA demands that all orders be subjected to a market impact assessment as part of pre-trade controls. Such an ex-ante check cannot be implemented from an operational perspective; in particular, it is rendered impossible due to the fact that a single investment firm does not know the entire order book – or in fact, the whole market. Therefore we reject ESMA’s consideration of introducing such a check, in addition to the requirement for determining “maximum order values” and “maximum order volumes”. The determination of these maximum values appears sufficient for the purpose of the pre-trade controls.

Q97. Do you agree with the proposal regarding monitoring for the prevention and identification of potential market abuse?

GBIC agrees. We welcome ESMA’s proposal in chapter 4.1, para. 34 of the consultation paper, which offers some leeway – given the principle of proportionality – for investment firms to refrain from implementing automated alert systems. This would only appear appropriate for market manipulative behavior like insider dealing, unlawful disclosure of inside information, or market manipulation by means of the employ of a fictitious device or any other form of deception or contrivance.

Besides, the requirements set out in Article 18 draft RTS 13 should be in line with the requirements laid down in the Market Abuse Regulation (EU) No 596/2014, to ensure a consistent European legislation.

Q98. Do you have any comments on Organisational Requirements for Investment Firms as set out above?

GBIC considers that Article 17 of MiFID governs algorithmic trading. The purpose of the regulation planned by draft RTS 13 is to set out detailed specifications. Hence, we welcome the clarifying definition in Article 1 (1) draft RTS 13, which limits the concept of "investment firms" – for the purposes of this regulation – to investment firms engaged in algorithmic trading. We also believe such a clarification to be necessary for any facts involving DEA clients as well as trading venues, which provide smart order routing algorithms for their customers. We therefore propose to extend the definition in Article 1 (1) draft RTS 13, as follows:

“'investment firm' means an investment firm engaged in algorithmic trading. This engagement does not include the use of algorithms, which are offered and operated by other investment firms or trading venues.”

Recital 9 draft RTS 13 requires that prospective DEA clients be checked as to their disciplinary history. This requirement cannot be implemented in practice, since it involves data that is not
publicly available. The requirement should therefore be deleted. The same applies to Article 24(i) draft RTS 13.

The scope of the last half-sentence in recital 13 draft RTS 13, is too wide. As we understand it, the five-second period set out for real-time monitoring can only be related to the monitoring of algorithmic order submission and execution, as defined in Article 1 (2) draft RTS 13. Therefore, recital 13 should be re-worded to provide more clarity, or the second sentence deleted in order to avoid misunderstandings.

Article 8 draft RTS 13 requires a separation of software, hardware and network infrastructure. However, since the network infrastructure forms part of software and/or hardware, the term "network infrastructure" should be deleted from Article 8 draft RTS 13.

The requirement in Article 13 draft RTS 13 to conduct testing with at least as many algorithms as the firm used on its most active day of trading during the preceding six-month period should be amended. What matters in a stress test is not the number of algorithms but the number of orders they generate. 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 generate a relatively small number of orders.

Including cyber-attacks in the stress testing environment, as envisaged in Article 13(d) draft RTS 13 appears to be appropriate. Nonetheless, a clarification is required that only relevant, internationally recognised standards are to be taken as benchmarks. We therefore propose using the following wording:

"...(d) performing penetration and vulnerability tests, which have to meet at least relevant, internationally recognised standards, to safeguard their systems against cyber-attacks."

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

GBIC does not have any additional comments.

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?

Regarding Article 23 of the draft RTS 14 the German Banking Industry Committee (GBIC), which represents more than 2,000 bank in Germany, holds the following view: These requirements apply to securities firms offering direct electronic access (DEA) to their customers. Therefore, these requirements should be moved to chapter IV of draft RTS 13. Otherwise, securities firms would need to impose specific requirements upon their DEA customers for every trading venue to which they provide access – leading to unreasonable efforts without corresponding benefits.

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

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.

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.

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

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

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

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

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.

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.

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?

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.

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.

