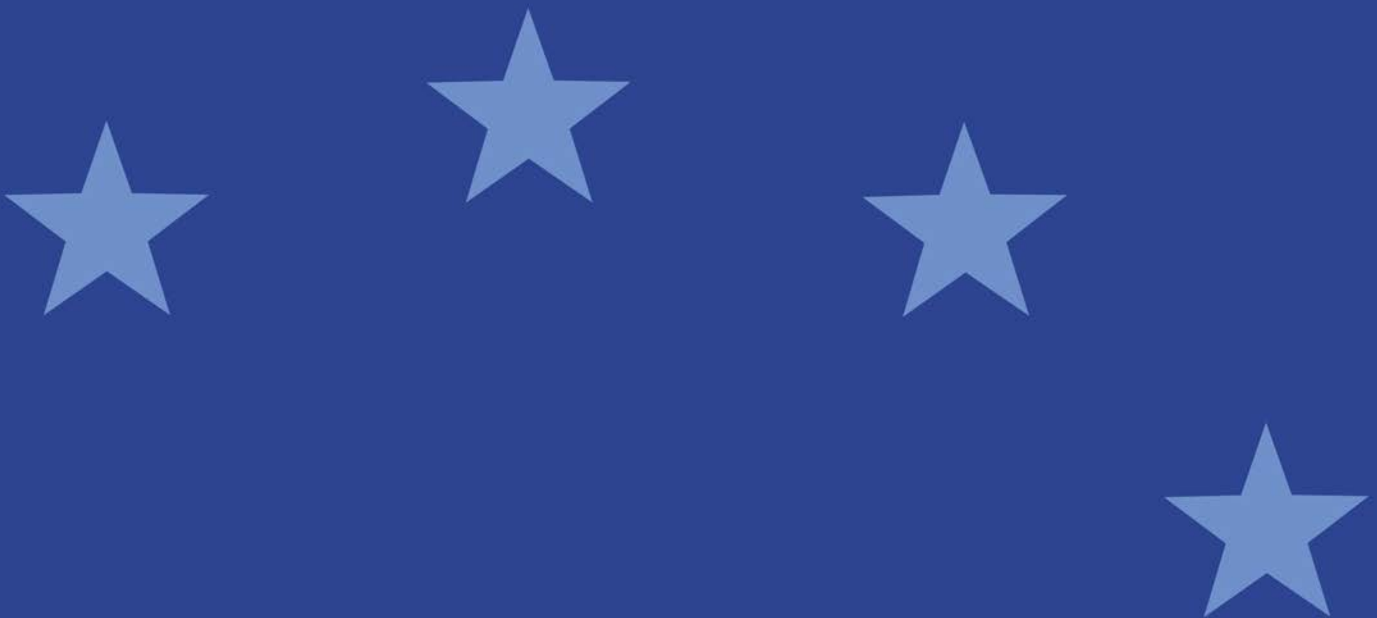
Anlage 2

Reply form for the ESMA MiFID II/MiFIR Discussion Paper



1. August 2014

EBF DRAFT

Responding to this paper

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

Instructions

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

i. use this form and send your responses in Word format;

ii. do not remove the tags of type <ESMA_QUESTION_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, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

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

Responses must reach us by **1 August 2014**.

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 heading 'Disclaimer'.

1. Overview

2. Investor protection

2.1. Authorisation of investment firms

2.2. Freedom to provide investment services and activities / Establishment of a branch

2.3. Best execution - publication of data related to the quality of execution by trading venues for each financial instrument traded

Q8: Do you agree data should be provided by all the execution venues as set out in footnote 24? If not, please state why not.

Given the wide range of intermediares which may be recognized as systemic internalisers, the German Banking Industry Committee, which represents more than 2,000 banks in Germany, considers it bizarre to include all systematic internalisers and market makers in the definition of execution venue and oblige them accordingly. The German Banking Industry Committee believes their inclusion potentially goes too far for the purposes 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.

Q9: If you think that the different types of venues should not publish exactly the same data, please specify how the data should be adapted in each case, and the reasons for each adjustment.

As explained in our reply to Q8, we would consider it inappropriate to impose the substantial cost of producing execution reports broken down by individual financial instrument on systematic internalisers of illiquid instruments, market makers or indeed any OTC venue which executes an insignificant volume of trades in an instrument.

Q10: Should the data publication obligation apply to every financial instrument traded on the execution venue? Alternatively, should there be a minimum threshold of activity and, if so, how should it be defined (for example, frequency of trades, number of trades, turnover etc.)?

Please see our replies to Q8 and Q9.

Q11: How often should all execution data be published by trading venues? Is the minimum requirement specified in MiFID II sufficient, or should this frequency be increased? Is it reasonable or beneficial to require publication on a monthly basis and is it possible to reliably estimate the marginal cost of increased frequency?

The German Banking Industry Committee considers annual reporting sufficient. Given the greater number of factors which have to be evaluated in Europe compared to the US, the

quarterly reports required there cannot be used as a yardstick for Europe. Since any material changes already trigger a review of best execution policies, there is no need to require execution venues to publish their routine reports with excessive frequency.

Q13: Do you agree that trading venues should publish the data relating to the quality of execution with regard to a uniform reference period, with a minimum of specific reporting details and in a compatible format of data based on a homogeneous calculation method? If not, please state why.

The German Banking Industry Committee would welcome a standardised reporting period and a standardised window for publishing reports, such as the beginning of each calendar year for the preceding 12 months. Standardisation along these lines would make it much easier for investment firms and banks to evaluate the data for the purposes of their best execution policies.

Q15: The venue execution quality reporting obligation is intended to apply to all MiFID instruments. Is this feasible and what differences in approach will be required for different instrument types?

A reporting obligation of this kind would be totally superfluous for non-standardised derivatives. And overall, an obligation to report data about the entire range of MiFID instruments broken down by individual instrument would be impracticable and lacking in transparency. It would pose too great a challenge to many market participants while being unnecessary from a client's perspective. A better approach, in our view, would be to group instruments into sensible categories, such as those required for the top five lists. We believe it is possible to interpret Article 27(6) of MiFID II as meaning that reports have to provide data not about all, but only about selected instruments for illustrative purposes. These could be the instruments making up leading indices, for example. Such an approach would, moreover, enable data to be reported on the basis of categories of instrument.

Q17: If available liquidity and execution quality are a function of order size, is it appropriate to split trades into ranges so that they are comparable? How should they be defined (for example, as a percentage of the average trading size of the financial instrument on the execution venue; fixed ranges by volume or value; or in another manner)?

The German Banking Industry Committee rejects anything which would further increase the complexity of the legal framework governing investment firms in the area of best execution. Additional complexity would serve no useful purpose and be excessively onerous.

Q19: What kind of cost should be reported (e.g. regulatory levies, taxes, mandatory clearing fees) and how should this data be presented to enable recipients to assess the total consideration of transactions?

It would be sufficient to report any clearing fees, in our view.

Q20: What would be the most appropriate way to measure the likelihood of execution in order to get useful data? Would it be a good indicator for likelihood of execution to measure the percentage of orders not executed at the end of the applicable trading period (for example the end of each trading day)? Should the modification of an order be taken into consideration?

The German Banking Industry Committee takes the view that a detailed breakdown should at most be required from trading venues. We reject anything which would increase the complexity of the legal framework governing best execution. Additional complexity would serve no useful purpose and be excessively onerous.

Q21: What would be the most appropriate way to measure the speed of execution in order to get useful data?

Prescribed measurement methods for speediness would only make sense for trading venues. We reject anything which would increase the complexity of the legal framework governing best execution. Additional complexity would serve no useful purpose and be excessively onerous.

Q25: What additional measures are required to define or capture the above data and relevant additional information (e.g. depth weighted spreads, book depths, or others) How should the data be presented: on an average basis such as daily, weekly or monthly for each financial instrument (or on more than one basis)? Do you think that the metrics captured in the Annex to this chapter are relevant to European markets trading in the full range of MiFID instruments? What alternative could you propose?

Measures of this kind would only make sense for trading venues. We reject anything which would increase the complexity of the legal framework governing best execution. Additional complexity would serve no useful purpose and be excessively onerous.

Q27: Would increasing the frequency of venue execution quality data generate additional costs for you? Would these costs arise as a result of an increase of the frequency of the review, or because this review will require additional training for your staff in order to be able to analyse and take into account these data? Please provide an estimate of these costs.

The German Banking Industry Committee believes publication of the data on an annual basis will be sufficient to enable firms to undertake regular reviews of their best execution policies. Any material changes may naturally also lead to policies being adjusted within the year.

Q28: Do you agree that investment firms should take the publication of the data envisaged in this Discussion Paper into consideration, in order to determine whether they represent a "material change"?

It can only be assumed that a material change has taken place if a substantial change in market share, for instance, is observed over a lengthy period or if it is foreseeable with a sufficient degree of certainty that the change is likely to persist.

2.4. Best execution - publication of data by investment firms

Q29: Do you agree that in order to allow clients to evaluate the quality of a firm's execution, any proposed standards should oblige the firm to give an appropriate picture of the venues and the different ways they execute an order?

Retail clients already have information about the top five trading venues used by an investment firm for each class of financial instrument. In the view of the German Banking Industry Committee, which represents more than 2,000 banks in Germany, this already provides clients

with a significant degree of detail. Further differentiation would not benefit the average retail client in any way.

Q30: Do you agree that when systematic internalisers, market makers, OTC negotiation or dealing on own account represent one of the five most important ways for the firm to execute clients' orders, they should be incorporated in the reporting obligations under Article 27(6) of MiFID II?

Article 27(6) of MiFID II refers to trading venues only. In consequence ESMA cannot oblige market participants to include systematic internalisers, market makers, etc. This point notwithstanding, ESMA could not consider it a violation of Article 27 of MiFID II if such execution channels were included in the statistics with the result that trading venues fell out of the top five list.

Q31: Do you think that the data provided should be different in cases when the firm directly executes the orders to when the firm transmits the orders to a third-party for execution? If yes, please indicate what the differences should be, and explain why.

From the client's perspective, it can make no difference whether a firm executes the order itself or transmits it to a third party for execution.

Q32: Do you consider that information on both directed and non-directed orders is useful? Should the data be aggregated so that both types of order are shown together or separated? Should there be a similar approach to disclosure of information on market orders versus limit orders? Do you think that another categorisation of client orders could be useful?

The German Banking Industry Committee rejects any increase in the complexity of the legal framework governing best execution. Additional complexity would serve no useful purpose and be disproportionately onerous.

Q33: Do you think that the reporting data should separate retail clients from other types of clients? Do you think that this data should be publicly disclosed or only provided to the NCA (e.g. when requested to assess whether there is unfair discrimination between retail clients and other categories)? Is there a more useful way to categorise clients for these purposes?

