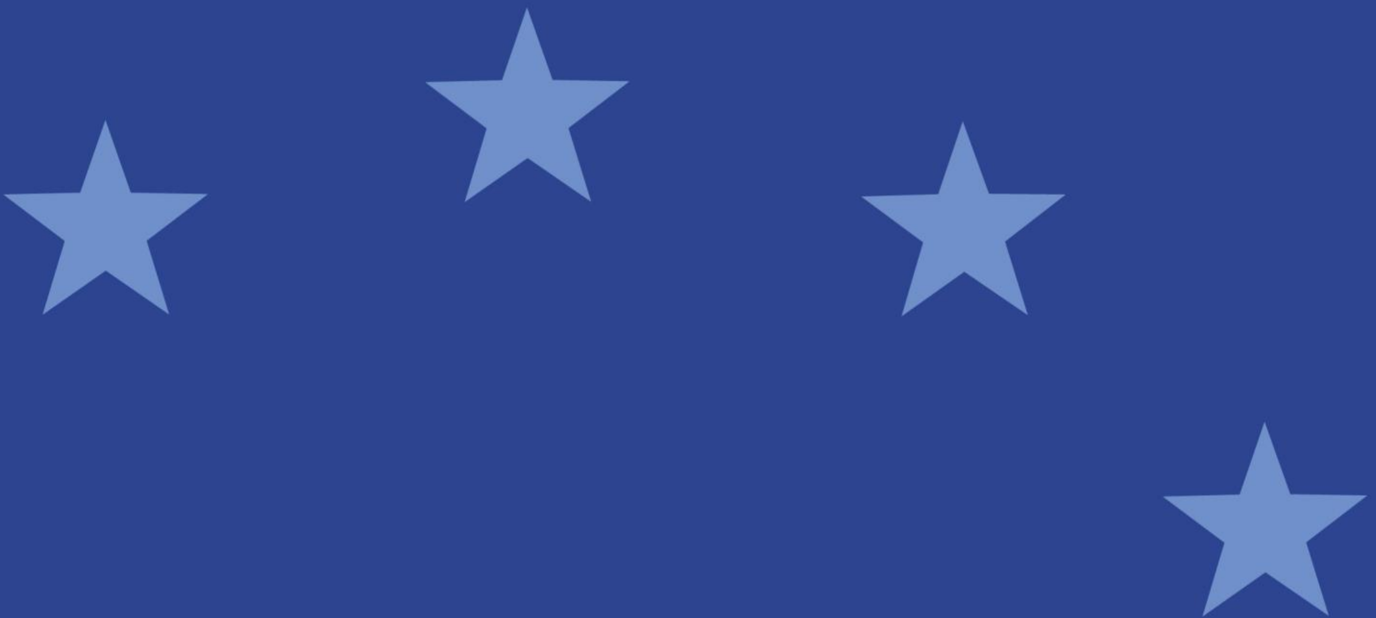
Reply form for the ESMA MiFID II/MiFIR Discussion Paper



22 May 2014

European Securities and Markets Authority

Date: 22 May 2014

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

Q1: Do you agree that the existing work/standards set out in points Error! Reference source not found. **and** Error! Reference source not found. Error! Reference source not found. **provide a valid basis on which to develop implementing measures in respect of the authorisation of investment firms?**

<ESMA_QUESTION_1>
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<ESMA_QUESTION_1>

Q2: What areas of these existing standards do you consider require adjustment, and in what way should they be adjusted?

<ESMA_QUESTION_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_2>

Q3: Do you consider that the list of information set out in point Error! Reference source not found. **should be provided to Home State NCAs? If not, what other information should ESMA consider?**

<ESMA_QUESTION_3>
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<ESMA_QUESTION_3>

Q4: Are there any other elements which may help to assess whether the main activities of an applicant investment firm is not in the territory where the application is made?

<ESMA_QUESTION_4>
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<ESMA_QUESTION_4>

Q5: How much would one-off costs incurred during the authorisation process increase, compared to current practices, in order to meet the requirements suggested in this section?

<ESMA_QUESTION_5>
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<ESMA_QUESTION_5>

Q6: Are there any particular items of information suggested above that would take significant time or cost to produce and if so, do you have alternative suggestions that would reduce the time/cost for firms yet provide the same assurance to NCAs?

<ESMA_QUESTION_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_6>

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

Q7: Do you agree that development of technical standards required under Articles 34 and 35 of MiFID II should be based on the existing standards and forms contained in the CESR Protocol on MiFID Notifications (CESR/07-317c)? If not, what are the specific areas in the existing CESR standards requiring review and adjustment?

<ESMA_QUESTION_7>
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<ESMA_QUESTION_7>

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.

<ESMA_QUESTION_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_8>

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.

<ESMA_QUESTION_9>
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<ESMA_QUESTION_9>

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.)?

<ESMA_QUESTION_10>
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<ESMA_QUESTION_10>

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?

<ESMA_QUESTION_11>
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<ESMA_QUESTION_11>

Q12: Please provide an estimate of the cost of the necessary IT development for the production and the publication of such reporting.

<ESMA_QUESTION_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_12>

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.

<ESMA_QUESTION_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_13>

Q14: Is the volume of orders received and executed a good indicator for investment firms to compare execution venues? Would the VBBO in a single stock published at the same time also be a good indicator by facilitating the creation of a periodic European price benchmark? Are there other indicators to be considered?

<ESMA_QUESTION_14>
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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?

<ESMA_QUESTION_15>
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<ESMA_QUESTION_15>

Q16: Do you consider that this requirement will generate any additional cost? If yes, could you specify in which areas and provide an estimation of these costs?

<ESMA_QUESTION_16>
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<ESMA_QUESTION_16>

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)?

<ESMA_QUESTION_17>
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<ESMA_QUESTION_17>

Q18: Do you agree that a benchmark price is needed to evaluate execution quality? Would a depth-weighted benchmark that relates in size to the executed order be appropriate or, if not, could you provide alternative suggestions together with justification?

<ESMA_QUESTION_18>
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<ESMA_QUESTION_18>

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?

<ESMA_QUESTION_19>
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<ESMA_QUESTION_19>

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?