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.
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”?
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.

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.

With regard to Article 1 (2) draft RTS 23 last part of the sentence: “…informing the seller of the action taken” the German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, objects to the obligation that the systematic internaliser (SI) should inform the seller. This information is obsolete and should be therefore deleted.

Article 1 (2) draft RTS 23 demands that SI not only report the transactions but also inform the seller about the report. The wording of the rule suggests that this information must be provided after each individual transaction. This leads to additional expenditure and unnecessary costs without offering anything in return. We therefore suggest that the SI be allowed to provide general information about their legal obligations. Article 2 draft RTS 23 could be amended as follows: “…that firm shall report the transaction. The systematic internaliser shall inform the
seller about the reporting obligation and how the seller can identify that its counterparty acted as a systematic internaliser.

Article 1 draft RTS 23 should expressis verbis confirm the option to set up agreements with other firms to delegate their obligation to publish the information as indicated in recital 1 of draft RTS 23 (“in the absence of any agreement to the contrary”).

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.

The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, considers that the risks identified by ESMA, based on which CCPs or trading venues may deny access, are valid reasons for denying access. We support such precautions in light of the protection of markets and all market participants. However, as a permanent denial of access would constitute a discrimination of market participants, we suggest including terms into draft RTS 24 as to how and within which timeframe such risks must be mitigated in order to grant access to the CCP or trading venue. For the time of denial of access, draft RTS 24 should clearly set forth that the trading obligation does not apply to the market participant(s) concerned.

Following the lift of denial of access to a CCP or trading venue, market participants affected must be granted a transition period in order to provide for the technical requirements to ensure access to the CCP and/or trading venue.

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?

Q161. In particular, do you agree with the arrangements proposed by ESMA for verifying compliance by issuers with obligations under Union law?

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?

Q163. Do you agree with the proposed RTS? What and how should it be changed?

Q164. Do you agree with the approach of providing an exhaustive list of details that the MTF/OTF should fulfil?

Q165. Do you agree with the proposed list? Are there any other factors that should be considered?

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?

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.

The German Banking Industry Committee, which represents more than 2,000 banks in Germany supports the use of XML – including XML subgroups such as FpML – for the purpose of transaction reporting. From today's perspective, XML and the associated subgroups represent suitable formats for fulfilling the extremely complex reporting obligations.

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

Yes. The German Banking Industry Committee, which represents more than 2,000 banks in Germany, continues to question the inclusion of positions, position changes or exercises of existing rights under the concept of "transaction" – and hence, any reporting obligation pursuant to Article 26 MiFIR in these cases. This definition approach is not supported by Level 1 of MiFIR. In fact, Level 1 does not provide any indication of legislative intent, on the part of all three European legislators such a fundamental extension and paradigm shift compared to existing European law.

Instead, Level 1 of MiFIR continues to rely on the (exclusive) understanding of "transaction" as an executed decision/order (cf. recital 34 to MiFIR: "... Competent authorities need to have full access to records at all stages in the order execution process, from the initial decision to trade, through to its execution..." (highlights made by the German Banking Industry Committee). The planned extension of reporting obligations to include positions, position changes or exercises of existing rights therefore lacks a legal basis on Level 1 of MiFIR. This is also evident when comparing it to EMIR, where – in contrast to MiFIR – Level 1 provides that: "... the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository ..." (cf. Article 9 (1) of Regulation 648/2012/EU; see the note above concerning highlights).

The German Banking Industry Committee also criticises that the definitions are not exhaustive (refer to Article 3 (2) and (4): "...but will not be limited to: ..."). The definition as to which transactions are subject to a reporting obligation must be finalised on Level 1 and 2 – providing for further scenarios in the context of Level 3 guidelines is not acceptable, since this would
render it impossible for those obliged to report to make all necessary provisions for the verifiable fulfilment of the reporting obligation.