We assume Level 1 envisages disclosure to the public, not to supervisors. There is no provision in Level 1 for disclosure to supervisory authorities in a greater degree of granularity. We reject any further increase in the complexity of the legal framework governing investment firms in the area of best execution. Additional complexity would serve no useful purpose and be disproportionately onerous.

Q34: Do you agree that the investment firms should publish the data relating to their execution of orders with regard to a uniform reference period, with a minimum of specific reporting details and in a compatible format of data based on a homogeneous calculation method? If not, please state why.

We do not see a need for requirements of this kind since we assume there will be little interest in such data on the part of clients. Professional clients are already in a position to obtain all data in

the desired form and we anticipate that the willingness of retail clients to absorb specific reporting details would be virtually non-existent.

Q35: What would be an acceptable delay for publication to provide the clients with useful data?

Data can only be published and analysed swiftly if it is not unduly complex (in terms of the number of items reported, granularity of presentation, etc.). This is an argument in favour of a measured approach to implementing the requirements.

Q36: What format should the report take? Should there be any difference depending on the nature of the execution venues (MTF, OTF, Regulated Market, systematic internalisers, own account) and, if so, could you specify the precise data required for each type?

We do not see a need for detailed requirements since we assume there will be little interest in such data on the part of clients. Professional clients are already in a position to obtain all data in the desired form and we anticipate that the willingness of retail clients to absorb specific details would be virtually non-existent. An obligation to provide the information to clients in a durable medium would generate totally excessive costs; we believe it will be perfectly sufficient to post the information on the firm's website.

Q37: Do you agree that it is proportionate to require investment firms to publish on an annual basis a summary based on their internal execution quality monitoring of their top five execution venues in terms of trading volumes, subject to certain minimum standards?

The German Banking Industry Committee considers a short, clear and easily understandable summary totally sufficient, especially for retail clients.

Q38: Do you have views on how 'directed orders' covered by client specific instructions should be captured in the information on execution quality? Is it possible to disaggregate reporting for directed orders from those for which there are no specific instructions and, if so, what the most relevant criteria would be for this exercise?

Directed orders do not lean onto a firm's execution policy and should not therefore be included in this information to avoid increasing complexity unnecessarily.

Q39: Minimum standards to ensure that the summary of the firm's internal execution quality monitoring of their top five execution venues (in terms of trading volumes) is comprehensive and contains sufficient analysis or context to allow it to be understood by market participants shall include the factors set out at paragraph 29. Do you agree with this analysis or are there any other relevant factors that should be considered as minimum standards for reporting?

We consider a short, clear and easily understandable summary totally sufficient, especially for retail clients. It should therefore be possible to keep any supplementary information to a minimum.

Q40: Can you recommend an alternative approach to the provision of information on execution quality obtained by investment firms, which is consistent with Article 27(6) of MiFID II and with ESMA's overall objective to ensure proportionate implementation?

It is essential, in our view, to keep the level of complexity of the requirements to a minimum. We therefore urge ESMA to exercise a sense of proportion when implementing the rules and avoid unnecessarily detailed requirements. We believe it is possible to interpret Article 27(6) of MiFID II as meaning that reports have to provide data not about all, but only about selected instruments for illustrative purposes. These could be the instruments making up leading indices, for example. Such an approach would, moreover, enable data to be reported on the basis of categories of instrument. Please see also our replies to the preceding questions.

Q41: Do you agree that ESMA should try to limit the number of definitions of classes of instruments and provide a classification that can be used for the different reports established by MiFID and MiFIR?

For the purposes of best execution information, we consider the classification appropriate with one exception. Structured products which are securitised as equities should not be placed in the same category as OTC derivatives, but should be put in the category of equity financial instruments. The same applies in other contexts, such as when determining the liquidity of instruments. Please see our replies to questions in the relevant chapters.

Q44: What information on conflicts of interest would be appropriate (inducements, capital links, payment for order flow, etc.)?

A conflicts policy is already disclosed on the basis of Article 18(2) of MiFID II. Requiring disclosure under best execution rules too would be unnecessary duplication.

3. Transparency

3.1. Pre-trade transparency - Equities

3.2. Post-trade transparency - Equities

3.3. Systematic Internaliser Regime - Equities

3.4. Trading obligation for shares (Article 23, MiFIR)

Q95: Do you consider that the determination of what is non-systematic, ad-hoc, irregular and infrequent should be defined within the same parameters applicable for the systematic internaliser definition? In the case of the exemption to the trading obligation for shares, should the frequency concept be more restrictive taking into consideration the other factors, i.e. 'ad-hoc' and 'irregular'?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, believes that the approach of basing determination of these criteria on the systematic internaliser criteria should be adopted where appropriate, e.g. in the case of "systematic" and "frequent". A more restrictive interpretation compared with the SI definition is not called for here in our view. "Ad hoc" and "irregular" should be interpreted independently. We suggest measuring them against the SI criterion "organised" under MiFID I.

Q96: Do you agree with the list of examples of trades that do not contribute to the price discovery process? In case of an exhaustive list_would you add any other type of transaction? Would you exclude any of them? Please, provide reasons for your response.

It must be ensured that the list of examples is by no means exhaustive. Further 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 in 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.

Q97: Do you consider it appropriate to include benchmark and/or portfolio trades in the list of those transactions determined by factors other than the current valuation of the share? If not, please provide an explanation with your response.

Yes.

3.5. Introduction to the non-equity section and scope of non-equity financial instruments

Q100: Do you agree with the proposed explanation for the various types of transferable securities that should be treated as derivatives for pre-trade and post trade transparency? If not, please provide arguments and suggestions for an alternative.

No, the German Banking Industry Committee, which represents more than 2,000 banks in Germany, does not agree with the proposal. Securitised derivatives are handled in trading in the same way as bonds. Given that pre-trade and post-trade transparency obligations are intended to benefit the market, securitised derivatives should be subject to the same requirements as bonds.

Q101: Do you agree with ESMA's proposal that for transparency purposes market operators and investment firms operating a trading venue should assume responsibility for determining to which MiFIR category the non-equity financial instruments which they intend to introduce on their trading venue belong and for providing their competent authorities and the market with this information before trading begins?

No, we do not agree with ESMA's proposal. The categorisation process should be centralised in the EU and the categories should be binding. We would suggest that ESMA takes on this responsibility. Otherwise, there is a danger of comparable financial instruments being assigned to different categories, especially if trading venues undertook the categorisation. This would destroy the level playing field.

Q102: Do you agree with the definitions listed and proposed by ESMA? If not, please provide alternatives.

Yes, we agree.

3.6. Liquid market definition for non-equity financial instruments

Q103: Do you agree with the proposed approach? If you do not agree please provide reasons for your answers. Could you provide for an alternative approach?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, considers the Level 1 requirements to be already highly complex. This complexity should not be further increased unnecessarily at Level 2. Option 3 nevertheless makes sense because the combination of the minimum number of transactions and the minimum number of trading days will ensure that only really liquid markets are covered by the definition. At the same time, ESMA should consider classifying certain low volumes of issuances as non-liquid from the outset.

Q104: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?

No. To obtain a clear picture of the market, it is not enough to focus only on the average turnover per trading day. Instead, the approaches of option 1 and option 2 should be combined. One of the two calculation methods should be binding, with the second serving as a corrective.

Q105: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?

A definitive assessment is not possible in the absence of concrete figures. Option 1 has the advantage of not further increasing the complexity of Level 1. Option 2 would be able to ensure that only continuous providers of liquidity were captured. This would make it necessary to have an EU-wide understanding of the term “contractual arrangement to provide liquidity”, however. It would be helpful if ESMA provided concrete calculations to illustrate each of the options in its Consultation Paper.

Q106: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?

The German Banking Industry Committee would welcome its use and ESMA’s approach of using only publically available spreads. However, those spreads should only be used where it is clear that they are generated by actual transactions because only they reflect reality. No indicative or composite measures should be used.

Q107: Should different thresholds be applied for different (classes of) financial instruments? Please provide proposals and reasons.

Yes. A single calibration is unlikely to be suitable for every asset class given the variance in sizes and trading approaches. However, the methodology for calculating these thresholds should be the same.

Q110: Do you agree with the proposed approach? If you do not agree please provide reasons for your answer. Could you provide an alternative approach?

We agree. All four criteria should be met if a product is to be classified as liquid.

Q111: Overall, could you think of an alternative approach on how to assess whether a market is liquid bearing in mind the various elements of the liquid market definition in MiFIR?

Overall, we find the approach to assessing liquidity complex and cumbersome. For details, please see our replies to Q103 to Q109.

Q112: Which is your preferred scenario or which combination of thresholds would you propose for defining a liquid market for bonds or for a sub-category of bonds (sovereign, corporate, covered, convertible, etc.)? Please provide reasons for your answer.

A problem common to all ESMA's scenarios is that too many bonds are classified as liquid. ESMA has failed to take account of the fact that bonds are a largely illiquid asset. A bond traded twice a day and, moreover, on only half of all trading days cannot be described as liquid. Yet in scenarios 4 and 5, 86.91% and 82.19% respectively of the traded volume is classified as liquid. This conclusion is false.

There is a regrettable lack of transparency surrounding the data ESMA has used for calculating the scenarios. In consequence, we cannot understand how the results have been arrived at. It is nevertheless evident that the figures in all scenarios have been set too low. The figures all need to be adjusted significantly upwards. A daily trading volume of €10 million in scenario 5, for example, is far too low.

The German Banking Industry Committee urges ESMA to take adequate account of market realities when setting the thresholds. It would be wrong to express a preference for scenarios which find most bonds to be liquid. It would be equally wrong to set the thresholds at a level aiming at a certain coverage ratio (of "liquid" bonds). Defining a liquid market wrongly would result in the risks for systematic internalisers of such instruments becoming prohibitive, above all owing to pre-trade transparency obligations. Liquidity would then dry up completely. This is not in the interests of issuers or clients.

Q113: Should the concept of liquid market be applied to financial instruments (IBIA) or to classes of financial instruments (COFIA)? Would be appropriate to apply IBIA for certain asset classes and COFIA to other asset classes? Please provide reasons for your answers

The crucial point is to categorise financial instruments in accordance with their actual liquidity. It is essential, in particular, 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. Owing to its high level of precision, the IBIA approach is most likely to achieve the desired objective, in our view, provided that its drawbacks – especially the scale of calculations involved – are compensated for. The COFIA approach has the advantage of simplicity, but there is a huge danger of illiquid financial instruments being erroneously categorised as liquid. This must be avoided at all costs. The COFIA approach would only be workable if the criteria for identifying liquidity were sufficiently precise and formulated in abstract terms. It is absolutely vital that the approach is correctly calibrated so that instruments are assigned to the right category.

Q114: Do you have any (alternative) proposals how to take the 'range of market conditions and the life-cycle' of (classes of) financial instruments into account - other than the periodic reviews described in the sections periodic review of the liquidity threshold and periodic assessment of the liquidity of the instrument class, above?