<ESMA_QUESTION_20>
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<ESMA_QUESTION_20>

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

<ESMA_QUESTION_21>
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<ESMA_QUESTION_21>

Q22: Are there other criteria (qualitative or quantitative) that are particularly relevant (e.g. market structures providing for a guarantee of settlement of the trades vs OTC deals; robustness of the market infrastructure due to the existence of circuit breakers)?

<ESMA_QUESTION_22>
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<ESMA_QUESTION_22>

Q23: Is data on orders cancelled useful and if so, on what time basis should it be computed (e.g. within a single trading day)?

<ESMA_QUESTION_23>
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<ESMA_QUESTION_23>

Q24: Are there any adjustments that need to be made to the above execution quality metrics to accommodate different market microstructures?

<ESMA_QUESTION_24>
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<ESMA_QUESTION_24>

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?

<ESMA_QUESTION_25>
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<ESMA_QUESTION_25>

Q26: Please provide an estimate of the costs of production and publication of all of the above data and, the IT developments required? How could these costs be minimised?

<ESMA_QUESTION_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_26>

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.

<ESMA_QUESTION_27>
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<ESMA_QUESTION_27>

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"?

<ESMA_QUESTION_28>
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<ESMA_QUESTION_28>

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?

<ESMA_QUESTION_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_29>

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?

<ESMA_QUESTION_30>
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<ESMA_QUESTION_30>

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.

<ESMA_QUESTION_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_31>

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?

<ESMA_QUESTION_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_32>

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?

<ESMA_QUESTION_33>
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<ESMA_QUESTION_33>

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.

<ESMA_QUESTION_34>
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<ESMA_QUESTION_34>

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

<ESMA_QUESTION_35>
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<ESMA_QUESTION_35>

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?

<ESMA_QUESTION_36>
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<ESMA_QUESTION_36>

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?

<ESMA_QUESTION_37>
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<ESMA_QUESTION_37>

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?

<ESMA_QUESTION_38>
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<ESMA_QUESTION_38>

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?

<ESMA_QUESTION_39>
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<ESMA_QUESTION_39>

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?

<ESMA_QUESTION_40>
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<ESMA_QUESTION_40>

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?

<ESMA_QUESTION_41>
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<ESMA_QUESTION_41>

Q42: If this approach is not viable how should these classes be defined? What elements should be taken into consideration for that classification? Please explain the rationale of your classification. Is there a need to delay the publication of the reporting for particular class of financial instruments? If the schedule has to be defined, what timeframe would be the most relevant?

<ESMA_QUESTION_42>
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<ESMA_QUESTION_42>

Q43: Is any additional data required (for instance, on number of trades or total value of orders routed)?

<ESMA_QUESTION_43>
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<ESMA_QUESTION_43>

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

<ESMA_QUESTION_44>
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<ESMA_QUESTION_44>

3. Transparency

3.1. Pre-trade transparency - Equities

Q45: What in your view would be the minimum content of information that would make an indication of interest actionable? Please provide arguments with your answer.

<ESMA_QUESTION_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_45>

Q46: Do you agree with ESMA's opinion that Table 1 of Annex II of Regulation 1287/2006 is still valid for shares traded on regulated markets and MTFs? Please provide reasons for your answer.

<ESMA_QUESTION_46>
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<ESMA_QUESTION_46>

Q47: Do you agree with ESMA's view that Table 1 of Annex II of Regulation 1287/2006 is appropriate for equity-like instruments traded on regulated markets and MTFs? Are there other trading systems ESMA should take into account for these instruments? Please provide reasons for your answer.

<ESMA_QUESTION_47>
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<ESMA_QUESTION_47>

Q48: Do you agree with ESMA's view that ADT remains a valid measure for determining when an order is large in scale compared to normal market size? If not, what other measure would you suggest as a substitute or complement to the ADT? Please provide reasons for your answer.

<ESMA_QUESTION_48>
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<ESMA_QUESTION_48>

Q49: Do you agree that ADT should be used as an indicator also for the MiFIR equity-like products (depositary receipts, ETFs and certificates)? Please provide reasons for your answers.

<ESMA_QUESTION_49>
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<ESMA_QUESTION_49>

Q50: Do you think there is merit in creating a new ADT class of 0 to €100,000 with an adequate new large in scale threshold and a new ADT class of €100,000 to €500,000? At what level should the thresholds be set? Please provide reasons for your answer.

<ESMA_QUESTION_50>
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<ESMA_QUESTION_50>

Q51: Do you think there is merit in creating new ADT classes of €1 to €5m and €5 to €25m? At what level should the thresholds be set? Please provide reasons for your answer.

<ESMA_QUESTION_51>
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<ESMA_QUESTION_51>

Q52: Do you think there is merit in creating a new ADT class for 'super-liquid' shares with an ADT in excess of €100m and a new class of €50m to €100m? At what level should the thresholds be set?

<ESMA_QUESTION_52>
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<ESMA_QUESTION_52>

Q53: What comments do you have in respect of the new large in scale transparency thresholds for shares proposed by ESMA?

<ESMA_QUESTION_53>
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<ESMA_QUESTION_53>

Q54: Do you agree with the ADT ranges selected? Do you agree with the large in scale thresholds set for each ADT class? Which is your preferred option? Would you calibrate the ADT classes and related large in scale thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).

<ESMA_QUESTION_54>
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<ESMA_QUESTION_54>

Q55: Which is your preferred scenario? Would you calibrate the ADT classes differently? Please provide reasons for your answers.

<ESMA_QUESTION_55>
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<ESMA_QUESTION_55>

Q56: Do you agree that the same ADT classes should be used for both pre-trade and post-trade transparency? Please provide reasons for your answers.

<ESMA_QUESTION_56>
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<ESMA_QUESTION_56>

Q57: How would you calibrate the large in scale thresholds for each ADT class for pre- and post-trade transparency? Please provide reasons for your answers.

<ESMA_QUESTION_57>
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<ESMA_QUESTION_57>

Q58: Do you agree with ESMA's view that the large in scale thresholds (i.e. the minimum size of orders qualifying as large in scale and the ADT classes) should be subject to a review no earlier than two years after MiFIR and Level 2 apply in practice?

<ESMA_QUESTION_58>
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<ESMA_QUESTION_58>

Q59: How frequently do you think the calculation per financial instrument should be performed to determine within which large in scale class it falls? Which combination of frequency and period would you recommend?