No double reporting of derivatives trades
At the same time, we believe that consistency will need to be created between EMIR and MiFIR concerning reporting obligations for derivatives contracts, in order to comply with the will of European legislators to prevent double reporting, as expressed in Article 26 (7) MiFIR.

Necessary specifications
The necessary specifications are still missing. To complete the fields, reporting parties need unambiguous use cases as to how future trade scenarios will need to be reported. These specifications must be communicated at an early stage, including a binding determination as to which fields are mandatory. Reporting parties will only be able to complete implementation by the deadline on 3 January 2017 if all required specifications are provided. In any case, a situation must be avoided such as the one seen with the implementation of EMIR, when some of the final specifications were made available far too late. The German Banking Industry Committee considers a consultation process concerning ESMA’s planned specifications (which ESMA intends to communicate in the form of guidelines) as being indispensable – even more so since highly detailed technical provisions are involved here.

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

Yes. In the opinion of the German Banking Industry Committee (GBIC) an explicit exemption from the reporting obligation should apply to the issue and redemption of units or shares in investment funds by or to the investment management company at issue or redemption prices determined by it. As we understand the exemption provided in Article 3 (3) (e) Draft RTS 32, it is precisely these cases that should be exempt. In fact an exemption would appear sensible, since these types of transactions cannot give rise to market abuse. We would therefore consider clarification in the form of a recital to be sensible.

In the opinion of the GBIC the exception in Article 3 (3) (b) collides with the statement in footnote 62 on page 561 of the consultation paper, which states that in certain cases, only the clearing broker has access to the necessary (client) data, and is therefore obliged to report. GBIC believes clarification is required that both the executing broker and the clearing broker must report the part of the transaction they are responsible for. This would also be in line with reporting obligations under EMIR.

With respect to the exception in Article 3 (3) (j), the limiting condition (iv) should be deleted. The limitations set out in (i) to (iii) are sufficient to provide any potential market abuse.

Please refer to our response to Q214 regarding our demand that reporting obligations for position changes be waived. In addition to this, the exception set out in Article 3 (3) (f) is worded too strictly, as far as internal transfers are required. Any position change should be exempt that does not lead to a change of ownership of the financial instrument.

The German Banking Industry strongly welcomes that securities financing transactions which are subject to a reporting obligation pursuant to Regulation 2014/0017 are exempt from reporting obligations under Article 26 of MiFIR. This will prevent a duplication of reports. GBIC assumes that the reporting obligation set out in the SFTR has a discharging effect, meaning
that no reporting obligation pursuant to Article 26 of MiFIR will arise if the application dates were different.

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

No. GBIC concurs with ESMA's view that the receiving firm is subject to the usual duties of care and diligence. Specifically, this means that it must carry out a plausibility check for the data received. In our view, it would be helpful if a corresponding recital was added to draft RTS 32.

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

Yes. The German Banking Industry Committee welcomes ESMA's proposal to create a unique link between the buy/sell indicator and the respective buyer and seller. This approach can be implemented technically, and would allow for unambiguous interpretation. Derivatives contracts should be treated according to EMIR requirements.

**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.**

The German Banking Industry Committee continues the criticism towards the planned client identification procedure. In detail:

- The proposed concept of client identification of natural persons is not appropriate. It would be a completely new procedure, which is not in line with the identification duties in accordance with the Third Anti-Money Laundering Directive (2005/60/EC; AMLD). The national requirements and guidelines by the NCAs contain detailed provisions how clients must be identified in accordance with Article 8 (1) (a) AMLD. In Germany, this means that natural persons must be identified on the basis of a valid official photo ID that satisfies domestic passport/ID requirements. In practice, this requirement is satisfied, in particular, through an identity card or an international passport (which is also written in English). Provided that the prerequisites set out above are satisfied, both identification options are thus on a par for AML requirements. Since clients are under no obligation to provide more extensive cooperation, they are free to present an identity card or another identity document recognised for AML purposes to the investment firm. To the extent that Annex II, Table 1 provides for a priority among different identification documents (cf. CZ, DE, DK, FI, FR, LT, LU, NL, NO, RO, SE, SK), such prioritisation, therefore, will not work in practice.