A key feature of the life cycle of bonds is that trading in them takes place – if at all – in the first four weeks after issuance. To take this into account, these first four weeks should be excluded when calculating the thresholds. This goes both for the "number of trading days" and for the "average daily volume" criterion. This will ensure that only permanently liquid bonds are deemed liquid. Our proposal applies to both the IBIA and COFIA approach.

The assessment of whether or not a financial instrument is liquid should be made quarterly on the basis of rolling twelve-month figures.

The thresholds should be reviewed annually, though it should not be assumed that adjustments will be necessary after every review.

Q117: Do you agree with the proposed approach? If not, please provide rationales and alternatives.

We generally agree. But this applies only if it is based on individual instruments, not asset classes. A systematic internaliser should on no account be obliged to continue quoting prices for an instrument which is classified as liquid in spite of the fact that the market has actually dried up.

3.7. Pre-trade transparency requirements for non-equity instruments

3.8. Post-trade transparency requirements for non-equity instruments

Q133: Do you think that the current post-trade regime for shares on the systematic internaliser's identity should be extended to non-equity instruments or that the systematic internaliser's identity is relevant information which should be published without exception?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, believes that systematic internalisers (SI) in non-equity instruments should not be required to disclose their identity, as they would then be exposed to unacceptable risks. Other market participants could specifically use this information against the SI, since they would know which financial instruments the SI must buy or sell. Prices could in this way be unnaturally distorted. Should an SI actually be willing to assume this risk, it would have to pass it on to its clients in the form of higher costs. This applies to liquid instruments and, even more so, to illiquid instruments.

Disclosure of SI identity is not necessary either to achieve market transparency. For this purpose, it is sufficient to publish the relevant information in this respect, i.e. price and volume.

Q134: Is there any other information that would be relevant to the market for the above mentioned asset classes?

No.

Q135: Do you agree with the proposed table of identifiers for transactions executed on non-equity instruments? Please provide reasons for your answer.

No, the proposed table is superfluous to a great extent. 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. ESMA's more detailed table simply means more time and effort needed to assign identifiers correctly, although the market would not be interested in these additional identifiers.

Q136: Do you support the use of flags to identify trades which have benefitted from the use of deferrals? Should separate flags be used for each type of deferral (e.g. large in scale deferral, size specific to the instrument deferral)? Please provide reasons for your answer.

Yes, trades which have benefitted from the use of deferrals should be identified as such. No further differentiation (cf. reply to Q135), e.g. separate flags for each type of deferral, is necessary.

Q138: Do you think that give-up/give-in trades (identified with a flag) should be included in post-trade reports or not made public? Please provide reasons for your answers.

No. Give-up/give-in trades should not be subject to the post-trade transparency requirements, as they do not contribute to price discovery.

Q139: Do you agree that securities financing transactions should be exempted from the post-trade transparency regime?

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

Q140: Do you agree that for the initial application of the new transparency regime the information should be made public within five minutes after the relevant non-equity transaction? Please provide reasons for your answer.

Given the newness of the post-trade transparency regime for non-equity instruments, a longer deferral period should be set; it should initially be at least 15 minutes. It should be borne in mind that in the bond market fully electronic trading is less widespread than in the equity market. A lot of information, including the flags that may be necessary, therefore has to be entered and checked manually. The initial deferral period of 15 minutes could be shortened later where necessary if the technical environment for this is in place. It is, however, important that when the new regime enters into force no requirements are set that cannot effectively be met by market participants.

A longer deferral period should be set for derivatives contracts, as in their case compilation of the transaction data to be disclosed is often highly complex.

Q141: Do you agree with the proposed text or would you propose an alternative option? Please provide reasons for your answer.

The proposed deferral period is much too short. The SI often has to unwind large-volume transactions over a period of several days. If the market gains knowledge of the transaction at the end of the trading day or at the beginning of the following trading day, 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 higher prices. The less liquid an instrument is, the greater are these risks. More granular deferral periods are necessary. For some instruments, deferral periods of several weeks would be appropriate.

Q142: Do you agree that the intra-day deferral periods should range between 60 minutes and 120 minutes?

An intra-day deferral period of between 60 and 120 minutes for trades that exceed the size specific to the instrument is too short. We believe that a longer, uniformly applying period is necessary.

Q143: Do you agree that the maximum deferral period, reserved for the largest transactions, should not exceed end of day or, for transactions executed after 15.00, the opening of the following trading day? If not, could you provide alternative proposals? Please provide reasons for your answer.

No, this period is much too short. See our reply to Q141.

Q144: Do you consider there are reasons for applying different deferral periods to different asset classes, e.g. fixing specific deferral periods for sovereign bonds? Please provide arguments to support your answer.

As a differentiation criterion, "liquidity", but not "asset class", is appropriate. Suitable liquidity-based deferrals must be set. This is the only way to avoid unacceptable risks for the SI that it would be unable to hedge adequately.

Q145: Do you support the proposal that the deferral for non-equity instruments which do not have a liquid market should be until the end of day + 1? Please provide reasons for your answer.

No, this period is also much too short. Particularly with illiquid instruments, it often takes several trading days to execute a large client order. If the market knew the exact volume of the order and possibly even the identity of the SI, the SI would only be able to execute the order at much poorer prices or would have to assume considerable risks with regard to its hedging transactions. The less liquid an instrument is, the greater are these risks. For some instruments, deferral periods of several weeks (even months for the most illiquid) would be appropriate.

Q146: Do you think that one universal deferral period is appropriate for all non-equity instruments which do not have a liquid market or that the deferrals should be set at a more granular level, depending on asset class and even sub asset class. Please provide reasons for your answer.

Further sub-groups are needed within the superordinate "illiquid" group. The less liquid an instrument is, the longer the deferral period must be. For some instruments, deferral periods of

several weeks are appropriate. This is the only way to avoid unacceptable risks for the SI that it would be unable to hedge adequately.

Q147: Do you agree with the proposal that during the deferred period for non-equity instruments which do not have a liquid market, the volume of the transaction should be omitted but all the other details of individual transactions must be published? Please provide reasons for your answer.

No, we do not agree with the ESMA proposal. 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. Even if the identity of the SI and the price are disclosed with a delay, this would create unacceptable risks for SIs, as publication of this information allows conclusions about the positions held by an SI or another investment firm. It is exactly this that deferred publication is designed to prevent.

A requirement to immediately publish all the details of a transaction except its volume would not be appropriate either, given the wording of Article 11(3) of MiFIR, which also applies to post-trade transparency for SIs and investment firms. Article 11(3)(a) of MiFIR merely stipulates that competent authorities may request deferred publication of "limited details of a transaction". Only where an extended deferral period is granted does Article 11(3)(b) of MiFIR allow (just) deferred publication of the volume of a transaction. ESMA's proposal that in every case of deferred publication all the details of a transaction except its volume should be published thus not only contradicts the regulatory purpose but also the wording and systematic approach of Article 11(3) of MiFIR. ESMA's proposal would thus be generally incompatible with Article 11(3) of MiFIR.

Q150: In your view, could those transactions determined by other factors than the valuation of the instrument be authorised for deferred publication to the end of day? Please provide reasons for your answer.

As ESMA correctly notes, real-time publication of transactions that are determined by factors other than the market valuation of the instrument is unnecessary, as such information would not be useful for the market (para. 73). In this light, it also appears appropriate to set a longer deferral period than up to the end of the trading day.

3.9. The transparency regime of non-equity large in scale orders and transactions

Q151: Do you agree with the proposed option? Which option would be more suitable for the calibration of the large in scale requirements within an asset class?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, agrees with the proposed option (Option 2). This option will be simpler to implement insofar as it would not require periodic calculation on an instrument-by- instrument basis.

Q152: Do you consider there are reasons for opting for different options for different asset classes? Please provide arguments.

No, if product grouping into sub-classes is sufficiently granular and there are long enough deferrals.

Q153: Do you agree that the choice between the two options should be consistent with the approach adopted for the assessment of liquidity? If not, please provide arguments.

We agree.

Q154: Do you agree with the proposed approach? If no, which indicator would you consider more appropriate for the determination of large in scale thresholds for orders and transactions?

No. To obtain a clear picture of the market, it is not enough to refer only to the average daily turnover (ADT). Instead, the computation methods under Option 1 and Option 2 should be combined. One of the two calculation methods should be binding, with the second serving as a corrective.

Q155: Do you agree that the proxy used for the determining the large in scale thresholds should be the same as the one used to assess the average size of transactions in the context of the definition of liquid markets? Please provide arguments.

Yes.

Q156: In your view, which option would be more suitable for the determination of the large in scale thresholds? Please provide arguments.

In our opinion, Option 1 would be more suitable for determining the large-in-scale thresholds. The thresholds should be defined directly without any complex policy-oriented methods.

Q157: Alternatively which method would you suggest for setting the large in scale thresholds?

The minimum trading volume subject to transparency requirements cannot be set as a target, but must be determined empirically using the appropriate method. As there is a trade-off between transparency as such and the negative influence on prices caused by the transparency of large-scale orders, setting the thresholds via a coverage ratio would not be a consistent approach for transparency purposes. The thresholds should be set in such a way that any strongly negative influence on prices by large-scale orders, which is also possible in liquid markets, is largely avoided.

Q158: In your view, should large in scale thresholds for orders differ from the large in scale thresholds for transactions? If yes, which thresholds should be higher: pre-trade or post-trade? Please provide reasons to support your answer.

We believe it would be appropriate to set the large in scale thresholds for orders lower than for transactions. The risk incurred under the pre-trade transparency requirements is far higher than under the post-trade transparency requirements.

Q159: Do you agree that the large in scale thresholds should be computed only on the basis of transactions carried out on trading venues following the implementation of MiFID II? Please, provide reasons for the answer.

We agree that the large in scale thresholds should be computed only on the basis of transactions carried out on trading venues following the implementation of MiFID II. The pre-trade waiver applies only to on venue orders and the inclusion of data on OTC transactions would bias the calculation.

Q161: Do you agree that the large in scale regime should be reviewed no earlier than two years after application of MiFIR in practice?

There should be a possibility to review the large in scale regime earlier in case of a wrong pre-calibration in order to prevent any negative impact on the financial markets.

3.10. Size specific to the instrument

Q162: Do you agree with the above description of the applicability of the size specific to the instrument? If not please provide reasons for your answer.

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, agrees with the description of the applicability of the size specific to the instrument.

Q163: Do you agree with the proposal that the size specific to the instrument should be set as a percentage of the large in scale size? Please provide reasons for you answer.