<ESMA_QUESTION_59>
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<ESMA_QUESTION_59>

Q60: Do you agree with ESMA's opinion that stubs should become transparent once they are a certain percentage below the large in scale thresholds? If yes, at what percentage would you set the transparency threshold for large in scale stubs? Please provide reasons to support your answer.

<ESMA_QUESTION_60>
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<ESMA_QUESTION_60>

Q61: Do you agree with ESMA's view that the most relevant market in terms of liquidity should be the trading venue with the highest turnover in the relevant financial instrument? Do you agree with an annual review of the most relevant market in terms of liquidity? Please give reasons for your answer.

<ESMA_QUESTION_61>
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<ESMA_QUESTION_61>

Q62: Do you agree with ESMA's view on the different ways the member or participant of a trading venue can execute a negotiated trade? Please give reasons for your answer.

<ESMA_QUESTION_62>
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<ESMA_QUESTION_62>

Q63: Do you agree that the proposed list of transactions are subject to conditions other than the current market price and do not contribute to the price formation process? Do you think that there are other transactions which are subject to conditions other than the current market price that should be added to the list? Please provide reasons for your answer.

<ESMA_QUESTION_63>
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<ESMA_QUESTION_63>

Q64: Do you agree that these are the two main groups of order management facilities ESMA should focus on or are there others?

<ESMA_QUESTION_64>
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<ESMA_QUESTION_64>

Q65: Do you agree with ESMA's general assessment on how to design future implementing measures for the order management facility waiver? Please provide reasons for your answer.

<ESMA_QUESTION_65>
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<ESMA_QUESTION_65>

Q66: Are there other factors that need to be taken into consideration for equity-like instruments? Please provide reasons for your answer.

<ESMA_QUESTION_66>
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<ESMA_QUESTION_66>

Q67: Do you agree that the minimum size for a stop order should be set at the minimum tradable quantity of shares in the relevant trading venue? Please provide reasons for your answer.

<ESMA_QUESTION_67>
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<ESMA_QUESTION_67>

Q68: Are there additional factors that need to be taken into consideration for equity-like instruments?

<ESMA_QUESTION_68>
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<ESMA_QUESTION_68>

Q69: Which minimum overall sizes for iceberg orders are currently employed in the markets you use and how are those minimum sizes determined?

<ESMA_QUESTION_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_69>

Q70: Which minimum sizes and which methods for determining them should be prescribed via implementing measures? To what level of detail should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?

<ESMA_QUESTION_70>
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<ESMA_QUESTION_70>

Q71: Which methods for determining the individual peak sizes of iceberg orders are currently employed in European markets?

<ESMA_QUESTION_71>
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<ESMA_QUESTION_71>

Q72: Which methods for determining peaks should be prescribed by implementing measures, for example, should these be purely abstract criteria or a measure expressed in percentages against the overall size of the iceberg order? To what level of details should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?

<ESMA_QUESTION_72>
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<ESMA_QUESTION_72>

Q73: Are there additional factors that need to be taken into consideration for equity-like instruments?

<ESMA_QUESTION_73>
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<ESMA_QUESTION_73>

3.2. Post-trade transparency - Equities

Q74: Do you agree that the content of the information currently required under existing MiFID is still valid for shares and applicable to equity-like instruments? Please provide reasons for your answer.

<ESMA_QUESTION_74>
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<ESMA_QUESTION_74>

Q75: Do you think that any new field(s) should be considered? If yes, which other information should be disclosed?

<ESMA_QUESTION_75>
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<ESMA_QUESTION_75>

Q76: Do you think that the current post-trade regime should be retained or that the identity of the systematic internaliser is relevant information which should be published? Please provide reasons for your response, distinguishing between liquid shares and illiquid shares.

<ESMA_QUESTION_76>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_76>

Q77: Do you agree with the proposed list of identifiers? Please provide reasons for your answer.

<ESMA_QUESTION_77>
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<ESMA_QUESTION_77>

Q78: Do you think that specific flags for equity-like instruments should be envisaged? Please justify your answer.

<ESMA_QUESTION_78>
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<ESMA_QUESTION_78>

Q79: Do you support the proposal to introduce a flag for trades that benefit from the large in scale deferral? Please provide reasons for your response.

<ESMA_QUESTION_79>
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<ESMA_QUESTION_79>

Q80: What is your view on requiring post-trade reports to identify the market mechanism, the trading mode and the publication mode in addition to the flags for the different types of transactions proposed in the table above? Please provide reasons for your answer.

<ESMA_QUESTION_80>
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<ESMA_QUESTION_80>

Q81: For which transactions captured by Article 20(1) would you consider specifying additional flags as foreseen by Article 20(3)(b) as useful?

<ESMA_QUESTION_81>
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<ESMA_QUESTION_81>

Q82: Do you agree with the definition of "normal trading hours" given above?

<ESMA_QUESTION_82>
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<ESMA_QUESTION_82>

Q83: Do you agree with the proposed shortening of the maximum permissible delay to 1 minute? Do you see any reason to have a different maximum permissible deferral of publication for any equity-like instrument? Please provide reasons for your answer

<ESMA_QUESTION_83>
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<ESMA_QUESTION_83>

Q84: Should the deferred publication regime be subject to the condition that the transaction is between an investment firm dealing on own account and a client of the firm? Please provide reasons for your answer.

<ESMA_QUESTION_84>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_84>

Q85: Which of the two options do you prefer in relation to the deferral periods for large in scale transactions (or do you prefer another option that has not been proposed)? Please provide reasons for your answer

<ESMA_QUESTION_85>
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<ESMA_QUESTION_85>

Q86: Do you see merit in adding more ADT classes and adjusting the large in scale thresholds as proposed? Please provide alternatives if you disagree with ESMA's proposal

<ESMA_QUESTION_86>
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<ESMA_QUESTION_86>

Q87: Do you consider the thresholds proposed as appropriate for SME shares?

<ESMA_QUESTION_87>
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<ESMA_QUESTION_87>

Q88: How frequently should the large in scale table be reviewed? Please provide reasons for your answer

<ESMA_QUESTION_88>
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<ESMA_QUESTION_88>

Q89: Do you have concerns regarding deferred publication occurring at the end of the trading day, during the closing auction period?