Moreover, especially for "all other countries" it is questionable whether the respective "national passport" would allow for a unique or accurate identification. For instance, it is questionable whether such documents always constitute an official photo ID. Furthermore, it is likely that they are issued only in the language of the respective country, i.e not in
English. Consequently, when a "national passport" is insufficient for identifying clients for AML purposes, "CONCAT" would have to apply as a fallback solution.

The same goes for the UK and GR: For these countries, Annex II, Table 1 provides for the national insurance number (UK) or the 10-digit DSS investor share (GR) to be used as first priority. However, to date there has been no requirement (neither on European nor national level) to ask a client for such identification numbers, nor is there any duty upon clients to cooperate. Furthermore, it appears questionable whether these numbers would permit a unique or accurate identification. In any event, these are not documents suitable to fulfil identification duties for AML purposes in Germany. Since clients are not obliged to present national identity cards (prescribed as a second priority), as outlined above, again "CONCAT" would have to apply as a fallback solutions in these cases for UK and GR.

To the extent that Annex II, Table 1 requires (national) tax identification numbers (first priority for ES, IT and PT; second priority for PL), it is impossible to identify clients on the basis of these numbers alone, thus requiring additional identification – which, in practice, is carried out in line with AML identification requirements. Furthermore, the tax identification number must be requested from clients only for contractual relationships established after 1 January 2004. Therefore, for the vast majority of existing clients the national tax identification number is not available. But in all these cases, the client has been identified according to AML identification requirements. Thus, it would be appropriate to resort to AML identification duties only. Furthermore, a fallback option ("CONCAT") is required in all these cases; this is lacking in ES, IT and PL so far.

Due to the reasons set out above, the planned procedure for identifying natural persons is not appropriate. Moreover, it would seem disproportionate to introduce an additional complex and at the same time insufficient identification procedure – besides the existing, AML identification requirements. In order to obtain the intended synchronisation of clients identification and having in mind that no priority between the passports in line with the AML requirements exists, the German Banking Industry Committee proposes to exclusively use "CONCAT" for client identification of natural persons, with a country code added.

• To the extent that ESMA requires "additional information regarding the identity of the client" on top of the "client designation", we see no basis for this in Level 1. Article 26 (3) MiFIR only requires "a designation to identify the clients...", but does not require additional information concerning the client's identity. To the extent that the authorisation to specify Level 1 also requires "details of the the identity of the client", this is likely to be an editorial mistake. In any event, the authorisation to specify Level 1 cannot exceed the very requirements set out in Level 1. Furthermore, such additional information – on top of client identification – would be disproportional, since it would fail to provide any added value for the automated reconciliation of transactions by the NCAs. Such information would also be disproportional, due to the fact that suspicious transactions are absolute exceptions. Consequently, as a less severe means, the NCA could request supplementary information about the client and/or the transaction, in line with current practice. Because of the disproportional, requiring additional information about the client, besides client identification, also lacks the necessary justification under data protection law. Therefore, the German Banking Industry Committee ask that the requirement to obtain additional information about the client be deleted.

• Due to the reasons set out above, Level 1 of MiFIR does not provide the basis for fields 14 to 19 and 29 to 34 (decision-makers). Article 26(3) MiFIR merely requires "a designation
of the clients on whose behalf the investment firm executed that transaction” (highlights made by GBIC) – not of the client who placed the order. The authorisation in Article 26 (9) (c) MiFIR also contains a corresponding restriction. Accordingly, fields 14 and 29, which require a designation of the client, are not covered by Level 1. Likewise, supplementary client details (fields 15 to 19 and 20 to 34) have no legal basis, since "decision-makers" are not mentioned in Article 26 (3) nor in Article 26 (9) (c) MiFIR. Therefore, the German Banking Industry Committee ask to delete fields 14 to 19, and 29 to 34.