While we consider the proposal appropriate in principle, we wish to stress that a final assessment is not possible, since ESMA has not published the data it used for its calculations. How the liquidity parameters are set is crucial; the large in scale size (LiS) depends on these parameters. If the size specific to the instrument (SSI) is set as a percentage of the LiS size, it should be as low a percentage as possible and at least in the single digit range – possibly even less than 1%. Such an SSI would also be appropriate for taking sufficient account of the differences between wholesale and retail orders already called for at Level 1. It must at any rate also be ensured that the thresholds for pre-trade transparency purposes are set lower than those for post-trade transparency purposes.

Q164: In your view, what methodologies would be most appropriate for measuring the undue risk in order to set the size specific threshold?

It will be primarily a qualitative judgement, dependent on specific factors within the market at any given time. It should therefore be calibrated cautiously so that there is no negative impact on the market.

Q167: Do you agree with ESMA's description of how the size specific to the instrument deferrals would interact with the large in scale deferrals? In particular, do you agree that the deferral periods for the size specific to the instrument and the large in scale should differ and have any specific proposals on how the deferral periods should be calibrated? Please provide reasons for your answer.

Yes, we agree.

3.11. The Trading Obligation for Derivatives

Q168: Do you agree that there should be consistent categories of derivatives contracts throughout MiFIR/EMIR?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, believes it makes sense to adopt the same categorisation for the decision on the trading obligation as for the decision on the clearing obligation. This is also in line with the requirements of Article 32 of MiFIR, which obligates ESMA to make a decision on the trading obligation for the categories of derivatives contracts that are subject to the clearing obligation. If in the case of a category of derivatives that is subject as a whole to the clearing obligation, there are material reasons for not subjecting the whole category but only part of it to the trading obligation, ESMA should stipulate a trading obligation for only part of the asset class.
We wish to refer to the clarification that is still to be provided by the European Commission on the settlement date for FX spot transactions. In our related comments, we pointed out that T+3 should not be set as a fixed threshold to separate spot transactions and derivatives contracts.

Q169: Do you agree with this approach to the treatment of third countries?

We agree with ESMA that the trading obligation criteria are in line with the standards set by EMIR for the clearing obligation in regard to non-EU counterparties. The criterion of a “direct, substantial and foreseeable effect within the Union” in Article 25(5) of MiFIR is identical with the requirements in Article 4(1)(a)(v) of EMIR for defining contracts subject to the clearing obligation that have been entered into by third-country parties. Accordingly, in terms of legal consequences, the relevant derivatives contracts should be subject to the trading obligation as well as the clearing obligation.

Q170: Do you agree with the proposed criteria based anti-avoidance procedure?

We agree with this approach, particularly that it should be based on the equivalent procedure under EMIR and that ESMA should publish (non-exhaustive) criteria for assessing when a case of avoidance exists. When applying these criteria, it must be ensured that legitimate business decisions that do not serve the purpose of avoiding the trading obligation are respected by ESMA. It should, in particular, be taken into account in this connection that the territorial scope of MiFIR is restricted to the area of the EU/EEA. This territorial restriction must not be undermined on the pretence of preventing avoidance of the trading obligation.

Q171: Do you think it would be reasonable for ESMA to consult venues with regard to which classes of derivatives contracts are traded on venue? Do you think venues would be well placed to undertake this task?

Besides the other market participants, “venues” are suitable points of contact to determine whether certain derivatives contracts are tradable on venue. In our view, a distinction must be made between the empirical assessment of whether and where orders in certain classes of derivatives contracts are executed on venue and the assessment of whether a class of derivatives contracts traded on venue is a candidate for inclusion in the trading obligation. Whilst the former assessment can naturally be provided best by the operators of the respective venues, the latter assessment by venues, on the other hand, can only have indicative effect and should, in addition, be embedded in full consultation of all market participants affected.

Q172: The discussion in section 3.6 on the liquid market for non-equity instruments around 'average frequency', 'average size', 'number and type of active market participants' and average size of spreads is also relevant to this chapter and we would welcome respondent's views on any differences in how the trading obligation procedure should approach the following:

Application of these criteria in the decision on the trading obligation should be based in principle on the liquid market definition for derivatives contracts. However, the thresholds should be set higher than in the liquid market definition under the transparency rules. Whereas the transparency rules merely make it a condition that a liquid market exists, the trading obligation requires that a derivatives contract can be considered "sufficiently liquid" (Article 32(2)(b) MiFIR).

We agree with ESMA that the liquidity definition should not be based on averages, since illiquid phases would as a result be balanced out by phases of particularly high liquidity. The consequence would be that a derivatives contract that is illiquid over a longer period of time would be subject to the trading obligation. The criterion "average frequency and size of trades over a range of market conditions" should therefore be understood as a median. This applies likewise to the liquid market definition, however.

Q173: Do you have a view on how ESMA should approach data gathering about a product's life cycle, and how a dynamic calibration across that life cycle might work? How frequently should ESMA revisit its assumptions? What factors might lead the reduction of the liquidity of a contract currently traded on venue? Are you able to share with ESMA any analysis related to product lifecycles?

We would consider two dimensions of a product's lifecycle: firstly, on a product level, and, secondly, on a transaction level.

On a product level, innovations, which may attract significant trading volumes, often undergo a rapid change of structural features between market participants, often resulting in strong competition between different versions of a product. Eventually, a higher degree of standardisation sets in. Defining criteria are usually standardised trade terms. Eventually, a stronger homogenisation sets in, often resulting in clearing houses making the product clearable and trading platforms taking on the product. A typical case study of this is the development of the CDS market, and here in particular the CDS index market. A trading obligation early on would have provided a significant competitive advantage to the proponents of the first product versions and would have most likely prevented the evolution into today's highly standardised market. In the context of the trading obligation evaluation, we would therefore recommend that at least an industry-agreed standardised trade documentation should be available. There should also be at least one year's worth of history since the first introduction of such a standardised documentation, as not every standardised product becomes a traded and liquid product. Looking at the various contracts introduced over time, it would probably be fair to say that it is rare for a product to become a truly traded commodity instead of just a speciality solution.

Secondly, on a transaction basis, most derivatives will only trade on standardised terms as of the trade date. There is generally no market for "aged" or "used" derivatives. For option markets, this is evidenced by the significantly higher liquidity for at-the-money options. For swap markets, the ability to obtain quotes for "broken dates" is severely constrained. This is intuitively clear, since any liquidity provider taking on such a product will have to transact several times to find a

suitable hedge and there is no natural market for, for example, a 3-year and 5-month swap trading 2 points away from current market yields.

To summarise, the life cycle evaluation should look at the availability of a sufficiently standardised documentation, a sufficient set of dependable and comparable data, sufficient transparency in information on the underlying (e.g. a proprietary index as an underlying would be problematic), and the individual trading characteristics of an individual transaction, which probably should enter into the definition of the subset of derivatives subject to the trading obligation.

Q174: Do you have any suggestions on how ESMA should consider the anticipated effects of the trading obligation on end users and on future market behaviour?

In the evaluation of effects of the trading obligation, the following aspects and scenarios should be considered:

Most derivative markets, with the potential exception of very few highly standardised future contracts like the Bund contract, are dependent upon the presence of liquidity providers who will accept risks from non-financial and financial end-users and manage them, usually on a portfolio basis, in a broadly risk-neutral way. A single end-user transaction therefore often gives rise to a larger number of related risk management transactions, often over a longer period of time, e.g. when hedging gamma risk, etc.

Where the introduction of a trading obligation impacts the ability of liquidity providers to manage their risks, their ability to offer the end-user product, or the price at which this is offered, may be impacted.

The introduction of a trading obligation could result in an "over-standardisation" of primary products, making it more difficult for end-users to obtain the risk product they require for their purposes. This risk can relatively easily be mitigated by a sufficiently precise definition of the products subject to the trading obligation, ensuring that products in question remain available for bilateral negotiation, in particular in larger sizes.

Another important effect could be trading costs: where the costs for trading on a platform, due to connectivity costs, trade charges, etc. would make a transaction uneconomical, the product in question will most likely disappear or be displaced. As we would assume that the purpose of the introduction is not to ban a product indirectly, the cost of trading and accessing trading platforms should be considered. To avoid the creation of monopolies, we would strongly urge considering the number of available trading venues in this analysis.

As no model will be able to exactly predict changes in market behaviour, we would recommend introducing trading obligations in a staggered way, with larger market participants as the primary adopters, and observing effects in the introductory phase. Drops in liquidity or significant increases in volatility or trading costs should be used to fine-tune the trading obligation in terms of definition of the sub-set of derivatives or size thresholds.

Further regulation of OTC derivatives contracts may have the – unintended – consequence of increasing the cost of hedging market risk. This, in turn, can lead to protection against risks being neglected, which would have negative macroeconomic implications.

Q175: Do you have any other comments on our overall approach?

We consider the appropriate definition of a class of derivatives as crucial to the working of the trading obligation. The taxonomy introduced by ESMA as part of the Discussion Paper is not sufficiently granular to differentiate between liquid and illiquid market segments. Generally, we would therefore expect the trading obligation to reference sub-classes of derivatives. Where these are sufficiently homogeneous, unintended side-effects and disproportionate costs are more likely to be avoided. A close analysis of the microstructure of a market, taking into account the maturity of a product, the needs of end-users and liquidity providers as well as the ability of trading systems and trading platforms to map existing bilateral structures is essential.

The top-down approach provided for in Article 32(4) of MiFIR, whereby a trading obligation can also be set for products that have not yet been traded on any venue, should only be applied in exceptional cases. It can, after all, be assumed that trading venues will, in their own interest, admit as many products as possible so as to create the condition for a trading obligation under Article 32(2) of MiFIR. If, on the other hand, no venue has an interest in admitting a certain product, this strongly suggests that the product concerned is not sufficiently liquid. A trading obligation pursuant to Article 32(4) of MiFIR would in this case be counter-productive.

From an operational perspective, a sufficiently long transition period should be allowed for introduction of the trading obligation, as both checking 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. In addition, when setting the implementation periods, it should be remembered that any generally applicable connection requirement on a certain date may lead to bottlenecks at venues similar to the situation triggered by mandatory connection to trade repositories on 12 February 2014 to comply with the EMIR reporting requirement. The transition period should therefore be at least twelve months and, like with the clearing obligation under Article 4 of EMIR, should be staggered for different categories of market participants.

Furthermore, there needs to be close consultation between the competent European and US institutions when determining which products are subject to the trading obligation. If a product is traded in both the US and the EU, the trading obligation should apply uniformly in the US and the EU. In the US, the introduction of a trading obligation for certain derivatives contracts in February 2014 led to a segmentation of the markets for products denominated in US dollars. As transactions with US persons have to be concluded via Swap Execution Facilities (SEFs) and connection to US SEFs is a complicated process for European market participants, the result was a split into an "on-SEF" market involving US persons and an "off-SEF" market not involving US persons. Liquidity in both markets is lower than in OTC trading before introduction of the trading obligation by the Dodd-Frank Act.