<ESMA_QUESTION_89>
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<ESMA_QUESTION_89>

Q90: Do you agree with ESMA's preliminary view of applying the same ADT classes to the pre-trade and post-trade transparency regimes for ETFs? Please provide reasons for your answer.

<ESMA_QUESTION_90>
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<ESMA_QUESTION_90>

3.3. Systematic Internaliser Regime - Equities

Q91: Do you support maintaining the existing definition of quotes reflecting prevailing market conditions? Please provide reasons for your answer.

<ESMA_QUESTION_91>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_91>

Q92: Do you support maintaining the existing table for the calculation of the standard market size? If not, which of the above options do you believe provides the best trade-off between maintaining a sufficient level of transparency and ensuring that obligations for systematic internalisers remain reasonable and proportionate? Please provide reasons for your answer.

<ESMA_QUESTION_92>
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<ESMA_QUESTION_92>

Q93: Do you agree with the proposal to set the standard market size for depositary receipts at the same level as for shares? Please provide reasons for your answer.

<ESMA_QUESTION_93>
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<ESMA_QUESTION_93>

Q94: What are your views regarding how financial instruments should be grouped into classes and/or how the standard market size for each class should be established for certificates and exchange traded funds?

<ESMA_QUESTION_94>
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<ESMA_QUESTION_94>

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'?

<ESMA_QUESTION_95>
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<ESMA_QUESTION_95>

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.

<ESMA_QUESTION_96>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_96>

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.

<ESMA_QUESTION_97>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_97>

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

Q98: Do you agree with the proposed description of structured finance products? If not, please provide arguments and suggestions for an alternative.

<ESMA_QUESTION_98>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_98>

Q99: For the purposes of transparency, should structured finance products be identified in order to distinguish them from other non-equity transferable securities? If so, how should this be done?

<ESMA_QUESTION_99>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_99>

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.

<ESMA_QUESTION_100>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_100>

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?

<ESMA_QUESTION_101>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_101>

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

<ESMA_QUESTION_102>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_102>

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?

<ESMA_QUESTION_103>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_103>

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

<ESMA_QUESTION_104>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_104>

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

<ESMA_QUESTION_105>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_105>

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

<ESMA_QUESTION_106>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_106>

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

<ESMA_QUESTION_107>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_107>

Q108: Do you have any proposals for appropriate spread thresholds? Please provide figures and reasons.

<ESMA_QUESTION_108>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_108>

Q109: How could the data necessary for computing the average spreads be obtained?

<ESMA_QUESTION_109>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_109>

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

<ESMA_QUESTION_110>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_110>

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?

<ESMA_QUESTION_111>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_111>

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.

<ESMA_QUESTION_112>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_112>

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

<ESMA_QUESTION_113>
Whilst we strongly support ESMA's proposal to use the COFIA approach for OTC derivatives, we recognize that the IBIA approach may be more appropriate for exchange traded derivatives (ETD).

ETDs are uniquely identified and have their own specific liquidity properties. They typically form benchmarks in their respective asset classes and therefore do not readily lend themselves to classification into broader classes of homogenous groups. It is typical for regulated markets to offer multiple contracts of the same series simultaneously (typically differentiated by expiry calendar month). Rather than considering each calendar month in isolation, we recommend that ESMA give consideration to defining ETDs as, for example, the “front contract”, the “second contract”, the “third contract”, and so on. ESMA could then perform its liquidity test on these rolling first / second / third contracts, rather than on any given contract in isolation. This has the advantage of allowing certain contracts of the same series to be identified repeatedly as the liquid contract or contracts on a cyclical (typically quarterly) basis. If adopting this approach, we recommend that ESMA give due regard to those ETD series that have liquidity in all calendar months of a series, and those ETD series that only have liquidity in the primary quarterly months (March, June, September and December) of the series.

For ETD, the periodical assessment of the liquidity of the instrument should be made monthly. Consideration of the particular instrument under the IBIA approach lends itself to a more precise determination, in particular to ensure that the assessment of liquidity is sufficiently responsive to variations in liquidity over time.
<ESMA_QUESTION_113>

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?

<ESMA_QUESTION_114>
In regard to the lifecycle of exchange traded derivatives (ETDs), we typically observe a lifecycle where, although the regulated market may offer multiple contracts of the same series (typically differentiated by calendar months for expiry), only a subset of the available contracts are liquid. The longest dated contracts are typically least liquid, with liquidity increasing closer to expiry (and in some cases reducing once expiry becomes imminent). As we outlined in our response to Question 113, were ESMA to consider individual ETD contracts individually as rolling contract series (the "front contract", the "second contract", the "third contract", etc. of any given ETD series), ESMA would automatically embed a life-cycle concept into the adopted approach towards ETDs.
<ESMA_QUESTION_114>

Q115: Do you have any proposals on how to form homogenous and relevant classes of financial instruments? Which specifics do you consider relevant for that purpose? Please distinguish between bonds, SFPs and (different types of) derivatives and across qualitative criteria (please refer to Annex 3.6.1).

<ESMA_QUESTION_115>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_115>

Q116: Do you think that, in the context of the liquidity thresholds to be calculated under MiFID II, the classification in Annex 3.6.1 is relevant? Which product types or sub-product types would you be inclined to create or merge? Please provide reasons for your answers

<ESMA_QUESTION_116>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_116>

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

<ESMA_QUESTION_117>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_117>

Q118: Do you agree with the proposed thresholds? If not, please provide rationales and alternatives.

<ESMA_QUESTION_118>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_118>

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

Q119: Do you agree with the description of request-for-quote system? If not, how would you describe a request-for-quote system? Please give reasons to support your answer.

<ESMA_QUESTION_119>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_119>

Q120: Do you agree with the inclusion of request-for-stream systems in the definition of request-for-quote system? Please give reasons to support your answer.

<ESMA_QUESTION_120>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_120>

Q121: Do you think that – apart from request-for-stream systems – other functionalities should be included in the definition of request-for-quote system? If yes, please provide a description of this functionality and give reasons to support your answer.

<ESMA_QUESTION_121>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_121>

Q122: Do you agree with the description of voice trading system? If not, how would you describe a voice trading system?