- Regarding the issue of identification on the basis of an LEI, the German Banking Industry Committee refers to its response to Q224.

Regarding 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.

Regarding fields 68-75: The question as to who took the investment decision is generally difficult to answer. As a rule, traders are subject to certain instructions – concerning the securities and volumes to be traded as well as the trading times; these instructions provide for some leeway concerning the concrete decision to trade. GBIC 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 such as board members.

Regarding field 74 (algorithm ID code/investment decision) and field 75 (algo ID code/execution) in conjunction with fields 68/69 (trader ID/investment decision) and fields 71/72 (trader ID/execution).

Identifying an algorithm always involves identifying a trader, without exception, since no algorithm is employed without observation by a responsible trader. Therefore, it must be possible, when filling fields 74 and/or 75, to simultaneously fill fields 68/69 and 71/72, respectively (please refer to our response to Q214 regarding the need for specifications).

Regarding field 77: It would be extremely challenging – if not impossible – to be able to flag shorts at the legal entity level at time of execution, especially if all global branches of a firm are in scope under MiFIR. The question that arises is how to consolidate the firm as a whole – to be able to see if a sale was short at the time of execution, i.e. on an ongoing basis, across multiple trading desks/locations. We would also appreciate clarification as to whether hedges, locate agreements and securities borrowing/lending transactions should be included in the short selling view.

Regarding field 80: as transaction reference number ESMA proposes for on-exchange transactions a reference number provided by the exchange; for all other transactions, an internal reference number is required. We propose to introduce two fields: the institution’s internal reference number, which must always be filled, as well as an external transaction reference number, which must be filled for on-exchange transactions only. This would facilitate identifying transactions in the event of any queries or corrections. Moreover, the required
uniqueness should be specified in more detail; we propose that the reference must be unique on the respective trade date.

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

Regarding field 81: The parameters proposed only cater for new reports and cancellation of reports. GBIC suggests adding certain amendments. We understand that firms are expected to correct reports retrospectively when a systematic error has been detected. While we agree with the general principle, we believe that the possibility to carry out retrospective corrections over a period of five years would place too massive a burden on firms, especially given the data volume that can be expected from MiFIR. We suggest setting the correction period to comprise the current year plus the year before detection. This timespan would still enable NCAs to exercise appropriate supervision and control.

Please refer to our response to Q214 concerning the necessity of having specifications in place regarding field definitions, and regarding a prior consultation of market participants.

Q219. Do you agree with the proposed approach to flag trading capacities?

Yes. In the opinion of the German Banking Industry Committee, a scenario with a “matched principal capacity” – which would require a corresponding flag – is likely to be a rare occurrence in Germany.

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. Even if the "specific waivers under which the trade took place" flag is already provided for under Level 1 of MiFIR, the German Banking Industry Committee anticipates problems in integrating this flag into the report, given the multitude of information that would have to be fed from front-office or middle-office systems into the reporting systems. This would require additional interfaces and processes to be created – which would further increase the complexity of the reports as well as the time involved.

At the same time, we cannot see the practical value of such information, especially since no indications for possible market abuse are visible here. Therefore, the GBIC would like to see this requirement abolished altogether.

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

Yes. However, the German Banking Industry Committee would like to point out that recital 17 is inconsistent with Article 11: whilst Article 11 (a) and (b) include the wording "...where at least
one component...", recital 17 includes "...as soon as more than one component...". The wording of recital 17 should be adapted to Article 11. Moreover, we anticipate significant problems in the implementation of the reporting obligation for basket or index-based financial instruments if the reporting obligation can be triggered by a single basket or index constituent. This applies in particular to financial instruments on markets where ISINs are not commonly used, but where other codes are used to identify the respective financial instruments. Please refer to our response to Q225 below regarding the overriding question as to how financial instruments subject to reporting obligations can be identified.

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

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?