From a competitive angle, it is, in addition, vital that there is mutual recognition of trading venues, particularly between Europe and the US. For data protection reasons, where trading venues store data, i.e. which country the servers storing data are located in, may also be important for market participants.

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).

Finally, attention should be paid to the risk identified by ESMA (paras 27-29, p. 192) that derivative instruments which are subject to a trading obligation can effectively no longer be traded on venue if they become illiquid, with corresponding consequences for hedging. In view of the uncertainty of forecasts about a product's future liquidity and the time needed to lift the trading obligation, a trading obligation should only apply once it can almost certainly be ruled out empirically that the product will become illiquid during the next six months.

3.12. Transparency Requirements for the Members of ESCB

3.13. formation for the purposes of transparency and other calculations

4. Microstructural issues

4.1. Microstructural issues: common elements for Articles 17, 48 and 49 MiFID II

Q185: Is there any element that has not been considered and/or needs to be further clarified in the ESMA Guidelines that should be addressed in the RTS relating to Articles 17, 48 and 49 of MiFID II?

In the view of the German Banking Industry Committee which represents more than 2,000 banks in Germany, it should be made clear that algorithms which merely serve the purpose of compliance with best execution requirements by forwarding orders to one or more trading venues are not deemed to be algorithms within the meaning of Article 17 of MiFID II.

Q189: Do you agree with the definition of "trading system" for investment firms?

No. The definition in para. 8. iii. goes much too far if it covers investment firms' trading systems. It needs to be narrowed appropriately to automated trading. Recital 61 of MiFID II expressly refers to a "specific subset of algorithmic trading" in connection with the definition of trading systems. This narrowing of the definition is missing in the Discussion Paper.
Furthermore, it should be stressed that the rules on algorithmic trading are not to be applied to pure OTC trading.

Q190: Do you agree with the definition of 'real time' in relation to market monitoring of algorithmic trading activity by investment firms?

We suggest dropping the idea of a fixed time delay of no more than five seconds. What "real time" means in a given case is for each investment firm to decide on its own responsibility, applying a risk-based approach and the proportionality principle. Real-time risk monitoring to which the 5-second ceiling is to apply is, namely, necessary for "any trading behaviour that may pose a threat to the firm's own risk management or to the orderly functioning of the markets", and which the firm "should be able to correct … while it is still occurring, minimising the damage to either the firm itself or to the markets to which the firm is submitting its orders". This may entail a large number of processes and, contrary to what ESMA says (para. 18), it is by no means certain that the current state of technology allows completion of all these processes within five seconds. Even if this were technically possible, the proportionality principle means that the technical burden would have to be weighed up against the extent of the potential damage and the

probability of such damage actually occurring. A fixed maximum time delay must therefore be rejected.

Q196: Would the MiFID II organisational requirements for investment firms undertaking algorithmic trading fit all the types of investment firms you are aware of? Please elaborate.

Yes.

Q197: Do you agree with the approach described above regarding the application of the proportionality principle by investment firms? Please elaborate.

We believe that application of the proportionality principle is appropriate. In line with para. 45 of chapter 4.1, we assume that the organisational arrangements of investment firms which offer DEA only have to be made when they offer DEA in conjunction with algorithmic trading. In our view, clarification to this effect is required in the Discussion Paper.

In addition, the frequency of reviews should be geared to the proportionality principle. Reviews should take place regularly and should be risk-based. A fixed minimum number of two reviews per year is therefore inappropriate.

Q198: Are there any additional elements that for the purpose of clarity should be added to/removed from the non-exhaustive list contained in the RTS? Please elaborate.

The following points should be deleted from the list, as they are of no specific relevance to algorithmic trading:

- ii. j. number of clearing members or CCP memberships;
- ii. l. number of firm's physical locations;
- ii. n. the firm's annual earnings and profits.

4.2. Organisational requirements for investment firms (Article 17 MiFID II)

Q200: Do you agree with the parameters outlined for initial restriction? Please elaborate.

The German Banking Industry Committee which represents more than 2,000 banks in Germany, believes that the requirement to keep the production of algorithms and their testing segregated at all times, as proposed by ESMA (para. 22), should be amended. Strict segregation is neither sensible nor feasible in practice. Particularly the persons involved in the production should also be involved in the testing phase. To avoid any potential conflicts of interest, authorisation of algorithms should, however, be handled by an independent unit (e.g. Risk Control).

Q201: Do you agree with the proposed testing scenarios outlined above? Would you propose any alternative or additional testing scenarios? Please elaborate.

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

With a view to the frequency of tests, we should like to point out that fixing a minimum number of two reviews per year is inappropriate. The number of reviews should instead be fixed by the investment firm itself; this should be a risk-based decision, applying the principle of proportionality.

Q202: Do you agree with ESMA's approach regarding the conditions under which investment firms should make use of non-live trading venue testing environments? Please elaborate.

While it makes sense to test algorithms in a non-live environment, investment firms should not be required to use the testing environment of every single trading venue on which they conduct algorithmic trading. This would mean that they would have to apply for access to a large number of different testing environments, which would entail considerable costs. Such an approach is neither balanced nor proportionate when set against its benefit, as the use of every single trading venue's own testing environment does not deliver any added value. Investment firms should therefore decide for themselves on the basis of a risk assessment whether, for example, the specificities of a certain algorithm or trading venue make it necessary to test an algorithm in the testing environment made available by the respective trading venue. If, on the basis of a risk assessment, an investment firm comes to the conclusion that the test results obtained in a specific testing environment are applicable to other trading venues as well, it should be allowed to dispense with additional tests in these trading venues' testing environment.

It should also be noted that not all trading venues make available a testing environment of their own.

Q205: Do you agree with the proposed monitoring and review approach? Is a twice yearly review, as a minimum, appropriate?

We agree with the proposed monitoring approach. Intra-day monitoring of the exposure in derivatives trading is necessary and appropriate particularly for algorithmic derivatives trading. Assigning the job of monitoring to a monitoring unit separated from trading also makes sense in order to avoid conflicts of interest.

We also generally agree with the requirement to regularly review monitoring systems. However, fixing a minimum number of two reviews per year is inappropriate. The number of reviews should instead be fixed by the investment firm itself; this should be a risk-based decision, applying the principle of proportionality. Depending on the volume of algorithmic trading conducted by the investment firm and the experience made with the monitoring system in the past, it is quite conceivable that, when making a risk-based decision, an investment firm may come to the conclusion that only one review per year is necessary. This applies likewise to the validation report that ESMA also considers necessary twice annually.

Q208: Is the proposed list of pre trade controls adequate? Are there any you would add to or remove from the list?

No. We do not believe that a fixed list of parameters that should be used, as a minimum, for the required filters would be appropriate. It would be better to leave the choice of parameters to each investment firm. The investment firm should be allowed to select, within the framework of a risk-based decision, the parameters that it considers appropriate for a specific algorithm and the specific circumstances of that firm. While the parameters proposed by ESMA may be appropriate in many cases, it is by no means certain that the use of all of these makes sense for every investment firm.

Q211: In particular, what are your views regarding the storage of the parameters used to calibrate the trading algorithms and the market data messages on which the algorithm's decision is based?

We believe that a storage period of five years is appropriate. ESMA should, however, make clear that this period is also adequate, i.e. that data do not have to be stored longer unless there is a specific reason for doing so (e.g. an ongoing investigation by a supervisory authority). The wording in para. 70 should be amended accordingly.

Additional storage of all market data is unnecessary. For one thing, given the volume of data involved, such storage would impose a considerable burden and, for another, it would not deliver any worthwhile benefit, as market data can also be obtained from external data providers when necessary (e.g. for an investigation by a supervisory authority).

Q212: Do you consider that the requirements regarding the scope, capabilities, and flexibility of the monitoring system are appropriate?

We agree in principle with the proposals. With regard to the alerts where market manipulation is suspected, ESMA should make clear that the "t+1" deadline applies only to automated reports. This means that any manual alert processing required can also be carried out later.

With regard to the issue of recording and storing market data addressed by ESMA (para. 82), we do not believe that such recording is necessary. For one thing, given the volume of data involved, such recording would impose a considerable burden and, for another, it would not deliver any worthwhile benefit, as market data can also be obtained from external data providers when necessary (e.g. for an investigation by supervisory authority).

Q214: Periodic reviews – would a minimum requirement of undertaking reviews on a half-yearly basis seem reasonable for investment firms engaged in algorithmic trading activity, and if not, what would be an appropriate minimum interval for undertaking such reviews? Should a more prescriptive rule be set as to when more frequent reviews need be taken?

It makes sense to review existing monitoring systems from time to time in order to prevent market manipulation. A review is called for particularly in regard to the factors that ESMA mentions (para. 79), i.e. changes in the firm's regulatory obligations, its trading strategy, the type and volume of instruments traded and the markets accessed. There is, however, no reason why a minimum number of two reviews per year should be fixed. It should instead be up to the investment firm to assess on an ongoing basis whether the parameters in question have changed and a review is therefore required. If, for example, neither the legal framework nor the algorithms, type and volume of instruments traded and trading venues have changed, calling for a formalised review every six months is inappropriate from a proportionality point of view.

Q216: What is your opinion of the elements that the DEA provider should take into account when performing the due diligence assessment? In your opinion, should any elements be added or removed? If so, which?

We assume that the due diligence assessment requirements are addressed solely to those DEA providers whose clients use algorithms within the meaning of Article 17 of MiFID II.

Knowledge of the source code is unnecessary. From a risk management perspective, we believe it is sufficient if the client gives the DEA provider an idea of how the algorithm works and what

external information is used. The size of the due diligence assessment in para. 92. iii should be reduced accordingly.

Q217: Do you agree that for assessing the adequacy of the systems and controls of a prospective DEA user, the DEA provider should use the systems and controls requirements applied by trading venues for members as a benchmark?

Insofar as DEA clients using algorithms are concerned, we believe that ESMA's proposal is appropriate. In such cases, trading platform requirements can be used at least as a guideline.

Q218: Do you agree that a long term prior relationship (in other areas of service than DEA) between the investment firm and a client facilitates the due diligence process for providing DEA and, thus, additional precautions and diligence are needed when allowing a new client (to whom the investment firm has never provided any other services previously) to use DEA? If yes, to what extent does a long term relationship between the investment firm and a client facilitate the due diligence process of the DEA provider? Please elaborate.

No. With regard to due diligence we see no practical benefits if a long-standing client who has not had any DEA so far is involved. Client due diligence must be appropriate in every case. For example, a long-term prior relationship with a client in cash management business does not allow any conclusions about the same client's potential behaviour in securities trading. Conversely, the same due diligence should apply to a client with whom a firm has not previously done business as to an already existing client who has not had any DEA so far.

Q219: Do you agree with the above approach? Please elaborate.