<ESMA_QUESTION_122>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_122>

Q123: Do you agree with the proposed table setting out different types of trading systems for non-equity instruments?

<ESMA_QUESTION_123>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_123>

Q124: Do you think that the information to be made public for each type of trading system provides adequate transparency for each trading system?

<ESMA_QUESTION_124>
ESMA should give particular thought to the trading of Exchange For Physical transactions ("EFPs"), a type of Package Transaction consisting of at least one transaction in an Exchange Traded Derivative plus a transaction in at least one other instrument, particularly where the size of the ETD component is below the relevant Large-in-Scale threshold. EFPs are worthy of particular consideration because the only means of trading ETD contracts are to either (a) trade on the order book with full pre-trade transparency, or (b) utilize the wholesale trading facilities generally made available by futures exchanges for the purpose of registering EFPs and Block Trades.

- An Exchange for Physical ("EFP") transaction is a transaction in ETD contracts where there is a simultaneous bona fide offsetting transaction of corresponding size (which could be in a cash bond, OTC swap, forward rate agreement, OTC option, a basket of stocks or another ETD).
- A Block Trade (not generally a Package Transaction but mentioned here for completeness) is a transaction in ETD contracts above a minimum number of traded contracts where negotiation of the transaction occurs bilaterally away from the order-book; Regulated Markets generally permit the entering of such trades into their wholesale trading facilities.

EFPs permit the trading of packages involving ETDs. Simultaneous execution of a package with a single counterparty using a single execution method alleviates the timing and mechanical risks and lowers bid/offer costs to those of the intended risk of the package.

We recommend that ESMA ensure that market participants be able to continue to negotiate EFPs bilaterally, away from the order book of the regulated market, including where the futures transaction is below prescribed Large in Scale sizes. If ESMA makes no provision for this scenario, market participants will be unable to register the futures contracts of such transactions to exchanges. Market participants would have to pay multiple bid-offer spreads in order to execute the entire package, and would be exposed to additional market risk in the event that one component were traded and other legs could not be traded as anticipated. Once registered on the regulated market, the contracts can be made subject to Post Trade transparency (consistent with any general requirements for Post Trade Transparency for Package Transactions) and centrally cleared as per any other ETD contract.

<ESMA_QUESTION_124>

Q125: Besides the trading systems mentioned above, are there additional trading models that need to be considered for pre-trade transparency requirements in the non-equity market space?

<ESMA_QUESTION_125>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_125>

Q126: If you think that additional trading systems should be considered, what information do you think should be made public for each additional type of trading model?

<ESMA_QUESTION_126>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_126>

Q127: Based on your experience, what are the different types of voice trading systems in the market currently? What specific characteristics do these systems have?

<ESMA_QUESTION_127>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_127>

Q128: How do these voice trading systems currently make information public or known to interested parties at the pre-trade stage?

<ESMA_QUESTION_128>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_128>

Q129: Do you agree with ESMA's approach in relation to the content, method and timing of pre-trade information being made available to the wider public?

<ESMA_QUESTION_129>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_129>

Q130: Do you agree with the above mentioned approach with regard to indicative pre-trade bid and offer prices which are close to the price of the trading interests? Please give reasons to support your answer

<ESMA_QUESTION_130>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_130>

Q131: If you do not agree with the approach described above please provide an alternative

<ESMA_QUESTION_131>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_131>

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

Q132: Do you agree with the proposed content of post-trade public information? If not, please provide arguments and suggestions for an alternative.

<ESMA_QUESTION_132>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_132>

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?

<ESMA_QUESTION_133>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_133>

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

<ESMA_QUESTION_134>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_134>

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

<ESMA_QUESTION_135>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_135>

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.

<ESMA_QUESTION_136>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_136>

Q137: Do you think a flag related to coupon payments (ex/cum) should be introduced? If yes, please describe the cases where such flags would be warranted and which information should be captured.

<ESMA_QUESTION_137>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_137>

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.

<ESMA_QUESTION_138>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_138>

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

<ESMA_QUESTION_139>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_139>

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.

<ESMA_QUESTION_140>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_140>

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

<ESMA_QUESTION_141>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_141>

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

<ESMA_QUESTION_142>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_142>

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.

<ESMA_QUESTION_143>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_143>

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.

<ESMA_QUESTION_144>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_144>

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.

<ESMA_QUESTION_145>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_145>

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.

<ESMA_QUESTION_146>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_146>

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.

<ESMA_QUESTION_147>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_147>

Q148: Do you agree that publication in an aggregated form with respect to sovereign debt should be authorised for an indefinite period only in limited circumstances? Please give reasons for your answers. If you disagree, what alternative approaches would you propose?

<ESMA_QUESTION_148>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_148>

Q149: In your view, which criteria and/or conditions would it be appropriate to specify as indicating there is a need to authorise extended/indefinite deferrals for sovereign debt??

<ESMA_QUESTION_149>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_149>

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.

<ESMA_QUESTION_150>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_150>

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?

<ESMA_QUESTION_151>
For exchange traded derivatives (ETDs), ESMA should adopt a similar approach to that adopted for Bonds and Structured Finance Products. As indicated in our response to Q113, we recommend use of IBIA for ETDs. We consider that Option 2 could be made workable for ETD, but we think the overriding requirement, in the interests of consistency, would be for ESMA to adopt the same calibration method for ETD as adopted for Bonds and Structured Finance Products.
<ESMA_QUESTION_151>

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

<ESMA_QUESTION_152>
We support the IBIA approach for exchange traded derivatives (ETDs) for the reasons set out in Q113 above, which we repeat below. We recognise that there are good reasons to adopt a COFIA approach for OTC derivatives and, therefore it may be suitable to have a COFIA approach for some asset classes and an IBIA approach for others. For the same reasons, for the purposes of calibrating Large In Scale, it should be possible for Option 1 to be adopted in respect of one asset class, where this is the most suitable approach taking into consideration the characteristics of that asset class, and Option 2 for other asset classes.