Yes. The German Banking Industry Committee believes that the proposed attachment point ("the primary relationship with the client") – as defined in Article 13 (2) (a) – to be unworkable. Where institutional clients are concerned, several branch offices are regularly involved; this criterion therefore fails to provide a clear-cut distinction. The GBIC suggests use of the [trading] book where the client order is executed as a reference point.

Q224. Do you anticipate any significant difficulties related to the implementation of LEI validation?

Yes. The German Banking Industry Committee anticipates extensive problems in obtaining an LEI from all 'LEI-eligible' clients (refer to Article 12 (2) (a) regarding these requirements). The Committee does not share ESMA's view that all clients will have an LEI by 3 January 2017. Clients that are not subject to reporting obligations themselves – the majority of corporate clients active in the securities business – are not obliged to apply for an LEI. This affects several millions of clients in Germany alone. Moreover, the German Banking Industry Committee expects particular problems concerning clients domiciled outside the European Economic Area. In practice, cases where corporate clients are not obliged to apply for an LEI will be far more relevant compared to reporting obligations under EMIR. Therefore, the German Banking Industry Committee considers creating a CONCAT code (as with natural persons) for such clients to be indispensable. For legal entities, the relevant data would include the date of establishment, and the company name.

Q225. Do you foresee any difficulties with the proposed requirements? Please elaborate.
Yes. The German Banking Industry Committee continues to see the lack of information as to whether a given financial instrument gives rise to a reporting obligation as a serious problem – a grave issue, especially given the prohibition on over-reporting. The only way to prevent over- or under-reporting is to define 100% of the target sample – anything else will inevitably lead to divergence. Therefore, the GBIC believes that ESMA will have to provide an up-to-date, machine-readable list of all financial instruments subject to reporting obligations. ESMA is in fact the only institution capable of compiling such a list ("golden source"). This would be based on the reports submitted by trading venues to their competent supervisory authority, in accordance with Article 27 MiFIR.

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?

The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, agrees.

Q233. Do you agree with the proposed criteria for calibrating the level of accuracy required for the purpose of clock synchronisation? Please elaborate.

No. The German Banking Industry Committee, which represents more than 2,000 banks in Germany, welcomes, in deed, that ESMA no longer proposes a general requirement to convert systems to a one-microsecond standard. However, the link chosen in Article 3 (4) draft RTS 36 ("the same time accuracy applied by the trading venue, one is member or participant of, or in the case of membership or participation of multiple trading venues, the same time accuracy to the most accurate trading venue of which one is a member or participant") is not appropriate, at least as far as the granularity of time is concerned. ESMA recognises that such requirement might be disproportionate for participants and members that do not engage in high-frequency algorithmic trading techniques or more broadly operate at a high latency (cf. para. 18 of the ESMA consultation paper).

The German Banking Industry Committee expressly supports this assessment by ESMA. Admission to a trading venue is not an appropriate criterion. The decision to seek admission is based on quite different aspects – such as the ability to act as a trading participant, to execute client orders, or to be able to offer own issued financial instruments via a trading venue. Also, trading venues have different trading systems, which members or participants of a trading venue do not necessarily use (all).

Therefore, the only suitable criterion for defining the degree of timing precision is whether the member or participant is engaged in high-frequency algorithmic trading ("HFAT"). Pursuant to Article 17 (2) No. 2 MiFID II, NCAs must be notified of such activities. Only in this case, it is appropriate to require synchronisation of the member's/participant's clock time with the clock time set by the respective trading venue. If Article 3 (4) draft RTS 36 were to be maintained, this would increase the risk that numerous members/participants will withdraw their admission to a trading venue, since the 'price' for admission would be too high, given the clock synchronisation requirements. As a consequence, such withdrawals might make client order business more expensive since it would then be executed via brokers – i.e. the intermediary chain would be extended.

In the opinion of the German Banking Industry Committee, there is no need to harmonise business clocks of Non-HFATs. Systems that are able to react within a fraction of a second of order entry and lifetime of the orders within that timeframe do not exist outside HFAT. With respect of voice trading, even a synchronisation down to one second is not necessary. For
reasons of proportionality, the maximum degree of synchronisation for Non-HFATs should be limited to 1/100th of a second at least.