We agree in principle with ESMA's proposal. However, investment firms should not be forced to make a distinction between clients' individual trading desks or traders when calculating the exposure.

Q220: Do you agree with the above approach, specifically with regard to the granular identification of DEA user order flow as separate from the firm's other order flow? Please elaborate.

We agree with the proposal that individual users of a DEA client should be assigned unique IDs. In this way, the DEA provider can see which user placed a certain order – this will be helpful, for example, in any supervisory investigations. However, we do not believe it is necessary to require the DEA provider to be able to block orders, if necessary, just from individual DEA client users. The DEA client would, it is true, benefit from such a requirement, since not the whole DEA client (i.e. the entire firm) would be temporarily excluded from the DEA service. On the other hand, a procedure whereby only individual employees of a DEA client can be excluded is not customary market practice and setting it up would impose a considerable burden. Charging the costs involved to DEA providers would be unjustified. The DEA client is, after all, responsible for the actions of its employees. Consequently, it must also bear the costs of any misconduct by its employees. It should thus be sufficient if DEA providers are allowed to temporarily exclude individual DEA clients in their entirety from the DEA service. If the reason for exclusion is the misconduct of a single DEA client employee, it is up to the DEA client to withdraw this employee's access authorisation and notify the DEA provider thereof so that the DEA service can be resumed.

4.3. Organisational requirements for trading venues (Article 48 MiFID II)

4.4. Market making strategies, market making agreements and market making schemes

4.5. Order-to-transaction ratio (Article 48 of MiFID II)

4.6. Co-location (Article 48(8) of MiFID II)

4.7. Fee structures (Article 48 (9) of MiFID II)

4.8. Tick sizes (Article 48(6) and Article 49 of MiFID II)

5. Data publication and access

5.1. General authorisation and organisational requirements for data reporting services (Article 61(4), MiFID II)

5.2. Additional requirements for particular types of Data Reporting Services Providers

5.3. Technical arrangements promoting an efficient and consistent dissemination of information – Machine readability Article 64(6), MiFID II

5.4. Consolidated tape providers

Q367: Should the tapes be offered to users on an instrument-by-instrument basis, or as a single comprehensive tape, or at some intermediate level of disaggregation? Do you think that transparency information should be available without the need for value-added products to be purchased alongside?

In the view of the German Banking Industry Committee, which represents more than 2,000 banks in Germany, a distinction should be made between data processing on the one hand and the distribution of data on the other. We believe that data processing should generally be granular. Where required by supervisory requirements, aggregation may also make sense in this case. With regard to distribution, we are opposed to any bundling of data, however. CTP users must be able to access information on an instrument-by-instrument basis.

5.5. Data disaggregation

Q370: Do you agree that venues should not be required to disaggregate by individual instrument?

No, the German Banking Industry Committee, which represents more than 2,000 banks in Germany, does not agree. Data providers should generally be required to make available disaggregated data on an individual transaction basis.

Q373: Do you agree that venues should be under an obligation to disaggregate according to the listed criteria unless they can demonstrate that there is insufficient customer interest?

The German Banking Industry Committee takes the view that data providers should generally be required to make available disaggregated data on an individual transaction basis. Offering data by asset class will usually not meet customer needs. We assume that the market will only have use for aggregated forms of data provision in exceptional cases. For this reason, such offerings will only make sense in exceptional cases.

5.6. Identification of the investment firm responsible for making public the volume and price transparency of a transaction (Articles 20(3) (c) and 21(5)(c), MiFIR)

5.7. Access to CCPs and trading venues (Articles 35-36, MiFIR)

Q377: Do you agree that exceeding the planned capacity of the CCP is grounds to deny access?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, believes that if a CCP were to deny a market participant access on capacity-related grounds, this would constitute discrimination of a market participant distorting competition. Capacity requirements should therefore be assessed and CCPs obligated to grant market participants access. If a CCP could deny individual market participants access, this would also jeopardise straight-through transaction processing. Arrangements should therefore be made to avoid any denial of access on capacity-related grounds.
On the assumption that denial of access is a rare exception that is not already covered by the resources and buffers assessed by ESMA upon initial authorisation and in ongoing monitoring, what the Discussion Paper says makes sense. However, in this case it must also be stipulated that the clearing obligation or the trading obligation is lifted temporarily if it is no longer possible for some market participants to obtain access to a CCP or trading venue.

Q380: Do you agree that exceeding the planned capacity of the CCP is grounds to deny access?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, believes that if a CCP were to deny a market participant access on capacity-related grounds, this would constitute discrimination of a market participant distorting competition. Capacity requirements should therefore be assessed and CCPs obligated to grant market participants access. If a CCP could deny individual market participants access, this would also jeopardise straight-through transaction processing. Arrangements should therefore be made to avoid any denial of access on capacity-related grounds.
On the assumption that denial of access is a rare exception that is not already covered by the resources and buffers assessed by ESMA upon initial authorisation and in ongoing monitoring, what the Discussion Paper says makes sense. However, in this case it must also be stipulated that the clearing obligation or the trading obligation is lifted temporarily if it is no longer possible for some market participants to obtain access to a CCP or trading venue.

5.8. Non- discriminatory access to and obligation to license benchmarks

6. Requirements applying on and to trading venues

6.1. Admission to Trading

6.2. Suspension and Removal of Financial Instruments from Trading - connection between a derivative and the underlying financial instrument and standards for determining formats and timings of communications and publications

7. Commodity derivatives

7.1. Ancillary Activity

7.2. Position Limits

7.3. Position Reporting

8. Market data reporting

8.1. Obligation to report transactions

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, believes that the ESMA proposals on transaction reporting largely go too far. Many requirements go beyond Level 1 of MiFIR and/or are disproportionate. A final assessment is, moreover, difficult because many points are unclear. For details, please see our replies below.

Irrespective of this, the new reporting requirements under Article 26 of MiFIR make it necessary for investment firms to implement a new reporting system, since – compared with reporting under Article 25(3) of MiFID I – substantial changes are involved. Existing reporting systems cannot be adapted accordingly. It is vital that the specifications required for implementation are available in good time. Only then will investment firms be able to complete implementation on schedule by 3 January 2017. A situation like with implementation of EMIR, where some of the final specifications were available much too late, must at any rate be avoided.

Q546: Do you agree with ESMA's proposal for what constitutes a 'transaction' and 'execution of a transaction' for the purposes of Article 26 of MiFIR? If not, please provide reasons.

In the view of German Banking Industry Committee, the definition of the term "transaction" proposed by ESMA goes well beyond Level 1. According to Article 26(1) of MiFIR, investment firms are required to report "transactions". This does not cover the determination of positions/changes in positions in all financial instruments, including the exercise of existing options, that is proposed by ESMA.

Despite the wording of Article 26(9)(h) of MiFIR, we do not believe that a distinction between "transaction" and "execution of a transaction" is appropriate. Only an order can in fact be executed, but not a transaction. A transaction is an executed order. This editorial oversight at Level 1 should not be carried over into Level 2. Only "transactions" can be subject to a reporting requirement.

Particularly paras 8, 11 and 12 therefore should be amended accordingly.

In addition, the terms used in paras 11, 12 and 15 urgently need to be defined. Because of the absence of any definitions (see, for example, “compression”, “assignment”, “novation”, “termination” and “redemption”), it is currently unclear what would actually have to be reported. As a result, a final assessment of the ESMA proposals is not possible at present.

Definitions should also take due account of life cycle events relating to exchange-traded derivatives.

The German Banking Industry Committee believes it would be highly beneficial to provide a list of transaction types per asset class and/or product that would fall under the reporting obligations in order to eliminate any uncertainty and provide a basis for investment firms to set up a new reporting environment.

Only if reporting requirements are sufficiently clear and precise can investment firms – as indicated by ESMA in para.16 – duly comply with the requirements.

Q548: Is there any other activity that should not be reportable under Article 26 of MiFIR?

Positions or changes in positions are not covered by the reporting requirement under Article 26(1) of MiFIR. For details, see our reply to Q546.

In addition, the German Banking Industry Committee wishes to make the following comments:

Para. 11. i.:
Maturity of derivatives contracts should not be considered reportable.

Para. 12. vii.:
The European Commission’s proposal for a Regulation on reporting and transparency of securities financing transactions (COM(2014) 40 final) sets a reporting requirement for (reverse) repos. These transactions should therefore not be reportable under Article 26 of MiFIR. Additionally, we wish to point out that the Deutsche Bundesbank also requires repos to be reported for the purpose of inclusion in ECB statistics as of autumn 2014. We are opposed to such double reporting, as it entails unnecessary extra work and costs. We are instead in favour of an exchange of information among supervisors.

Q549: Do you foresee any difficulties with the suggested approach? Please elaborate.

The possibility provided for under Article 26(4) of MiFIR for a transmitting investment firm to implicitly instruct an executing investment firm, by passing on client details, to report the transaction is at odds with the principle of freedom of contract. While an initial assessment indicates that such a case is rare in practice, further examination is necessary. It must at any rate be ensured that an executing investment firm is not subject to a mandatory reporting requirement.

Q550: 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.

There is neither a legal basis nor any need for fields 21 to 27, 30 to 36, 40 to 47, 49 to 55, 71 to 73 and 76 to 78 (additional information on counterparty, decision maker, client, trader) (for details, see our reply to Q551). These fields should therefore be deleted.

Fields 28 to 36: Decision maker for the counterparty
Reporting the "decision maker for the counterparty" goes beyond Level 1. Moreover, the investment firm does not know who this is. As the counterparty is required in any case to indicate its decision maker in its report (cf. Article 26(3) of MiFIR), there is no need to report the "decision maker for the counterparty". Fields 28 to 36 should therefore be dropped.

Field 81: Short selling flag
and
Field 82: SSR exemption flag
The German Banking Industry Committee is in favour of deletion of these fields (see our reply to Q557 et seq., particularly to Q558). Inclusion of two fields for the short selling flag is not at any rate acceptable. Under Article 26(3) of MiFIR, only **one** designation can be required ("a designation to identify a short sale as defined in Article 2(1)(b) of Regulation (EU) No 236/2012"; likewise, Article 26(9)(d) of MiFIR: "the designation to identify short sales of shares and sovereign debt as referred to in paragraph 3"). Feld 82 should therefore definitely be dropped.

Field 87: Option exercise
The exercise of an option is not a reportable transaction (see our reply to Q546). This field should therefore be deleted.

Field 88: Repo flag
This field should be dropped (see our reply to Q548).

Feld 91: Report Matching Number
"Where the transaction is concluded OTC, this unique number shall be agreed upon between the different parties."

This requirement is not covered by the Level 1 text.

In addition, it is extremely questionable whether such a report matching number is actually implementable in practice. The introduction of such a matching number would pose a huge challenge to the industry and would require close cooperation between exchanges, IT solution providers for various kinds of systems utilised in the market and investment firms.