ETDs are uniquely identified and have their own specific liquidity properties. They typically form benchmarks in their respective asset classes and therefore do not readily lend themselves to classification into broader classes of homogenous groups. It is typical for regulated markets to offer multiple contracts of the same series simultaneously (typically differentiated by expiry calendar month). Rather than considering each calendar month in isolation, we recommend that ESMA give consideration to defining ETDs as, for example, the “front contract”, the “second contract”, the “third contract”, and so on. ESMA could then perform its liquidity test on these rolling first / second / third contracts, rather than on any given contract in isolation. This has the advantage of allowing certain contracts of the same series to be identified repeatedly as the liquid contract or contracts on a cyclical (typically quarterly) basis. If adopting this approach, we recommend that ESMA give due regard to those ETD series that have liquidity in all calendar months of a series, and those ETD series that only have liquidity in the primary quarterly months (March, June, September and December) of the series.

For ETD, the periodical assessment of the liquidity of the instrument should be made monthly. Consideration of the particular instrument under the IBIA approach lends itself to a more precise determination, in particular to ensure that the assessment of liquidity is sufficiently responsive to variations in liquidity over time.
<ESMA_QUESTION_152>

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.

<ESMA_QUESTION_153>
Option 2 appears most viable where COFIA is used for the assessment of liquidity. We consider that either option could be made workable where IBIA is used.
<ESMA_QUESTION_153>

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?

<ESMA_QUESTION_154>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_154>

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.

<ESMA_QUESTION_155>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_155>

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

<ESMA_QUESTION_156>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_156>

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

<ESMA_QUESTION_157>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_157>

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.

<ESMA_QUESTION_158>
ESMA should give particular thought to the trading of Exchange For Physical transactions ("EFPs"), a type of Package Transaction consisting of at least one transaction in an Exchange Traded Derivative plus a transaction in at least one other instrument, particularly where the size of the ETD component is below the relevant Large-in-Scale threshold. EFPs are worthy of particular consideration because the only means of trading ETD contracts are to either (a) trade on the order book with full pre-trade transparency, or (b) utilize the wholesale trading facilities generally made available by futures exchanges for the purpose of registering EFPs and Block Trades.

- An Exchange for Physical ("EFP") transaction is a transaction in ETD contracts where there is a simultaneous bona fide offsetting transaction of corresponding size (which could be in a cash bond, OTC swap, forward rate agreement, OTC option, a basket of stocks or another ETD).

- A Block Trade (not generally a Package Transaction but mentioned here for completeness) is a transaction in ETD contracts above a minimum number of traded contracts where negotiation of the transaction occurs bilaterally away from the order-book; Regulated Markets generally permit the entering of such trades into their wholesale trading facilities.

EFPs permit the trading of packages involving ETDs. Simultaneous execution of a package with a single counterparty using a single execution method alleviates the timing and mechanical risks and lowers bid/offer costs to those of the intended risk of the package.

We recommend that ESMA ensure that market participants be able to continue to negotiate EFPs bilaterally, away from the order book of the regulated market, including where the futures transaction is below prescribed Large in Scale sizes. If ESMA makes no provision for this scenario, market participants will be unable to register the futures contracts of such transactions to exchanges. Market participants would have to pay multiple bid-offer spreads in order to execute the entire package, and would be exposed to additional market risk in the event that one component were traded and other legs could not be traded as anticipated. Once registered on the regulated market, the contracts can be made subject to Post Trade transparency (consistent with any general requirements for Post Trade Transparency for Package Transactions) and centrally cleared as per any other ETD contract.

<ESMA_QUESTION_158>

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.

<ESMA_QUESTION_159>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_159>

Q160: Do you think that the condition for deferred publication of large in scale transactions currently applying to shares (transaction is between an investment firm that deals on own account and a client of the investment firm) is applicable to non-equity instruments? Please provide reasons for your answer.

<ESMA_QUESTION_160>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_160>

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

<ESMA_QUESTION_161>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_161>

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.

<ESMA_QUESTION_162>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_162>

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.

<ESMA_QUESTION_163>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_163>

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

<ESMA_QUESTION_164>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_164>

Q165: Would you suggest any other practical ways in which ESMA could take into account whether, at such sizes, liquidity providers would be able to hedge their risks?

<ESMA_QUESTION_165>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_165>

Q166: Do you agree with ESMA's description of how the size specific to the instrument waiver would interact with the large in scale waiver? Please provide reasons for your answer.

<ESMA_QUESTION_166>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_166>

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.

<ESMA_QUESTION_167>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_167>

3.11. The Trading Obligation for Derivatives

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

<ESMA_QUESTION_168>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_168>

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

<ESMA_QUESTION_169>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_169>

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

<ESMA_QUESTION_170>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_170>

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?

<ESMA_QUESTION_171>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_171>

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:

<ESMA_QUESTION_172>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_172>

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?

<ESMA_QUESTION_173>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_173>

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?

<ESMA_QUESTION_174>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_174>

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

<ESMA_QUESTION_175>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_175>

3.12. Transparency Requirements for the Members of ESCB

Q176: Do you agree that the above identifies the types of operations that can be undertaken by a member of the ESCB for the purpose of monetary, foreign exchange and financial stability policy and that are within the MiFID scope? Please give reasons to support your answer.

<ESMA_QUESTION_176>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_176>

Q177: What is your view about the types of transactions for which the member of the ESCB would be able to provide prior notification that the transaction is exempt?

<ESMA_QUESTION_177>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_177>

3.13. Article 22, MiFIR: Providing information for the purposes of transparency and other calculations

Q178: Do you have any comments on the content of requests as outlined above?

<ESMA_QUESTION_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_178>

Q179: Do you have proposals on how NCAs could collect specific information on the number and type of market participants in a product?

<ESMA_QUESTION_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_179>

Q180: Do you consider the frequency of data requests proposed as appropriate?

<ESMA_QUESTION_180>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_180>

Q181: How often should data be requested in respect of newly issued instruments in order to classify them correctly based on their actual liquidity?

<ESMA_QUESTION_181>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_181>

Q182: What is your view of ESMA's initial assessment of the format of data requests and do you have any proposals for making requests cost-efficient and useful for all parties involved?

<ESMA_QUESTION_182>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_182>

Q183: Do you consider a maximum period of two weeks appropriate for responding to data requests?

<ESMA_QUESTION_183>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_183>

Q184: Do you consider a storage time for relevant data of two years appropriate?

<ESMA_QUESTION_184>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_184>

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?

<ESMA_QUESTION_185>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_185>

Q186: Do you agree with the definition of 'trading systems' for trading venues?