The German Banking Industry Committee strongly criticises the fact that the scope of application is not set to be exhaustive (refer to Article 2 (2) Draft RTS 36: "...shall include but shall not be limited to the following: ..."). The scope of application must be finalised on Level 1 and 2 – a mandate to provide for further scenarios on Level 3, i.e. via guidelines, would not be appropriate.

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?

The German Banking Industry Committee (GBIC), which represents more than 2,000 banks in Germany, considers that even if CCPs do not provide for limits for their clients, however, clients may deposit additional collateral with a CCP on a voluntary basis (recommended in case of segregated accounts). Under current practices, CCPs would inform their clients if additional collateral were required for a specific transaction; the client would then post such additional collateral on an intraday basis. It is common practice of CCPs to perform several intraday checks as to which clients are required to post additional collateral.

In cases of intermediated clearing using a clearing broker, it is not clear how a pre-trade check could be performed. It is current practice that clients of clearing brokers will post a collateral buffer with the broker, but not with the CCP. Nevertheless, we think that certain pre-checks may be useful. Not only the credit limits of the clients should be checked by the trading venue, but the limit of the clearing broker itself as well. Furthermore, it would be advisable to check the counterparty (including counterparty limit and contractual agreements like execution agreement). Finally, as long as there is no interoperability between CCPs, the trading venue should check, which CCP should clear the transaction.

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.

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, disagrees. It is deeply concerned that ESMA’s proposed draft RTS will severely impede ETD trading especially in Germany.

ETDs are usually cleared by a Central Counterparty (“CCP”). However, only a minority of market participants maintains a clearing membership with the CCP or is a client registered at a particular regulated market (“RM”).

Most market participants request a Clearing Member (“CM”) to execute ETDs on a particular RM. In return, the CM receives an execution fee (“commission”) for its service from the market participant who has ordered the ETD. It is already questionable whether the relationship between the CM and the market participant qualifies as derivative. However, the described tripartite chain of contracts is usually extended by a forth counterparty in cases where a retail client places his order at his local bank which holds no clearing membership with the respective CCP and must therefore rely on the services of a CM. A fifth party enters the set-up when the CCP is domiciled in a foreign jurisdiction and a domestic broker has to approach a local CM.

In all these scenarios the CCP only distinguishes between those ETDs a CM maintains for its own account and those held by a CM for its clients (i.e. the market participants who have ordered the ETDs). If the CCP makes a payment to the CM with respect to an ETD which the CM has entered into on behalf of a client, the CM is, under the agreement between the client and the CM, obliged to forward it to the relevant client. If the CCP has a claim against the CM with respect to an ETD which the CM has entered into on behalf of a client, the relevant client is, under its agreement with the CM, obliged to reimburse the CM by making a corresponding payment to the CM. This is not an obligation arising from any derivative between the CM and the client.

This concept has been working for decades now and is widely appreciated and accepted by all market participants. In fact, it has become an industrial standard throughout the years. Thus, neither a lack of indirect clearing services offering nor any systemic risk can be asserted for the German market.

If these above-mentioned four-and-five-party arrangements would fall under the scope of indirect ETD clearing we believe that German banks acting as clients or CM would find it extremely difficult to abide to the rules set forth in ESMA’s draft RTS 38. The experience with EMIR already demonstrates that market participants did not find a solution to create arrangements that fulfil the requirements on indirect clearing arrangements. In consequence smaller and medium sized banks will refrain from offering indirect ETD clearing with the – from
a systemic-risk-perspective – unintended effect of further market concentration. Additionally, such a development might undermine the goal agreed by the G20 to promote ETD to the disadvantage of OTC business.