It would undoubtedly mean investment running into millions for every investment firm, as such a unique matching number does not exist at present. Different systems are in place within each investment firm. Each of these uses its own unique numbering scheme and also references to its predecessor or successor system respectively to allow matching between both systems. An additional field allowing unique matching as far as the final counterparty of the transaction would have to be created for every single system. A requirement to generate a unique report matching number would hence be completely disproportionate.

The German Banking Industry Committee is therefore firmly in favour of dropping this field.

To populate the other fields, investment firms need clear-cut examples of how any given transaction is to be reported. The following comments are intended to make this clear. We

should, however, like to stress that they do not claim to be exhaustive and that all other fields basically require further specification.

Field 59: Instrument classification
A Unique Product Identifier (UPI) should be issued by a superordinated institution, e.g. Wertpapier-Mitteilungen (WM), to ensure reliable cross-border identification.

Field 60: Ultimate underlying instrument identification code type
and
Field 61: Ultimate underlying instrument identification code
Precise definition of how this field is to be populated is required. "I" for ISIN is clear. There are, however, also financial instruments for which there is no ISIN (e.g. baskets); in this case, it is unclear which code type would have to be used for reporting or whether the field should remain blank. Furthermore, synchronisation with EMIR should be considered.

Feld 69 - 73: Trader (investment decision) identification
The term "investment" would have to be defined more precisely. It is not clear whether this field only has to be completed for a "real" investment or for any purchase or where the transaction was concluced only for a subsequent client transaction (immediate sale to the client). In addition, it is unclear how market making transactions are to be treated. Who would ESMA see to be the decision maker for a transaction on the back of a market maker quote?

Feld 86: Compression
The term "compression" needs to be defined.

Q551: Do you have any comments on the designation to identify the client and the client information and details that are to be included in transaction reports?

The German Banking Industry Committee calls for the introduction of a uniform and unique identifier for natural persons at national level. Given the extremely small number of natural persons that maintain securities accounts in different EU countries, we believe that EU-wide harmonisation is overly burdensome and complicated.

When identifying natural persons, it must be ensured that reporting is based only on client identifiers that investment firms are already legally required to collect **and** store in systems today. Subsequent collection of client identifiers solely for reporting purposes would be disproportionate. For example, Germany alone has over 25 million securities accounts at present.

In the case of identifiers that still would have to be collected, an additional factor is that clients are not obligated to cooperate. We refer in this connection to the experience made by the Bundesrepublik Deutschland Finanzagentur GmbH, which requested its clients at the beginning of 2012 to provide proof of their identity for the purpose of ex post identification under the Anti-Money Laundering Act. Very few responded. Many securities accounts had to be closed. This example shows that collecting identifiers from existing clients ex post would not only impose a considerable and ultimately disproportionate burden but would also raise legal issues. Due to the absence of any obligation for clients to cooperate, an investment firm could not, for example, refuse to accept and execute a sell order on the grounds that the client had failed to provide it with the legally required identification.

Where, on top of the “client designation”, ESMA calls for “additional information regarding the identity of the client”, this is not covered by Level 1. Article 26(3) of MiFIR merely calls for “a designation to identify the clients …”, but not additional information regarding the identity of the client. If the Level 1 empowerment to provide further specification calls for “details of the identity of the client” as well, this must be an editorial oversight. The Level 1 empowerment to provide further specification cannot at any rate go beyond the requirements set at Level 1. Furthermore, a requirement to provide such additional information on top of a client ID would not be necessary, as it does not deliver any added value for automated transaction matching by national competent authorities (NCAs). It would thus also be completely disproportionate, since suspicious transactions are the absolute exception. Consequently, a much more reasonable approach is for the NCA continue to request additional details of the client or the transaction from investment firms in suspicious cases. The German Banking Industry Committee is therefore strongly in favour of dropping the requirement to provide additional details of the client. The same goes for all other cases in which identification is proposed (counterparty, decision maker, trader).

The German Banking Industry Committee also wishes to expressly point out that the ESMA recommendations on the identification of natural persons and additional information would have to be examined closely to determine their compatibility with data protection law. In particular, it is questionable whether they are proportionate (see above). If natural persons who are not covered by European data protection rules would also have to be identified, the extent to which the proposals are consistent with existing (national) data protection law of the third countries, in addition, needs to be examined.

The German Banking Industry Committee supports the usage of Legal Identity Identifiers (LEIs) for the identification of legal persons, but would like to point out that there are still issues relating to the usage of LEIs under EMIR which will consequently also apply to MiFIR. Furthermore, it appears that there are inconsistencies regarding identification of asset managers versus the fund itself. Under EMIR, the fund needs to be identified, whilst under MiFID I currently the asset manager is identified. This needs to be clarified and harmonised.

Q552: What are your views on the general approach to determining the relevant trader to be identified?

The German Banking Industry Committee considers the approach to be generally acceptable. Consideration could be given to identifying traders in the same way as other natural persons. At the same time, we assume that the field would not have to be populated in every report, as there are transactions that do not allow attribution to a single trader. An example is orders that a client places online.

Any requirement to report traders would make extensive adjustments necessary, as details of traders are not available in back office systems. Investment firms will therefore have to include other systems in the generation of reporting data.

Q554: Do you have any views on how to identify the relevant trader in the cases of Direct Market Access and Sponsored Access?

The German Banking Industry Committee wishes to point out that implementation in practice is likely to raise numerous questions, as this is a complex issue.

We believe that trades might be identifiable by providing the User Access Code. Details of the trader are currently not available within the system landscape, however, and would require additional set-up efforts.

Q555: Do you believe that the approach outlined above is appropriate for identifying the 'computer algorithm within the investment firm responsible for the investment decision and the execution of the transaction'? If not, what difficulties do you see with the approach and what do you believe should be an alternative approach?

Because of national legislation, Germany is the only EU Member State that has already gathered extensive experience in identification of computer algorithms. This experience should be taken into account by ESMA. It will help to prevent problems that have already been resolved at national level cropping up again at EU level.

In Germany, the algorithm has to be identified to the exchange to which the order is sent: a single field is used for this in Germany. Because of the distinction between decision algorithm and execution algorithm, ESMA, on the other hand, proposes that two fields should be populated. The German Banking Industry Committee does not believe this is necessary; a single field would be more appropriate.

Q556: 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.

MiFIR creates new market structures, including pre-trade and post-trade transparency waivers. It is still too early at present for a reliable assessment of the practical implications. Hence, the implications for reporting cannot be fully assessed either. We assume that numerous practical problems will crop up, so that it is unclear whether the designations in brackets for applicable waivers (e.g. R, NTV, NTI, NTC, L, S, I) are the data that are to be indicated in reports and how combinations would have to be handled. We wish to stress that this assessment is not final.

Q557: Do you agree with ESMA's proposed approach to adopt a simple short sale flagging approach for transaction reports? If not, what other approaches do you believe ESMA should consider and why?

There is no simple way of calculating a prohibited short sell activity. It always depends on various factors which have to be looked at individually. This cannot be dealt with in mass data reporting.

<u>Paras. 99 – 101, option 1:</u>

1. Retail clients are out of scope because both online brokerage and manual executions prevent them from short selling. Any sell transaction must be on a covered basis. Short selling is technically not possible and therefore there does not need to be a dialogue on it.
2. Professional clients typically execute through DMA where there is no dialogue with the broker. It is not possible to ask every client for every sell of sovereign bonds or equities whether the transaction is a short sell or will result in a short position.
3. Where there is still voice execution, it is highly unlikely that a client will voluntarily disclose the fact that he is about to breach Regulation (EU) 236/2012 on short selling (SSR).

<u>Paras. 99 – 101, option 2:</u>

1. In the case of retail clients, the broker does calculate whether a transaction entered into the online brokerage system would result in a short position and the broker will generally

prevent the client from doing so, ignoring whether the client may have positions with a different broker.

2. For professional clients, there are many more impediments preventing the broker from performing a reliable calculation:
    a. Securities in the settlement process. The client owns them legally but they are not yet in the account. How are they to be treated?
    b. Securities with another broker cannot be included in the calculation.
    c. In the case of proprietary trading, how should a short position be calculated? On a trading book, desk, department, branch or legal entity level? The higher you go, the more complex and unreliable the calculation is.
    d. The broker might not be the custodian at all. In this case, he has no visibility whatsoever and every sell transaction would appear as a naked short sell.
    e. If a settlement fails, this might be the result of a naked short sell, but it can also be the result of a technical failure which is remedied within a short period of time.
    f. The only reliable information to indicate that a short sale prohibited under the SSR has occurred is when the investment firm or broker starts the buy-in process. This date is typically 5-10 days after the reportable transaction was concluded. Therefore, reporting entities should not be required to report in t+1 what is only reliable information in t+10.
    g. Taking this thought process further, the impact of imposing the short selling calculation to be done by the broker might force the broker to only allow client transactions on a covered basis, i.e. the speed of execution and the market liquidity would be seriously compromised.
    h. When trying to calculate a net short position, it may be necessary to include positions from different time zones. According to Article 9(2) SSR the relevant time is that of the Member State of the relevant NCA to whom the relevant position must be notified. This is feasible, but adds to the complexity of the calculation to be implemented.
    i. Finally, it is highly questionable if a client can be required to pro-actively report himself to an NCA for prohibited short trading.

None of the two options is able to produce reliable information allowing the investment firm or broker to determine if a short sell that is prohibited under the SSR has taken place.

<u>Para. 102:</u>
This idea implies that, from an NCA point of view, it might be acceptable to factor in the possibility for the broker to produce inaccurate transaction reports. However, from a broker or investment firm perspective, this is clearly not acceptable and would expose the investment firm/broker to considerable legal risks. If transaction reporting is based on vague assumptions, every "yes" in field 81 has the potential of leading to further investigations and allegations. Also, how can inaccurate transaction reporting from one investment firm be balanced against potentially inaccurate transaction reporting from another investment firm?

However, it might be possible to adjust transaction reports by way of cancel/correct as soon as the reporting financial institution has reliable information about a prohibited short sale. The downside to this approach clearly is the fact that, technically, every line of transaction reporting would be produced conditionally, as any transaction reported in t+1 might turn out to be an uncovered short sale in t+10.

It is assumed that for proprietary business covered short sales are expected to be reported. It is unclear at which level such covered short sales will need to be determined, e.g. book, desk, entity, etc. Also, larger entities might face substantial difficulties in identifying covered short sales due

to the employed system environment and the point in time the covered short sale is to be identified. It is assumed this will be at execution.

Q558: Which option do you believe is most appropriate for flagging short sales? Alternatively, what other approaches do you think ESMA should consider and why?