<ESMA_QUESTION_186>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_186>

Q187: Do you agree that the requirements under Articles 48 and 49 of MiFID II are only relevant for continuous auction order book systems and quote-driven trading systems and not for the other systems mentioned above?

<ESMA_QUESTION_187>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_187>

Q188: Which hybrid systems, if any, should be considered within the scope of Articles 48 and 49, and why?

<ESMA_QUESTION_188>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_188>

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

<ESMA_QUESTION_189>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf

<ESMA_QUESTION_189>

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

<ESMA_QUESTION_190>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf

<ESMA_QUESTION_190>

Q191: Is the requirement that real time monitoring should take place with a delay of maximum 5 seconds appropriate for the risks inherent to algorithmic trading and from an operational perspective? Should the time frame be longer or shorter? Please state your reasons.

<ESMA_QUESTION_191>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_191>

Q192: Do you agree with the definition of 't+1' in relation to market monitoring of algorithmic trading activity by investment firms?

<ESMA_QUESTION_192>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_192>

Q193: Do you agree with the parameters to be considered to define situations of 'severe market stress' and 'disorderly trading conditions'?

<ESMA_QUESTION_193>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_193>

Q194: Do you agree with the aboveapproach?

<ESMA_QUESTION_194>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_194>

Q195: Is there any element that should be added to/removed from the periodic self-assessment?

<ESMA_QUESTION_195>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_195>

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.

<ESMA_QUESTION_196>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_196>

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

<ESMA_QUESTION_197>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_197>

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.

<ESMA_QUESTION_198>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_198>

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

Q199: Do you agree with a restricted deployment of algorithms in a live environment? Please elaborate

<ESMA_QUESTION_199>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_199>

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

<ESMA_QUESTION_200>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_200>

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

<ESMA_QUESTION_201>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_201>

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.

<ESMA_QUESTION_202>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_202>

Q203: Do you consider that ESMA should specify more in detail what should be the minimum functionality or the types of testing that should be carried out in non-live trading venue testing environments, and if so, which?

<ESMA_QUESTION_203>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_203>

Q204: Do you consider that the requirements around change management are appropriately laid down, especially with regard to testing? Please elaborate.

<ESMA_QUESTION_204>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_204>

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

<ESMA_QUESTION_205>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_205>

Q206: To what extent do you agree with the usage of drop copies in the context of monitoring? Which sources of drop copies would be most important?

<ESMA_QUESTION_206>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_206>

Q207: Do you agree with the proposed approach?

<ESMA_QUESTION_207>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_207>

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

<ESMA_QUESTION_208>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_208>

Q209: To what extent do you consider it appropriate to request having all the pre-trade controls in place? In which cases would it not be appropriate? Please elaborate.

<ESMA_QUESTION_209>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_209>

Q210: Do you agree with the record keeping approach outlined above?

<ESMA_QUESTION_210>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_210>

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?

<ESMA_QUESTION_211>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf

<ESMA_QUESTION_211>

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

<ESMA_QUESTION_212>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_212>

Q213: Trade reconciliation – should a more prescriptive deadline be set for reconciling trade and account information?

<ESMA_QUESTION_213>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_213>

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?

<ESMA_QUESTION_214>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_214>

Q215: Are there any elements that have not been considered and / or need to be further clarified here?

<ESMA_QUESTION_215>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_215>

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?

<ESMA_QUESTION_216>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_216>

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?

<ESMA_QUESTION_217>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_217>

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.

<ESMA_QUESTION_218>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_218>

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

<ESMA_QUESTION_219>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_219>

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.

<ESMA_QUESTION_220>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_220>

Q221: Are there any criteria other than those listed above against which clearing firms should be assessing their potential clients?

<ESMA_QUESTION_221>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_221>

Q222: Should clearing firms disclose their criteria (some or all of them) in order to help potential clients to assess their ability to become clients of clearing firms (either publicly or on request from prospective clients)?

<ESMA_QUESTION_222>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_222>

Q223: How often should clearing firms review their clients' ongoing performance against these criteria?

<ESMA_QUESTION_223>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_223>

Q224: Should clearing firms have any arrangement(s) other than position limits and margins to limit their risk exposure to clients (counterparty, liquidity, operational and any other risks)? For example, should clearing firms stress-test clients' positions that could pose material risk to the clearing firms, test their own ability to meet initial margin and variation margin requirements, test their own ability to liquidate their clients' positions in an orderly manner and estimate the cost of the liquidation, test their own credit lines?

<ESMA_QUESTION_224>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_224>

Q225: How regularly should clearing firms monitor their clients' compliance with such limits and margin requirements (e.g. intra-day, overnight) and any other tests, as applicable?

<ESMA_QUESTION_225>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_225>

Q226: Should clearing firms have a real-time view on their clients' positions?

<ESMA_QUESTION_226>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_226>

Q227: How should clearing firms manage their risks in relation to orders from managers on behalf of multiple clients for execution as a block and post-trade allocation to individual accounts for clearing?

<ESMA_QUESTION_227>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_227>

Q228: Which type(s) of automated systems would enable clearing members to monitor their risks (including clients' compliance with limits)? Which criteria should apply to any such automated systems (e.g. should they enable clearing firms to screen clients' orders for compliance with the relevant limits etc.)?

<ESMA_QUESTION_228>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_228>

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

Q229: Do you agree with requiring trading venues to perform due diligence on all types of entities willing to become members/participants of a trading venue which permits algorithmic trading through its systems?

<ESMA_QUESTION_229>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_229>

Q230: Do you agree with the list of minimum requirements that in all cases trading venues should assess prior to granting and while maintaining membership? Should the requirements for entities not authorised as credit institutions or not registered as investment firms be more stringent than for those who are qualified as such?

<ESMA_QUESTION_230>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_230>

Q231: If you agree that non-investment firms and non-credit institutions should be subject to more stringent requirements to become member or participants, which type of additional information should they provide to trading venues?

<ESMA_QUESTION_231>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_231>

Q232: Do you agree with the list of parameters to be monitored in real time by trading venues? Would you add/delete/redefine any of them? In particular, are there any trading models permitting algorithmic trading through their systems for which that list would be inadequate? Please elaborate.