Apart from the requirements as regards how to deploy indirect clearing, we believe that the proposed RTS leave uncertainty on a particular question which is of major importance for market participants, namely as to whether the offering of indirect clearing services is compulsory under Articles 29 and 30 MiFIR:

Article 29 (1) MiFIR creates a clearing obligation for ETDs. Since it refers to the “operator” of a RM rather than to Financial Counterparties and Non-Financial Counterparties above the clearing threshold, one could get the impression that Article 29 (1) MiFIR does only have impact on operators of a RM.

Unfortunately, the said provision is flanked by a provision about “indirect clearing arrangements” which seems to be superfluous if Article 29 (1) MiFIR would only have impact on the operators of a RM. For that reason, it would really be appreciated if ESMA could clarify that Article 30 MiFIR does not require indirect clearing arrangements to be put in place but leaves it up to the parties to access the ETD market via the existing market practice described above (i.e. brokerage agreements and undisclosed agencies).

In case EMSA does not follow this view, we would propose to at least introduce clearing thresholds – corresponding to the relevant EMIR provisions, in particular Art. 11 of Delegated Regulation 149/2013. The thresholds could even be set higher than in Delegated Regulation 149/2013, since the risk related to ETD is lower than with regard to OTC trades. Furthermore, in order to establish a level playing field between OTC trades and ETDs, transactions entered into for hedging purposes should be exempt from the obligation to establish (indirect) clearing relationships (Article 10(3) EMIR).

As regards individual provisions of the draft RTS we would like to focus on the issues of account segregation, default management procedures and return of liquidation proceeds.

Obliging clearing members to manage the client’s default as set forth in Article 4 (4) draft RTS 38 amounts to CM acting as a quasi-CCP albeit without the insolvency protections granted to actions taken by CCPs (for example under the Settlement Finality Directive). This would expose CMs to severe legal risks, in particular with respect to claims for damages by the insolvency administrator of its client.

Furthermore, we would recommend the removal of the word “individually” in Art. 4 (5) draft RTS 38. Hereby, it would be made clear that the CCP, on request of the clearing member, is only required to open an omnibus segregated account for the exclusive purpose of holding the assets and positions of the client’s indirect clients. Otherwise, the draft RTS 38 would exceed the protection level granted by Article 5 (2) of the EMIR Delegated Regulation 149/2013 and contradict the legal mandate set out in Article 30 (2) MiFIR.

A similar reasoning applies for the obligation imposed by the draft RTS 38 on the CM in the case of a client’s default to pay out liquidation proceeds directly to the indirect client. Such a
provision must be regarded as “gold-plating” the protection level provided by Article 48 (7) EMIR which permits a CCP to return liquidation proceeds to the clients of the CM for the account of its clients. The procedures for the return of liquidation proceeds to the indirect clients should therefore only apply when the indirect clients have opted for a gross omnibus account.

However, we agree with ESMA that deleting the requirement of portability, as proposed, addresses at least one major concern of market participants with regard to indirect clearing.

For a more detailed analysis, the German Banking Industry Committee would like to make reference to the Futures Industry Association’s (FIA Europe) comments on this section of the consultation paper, which we fully support. The same applies for the amendments provided by FIA Europe to ESMA’s draft RTS 38.

Finally, we would like to point out that a cost benefit-analysis with respect to ESMA’s proposals has not yet been made and Annex A of the Consultation Paper is devoid of a cost-benefit analysis as regards the requirements of draft RTS 38. The obligations proposed in the draft RTS 38 on CCPs, clearing members, clients and indirect clients are likely to necessitate a number of operational changes to established ETD market practices. We estimate that the costs associated with such changes are not justified, in particular given that the existing market structure, as mentioned above, has been working for decades and does not create any systemic risks.

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?

The German Banking Industry Committee (GBIC) doubts that the segregation of positions within one gross account as provided for in Article 3 draft RTS 38 will achieve the same level of protection as the full segregation of accounts as provided for under EMIR. In case an indirect client fails to provide sufficient collateral, the CCP will use any charged assets contained in the gross account in order to collateralise its positions, irrespective of which indirect client actually provided the collateral.