Considering the above, ESMA should **not** request reporting firms to produce a short selling flag and should continue to rely on existing mechanisms. Investment firms and brokers are today required to monitor client activity in this regard and to file suspicious transactions in case they detect short sells prohibited by SSR. The advantage of this solution is clear: this is the only method of producing reports that can then be used for further investigations.

With regard to para. 93 (two fields for a designation to identify short sales), see our reply to Q550.

Q559: What are your views regarding the two options above?

The German Banking Industry Committee agrees with option 1. The investment firm should not report any potential short selling if it is buying from a client and selling to the market in a principal capacity. However, the timing problem remains: in t+1, the investment firm does not know whether the transaction is a short sell because it will only know at t+2 settlement if what it has bought from a client will be settled as planned. And it will not know before 10 days later if the delay will result in a buy-in.

Q560: Do you agree with ESMA's proposed approach in relation to reporting aggregated transactions? If not, what other alternative approaches do you think ESMA should consider and why?

In line with the replies to Q557 - Q559, in the case of aggregated transactions it is even more difficult to determine if a sell was prohibited short selling. Therefore, investment firms should not be required to report any but use the existing reporting in the form of suspicious transactions as soon as there is reliable evidence as to which of the aggregated sell transactions was a prohibited short sell.

Q561: Are there any other particular issues or trading scenarios that ESMA should consider in light of the short selling flag?

Please see our replies to Q557 - 560.

Q562: Do you agree with ESMA's proposed approach for reporting financial instruments over baskets? If not, what other approaches do you believe ESMA should consider and why?

The German Banking Industry Committee would like to again stress the need for a golden source of reportable financial instruments. We appreciate the difficulties this might create for ESMA and understand that ESMA wishes to ensure that no reporting gap is created by publishing a golden source. However, we believe that each investment firm will come up against the same issue as described by ESMA in the Discussion Paper. Therefore, we would welcome the opportunity to discuss this topic in more detail with ESMA in order to find an industry solution. Also, such data on baskets might not be available in the market for use in determining instruments over baskets.

Only if reporting requirements are sufficiently clear and precise can investment firms – as indicated by ESMA in para.16 – duly comply with the requirements.

Q563: Which option is preferable for reporting financial instruments over indices? Would you have any difficulty in applying any of the three approaches, such as determining the weighting of the index or determining whether the index is the underlying in another financial instrument? Alternatively, are there any other approaches which you believe ESMA should consider?

Like the basket approach, the first option is a clear-cut, uniform approach and is therefore preferable. As regards the second option, calculating the index weighting is in principle possible, but imposes an extra burden and harbours the danger that it will alter the reporting requirement where the composition of the index changes. Under the third option, extensive, time-consuming data retrieval is also needed to assess the reporting requirement. The German Banking Industry Committee therefore favours the first option (cf. para. 124 i).

ESMA should at least publish a list of relevant indices.

Q564: Do you think the current MiFID approach to branch reporting should be maintained?

The idea of making the host NCA responsible for the enforcement of reporting requirements according to Article 26 of MiFIR calls for a fully harmonised reporting mechanism. However, it should be the investment firm's responsibility in the first place to ensure that its branches provide the head office with the right data.

The German Banking Industry Committee believes that the suggested approach, i.e. reporting to be carried out by the head office, including all branches, to the home regulator is sensible. The approach would remove the inconsistent application of MiFID rules by NCAs with regard to branch reporting that we see today.

Q565: Do you anticipate any difficulties in implementing the branch reporting requirement proposed above?

The German Banking Industry Committee expects this new approach to be a major project, as it will require harmonisation and centralisation of front-end to back-end software, client and product static data and the completely new design of a TR system. We also anticipate major legal impediments, as the new rules raise a number of data protection issues that will have to be addressed in all EU Member States.

Q566: Is the proposed list of criteria sufficient, or should ESMA consider other/extra criteria?

It is up to ESMA and the NCAs to determine which NCAs should receive which transaction reports once they have been received by the home-country regulator. Alternatively, a centralised database could be suitable for this purpose if it allows the NCAs to retrieve data in a standardised quality.

Q567: Which format, not limited to the ones above, do you think is most suitable for the purposes of transaction reporting under Article 26 of MiFIR? Please provide a detailed explanation including cost-benefit considerations.

The German Banking Industry Committee believes that making use of already established reporting formats such as those implemented under EMIR might be a sensible approach. The formats in use today, e.g. CSV and SML, are also appropriate.

8.2. Obligation to supply financial instrument reference data

Q577: What criteria would you consider appropriate to establish the RCA for instruments that are currently not covered by the RCA rule?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, wishes to point out that, in the case of OTC derivatives, extensive data reporting already takes place under EMIR through the requirement to report to trade repositories.

In the case of instruments not traded on trading venues that are not issued by the systematic internalisierer (SI) itself, we believe that reporting reference data to the NCA is problematic for the following reasons:

1. The SI is not the original source of the information. The SI can only obtain information direct from the issuer or from data vendors.
2. Issuers are not required to make necessary information available to SIs promptly.
3. The SI would be unable to verify information provided by a data vendor on a reasonable efforts basis within a reasonable time. Publication of non-verified, incorrect information would expose the SI to uncontrollable liability risks vis-à-vis issuers and market participants.
4. Should SIs be designated for sub-categories of financial instruments, it would be unacceptable if the SI were also required to monitor changes in information on financial instruments which are included in the sub-category but for which it does not currently make any quotes and possibly does not even intend to do so anytime.

The obligation to provide reference data for financial instruments not traded on trading venues should, for the aforementioned reasons, only apply to the SI's own securities issues. ESMA should examine to what extent the information requirements are already covered by existing data vendors (e.g. WM-Datenservice).

8.3. Obligation to maintain records of orders

8.4. Requirement to maintain records of orders for firms engaging in high-frequency algorithmic trading techniques (Art. 17(7) of MIFID II)[1]

Q600: Do you foresee any difficulties with the elements of data to be stored proposed in the above paragraph? If so, please elaborate.

The German Banking Industry, which represents more than 2,000 banks in Germany, is in favour of restricting the record-keeping requirement to executed orders. The requirement to

[1] Please note that this section has to be read in conjunction with the section on the "Record keeping and co-operation with national competent authorities" in this DP.

keep records of non-binding quotes is unreasonable, as these do not have the ability to influence markets. They do not create a direct risk situation. Their exclusion is also called for from a cost-benefit angle, as the number of non-binding quotes exceeds the number of actual orders many times over (50:1 and more).

8.5. Synchronisation of business clocks

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, believes that, when assessing ESMA's proposals, a clear distinction should be made between the question of synchronised business clocks and the question of how exact system timestamping must be. Whilst – as ESMA itself already says – synchronisation to a single source "might be costly and technically challenging" (cf. para. 8.ii), any obligation to synchronise the systems to the microsecond level would be completely disproportionate (for details, see our reply to Q603 below).

Q602: Would you prefer a synchronisation at a national or at a pan-European level? Please elaborate. If you would prefer synchronisation to a single source, please indicate which would be the reference clock for those purposes.

Despite the aforementioned costs and challenges, the German Banking Industry Committee has no objections to synchronisation at pan-European level.

Q603: Do you agree with the requirement to synchronise clocks to the microsecond level?

The German Banking Industry Committee is opposed to any general requirement to synchronise systems to the microsecond level. At present, investment firms' business clocks are usually accurate to one hundredth of a second. Because of the broad scope proposed by ESMA (see in this connection para. 13), synchronisation of clocks would affect numerous systems or interfaces (up to several thousand) within **every** investment firm or group. Conversion from hundredths of a second to milliseconds would therefore already impose a considerable burden. Conversion to microseconds would be completely disproportionate and would necessitate the replacement or expansion of existing IT hardware and software facilities. This would require **every** large investment firm or every group to invest heavily, in some cases in the three-digit million euro range. Such conversion would be completely disproportionate particularly also for almost all investment firms that do not conduct high-frequency trading. In the interests of proportionality, the German Banking Industry Committee is therefore in favour of retaining the existing clock accuracy standard of one hundredth of a second.

Q604: Which would be the maximum divergence that should be permitted with respect to the reference clock? How often should any divergence be corrected?

The accuracy that can be obtained by using the Network Time Protocol (NTP) and connecting to GPS or PTB Braunschweig's (the German national metrology institute's) atomic clock (through a medium-wave time signal) should apply in this respect.

9. Post-trading issues

9.1. Obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP)

Q606: In particular, who are currently responsible, in the ETD and OTC context, for obtaining the information required for clearing and for submitting the transaction to a CCP for clearing? Do you consider that anything should be changed in this respect? What are the current timeframes, in the ETD and OTC context, between the conclusion of the contract and the exchange of information required for clearing on one hand and on the other hand between the exchange of information and the submission of the transaction to the CPP?

In the view of the German Banking Industry Committee, which represents more than 2,000 banks in Germany, the middleware (trade confirmation platforms such as MarkitWire) is a bottleneck in the time flow.

Q608: When does the CM assume the responsibility of the transactions? At the time when the CCP accepts the transaction or at a different moment in time?

Acceptance of the contract for CCP clearing produces the final “cleared” status for the respective derivatives trade. The CM thus also assumes responsibility at this point in time

Q609: What are your views on how practicable it would be for CM to validate the transaction before their submission to the CCP? What would the CM require for this purpose and the timeframe required? How would this validation process fit with STP?

Validation is in principle important. Staggered assessment of the transaction by the CM before its submission to the CCP may make sense, but because of the highly automated processes, with simultaneous CCP and the CM validation, it does not deliver any significant benefit.

Q611: What are your views on the systems, procedures, arrangements and timeframe for (1) the submission of a transaction to the CCP and (2) the acceptance or rejection of a transaction by the CCP in view of the operational process required for a strong product validation in the context of ETD and OTC? How should it compare with the current process and timeframe? Does the current practice envisage a product validation?

Yes, the current practice envisages a product validation (that is highly important in our view). Overall, the process currently established for CCPs and market participants appears to be quick and stable. There is no need for any discussion on changing it. See also Q609.

Q613: What are your views on the treatment of rejected transactions for transactions subject to the clearing requirement and those cleared on a voluntary basis? Do you agree that the framework should be set in advance?

When setting standards, the IOSCO paper on the “Requirements for Mandatory Clearing” of February 2012 should be taken into account, as the market has used these recommendations as a guide so far. As also recommended in the IOSCO paper, an exemption threshold for small tranasctions (EUR 500,000) should be introduced.

With regard to the clearing periods, it should be borne in mind that the further away the party concerned is from the clearing house, the longer these periods should be. For example, an intraday clearing requirement for end clients does not appear possible, as the client clearing model is geared to t+1.

The general conditions under which a CCP can refuse a transaction should be defined precisely.

9.2. Indirect Clearing Arrangements

Q615: In your view, how should it compare with current practice?

The German Banking Industry Committee, which represents more than 2,000 banks in Germany, favours a uniform approach under EMIR and MiFID/MiFIR.