<ESMA_QUESTION_232>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_232>

Q233: Regarding the periodic review of the systems, is there any element that has not been considered and/or needs to be further clarified in the ESMA Guidelines that should be included?

<ESMA_QUESTION_233>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_233>

Q234: Do you agree with the above approach?

<ESMA_QUESTION_234>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_234>

Q235: Do you think ESMA should determine minimum standards in terms of latency or is it preferable to consider as a benchmark of performance the principle "no order lost, no transaction lost"?

<ESMA_QUESTION_235>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_235>

Q236: Do you agree with requiring trading venues to be able to accommodate at least twice the historical peak of messages?

<ESMA_QUESTION_236>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_236>

Q237: Do you agree with the list of abilities that trading venues should have to ensure the resilience of the market?

<ESMA_QUESTION_237>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_237>

Q238: Do you agree with the publication of the general framework by the trading venues? Where would it be necessary to have more/less granularity?

<ESMA_QUESTION_238>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_238>

Q239: Which in your opinion is the degree of discretion that trading venues should have when deciding to cancel, vary or correct orders and transactions?

<ESMA_QUESTION_239>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_239>

Q240: Do you agree with the above principles for halting or constraining trading?

<ESMA_QUESTION_240>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_240>

Q241: Do you agree that trading venues should make the operating mode of their trading halts public?

<ESMA_QUESTION_241>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_241>

Q242: Should trading venues also make the actual thresholds in place public? In your view, would this publication offer market participants the necessary predictability and certainty, or would it entail risks? Please elaborate.

<ESMA_QUESTION_242>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_242>

Q243: Do you agree with the proposal above?

<ESMA_QUESTION_243>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_243>

Q244: Should trading venues have the ability to impose the process, content and timing of conformance tests? If yes, should they charge for this service separately?

<ESMA_QUESTION_244>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_244>

Q245: Should alternative means of conformance testing be permitted?

<ESMA_QUESTION_245>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_245>

Q246: Could alternative means of testing substitute testing scenarios provided by trading venues to avoid disorderly trading conditions? Do you consider that a certificate from an external IT audit would be also sufficient for these purposes?

<ESMA_QUESTION_246>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_246>

Q247: What are the minimum capabilities that testing environments should meet to avoid disorderly trading conditions?

<ESMA_QUESTION_247>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_247>

Q248: Do you agree with the proposed approach?

<ESMA_QUESTION_248>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_248>

Q249: In particular, should trading venues require any other pre-trade controls?

<ESMA_QUESTION_249>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_249>

Q250: Do you agree that for the purposes of Article 48(5) the relevant market in terms of liquidity should be determined according to the approach described above? If, not, please state your reasons.

<ESMA_QUESTION_250>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_250>

Q251: Are there any other markets that should be considered material in terms of liquidity for a particular instrument? Please elaborate.

<ESMA_QUESTION_251>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_251>

Q252: Which of the above mentioned approaches is the most adequate to fulfil the goals of Article 48? Please elaborate

<ESMA_QUESTION_252>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_252>

Q253: Do you envisage any other approach to this matter?

<ESMA_QUESTION_253>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_253>

Q254: Do you agree with the list of elements that should be published by trading venues to permit the provision of DEA to its members or participants?

<ESMA_QUESTION_254>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_254>

Q255: Do you agree with the list of systems and effective controls that at least DEA providers should have in place?

<ESMA_QUESTION_255>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_255>

Q256: Do you consider it is necessary to clarify anything in relation to the description of the responsibility regime?

<ESMA_QUESTION_256>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_256>

Q257: Do you consider necessary for trading venues to have any other additional power with respect of the provision of DEA?

<ESMA_QUESTION_257>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_257>

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

Q258: Do you agree with the previous assessment? If not, please elaborate.

<ESMA_QUESTION_258>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_258>

Q259: Do you agree with the preliminary assessments above? What practical consequences would it have if firms would also be captured by Article 17(4) MiFID II when posting only one-way quotes, but doing so in different trading venues on different sides of the order book (i.e. posting buy quotes in venue A and sell quotes in venue B for the same instrument)?

<ESMA_QUESTION_259>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_259>

Q260: For how long should the performance of a certain strategy be monitored to determine whether it meets the requirements of Article 17(4) of MiFID II?

<ESMA_QUESTION_260>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_260>

Q261: What percentage of the observation period should a strategy meet with regard to the requirements of Article 17(4) of MiFID II so as to consider that it should be captured by the obligation to enter into a market making agreement?

<ESMA_QUESTION_261>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_261>

Q262: Do you agree with the above assessment?

<ESMA_QUESTION_262>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_262>

Q263: Do you agree with this interpretation?

<ESMA_QUESTION_263>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf

<ESMA_QUESTION_263>

Q264: Do you agree with the above assessment? If not, please elaborate.

<ESMA_QUESTION_264>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_264>

Q265: Do you agree with the above interpretation?

<ESMA_QUESTION_265>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_265>

Q266: Do you agree with the above proposal?

<ESMA_QUESTION_266>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_266>

Q267: Do you agree with the above proposal?

<ESMA_QUESTION_267>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_267>

Q268: Do you agree with the approach described (non-exhaustive list of quoting parameters)?

<ESMA_QUESTION_268>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_268>

Q269: What should be the parameters to assess whether the market making schemes under Article 48 of MiFID II have effectively contributed to more orderly markets?

<ESMA_QUESTION_269>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_269>

Q270: Do you agree with the list of requirements set out above? Is there any requirement that should be added / removed and if so why?

<ESMA_QUESTION_270>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_270>

Q271: Please provide views, with reasons, on what would be an adequate presence of market making strategies during trading hours?

<ESMA_QUESTION_271>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_271>

Q272: Do you consider that the average presence time under a market making strategy should be the same as the presence time required under a market making agreement ?

<ESMA_QUESTION_272>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_272>

Q273: Should the presence of market making strategies during trading hours be the same across instruments and trading models? If you think it should not, please indicate how this requirement should be specified by different products or market models?

<ESMA_QUESTION_273>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_273>

Q274: Article 48(3) of MiFID II states that the market making agreement should reflect “where applicable any other obligation arising from participation in the scheme”. What in your opinion are the additional areas that that agreement should cover?

<ESMA_QUESTION_274>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_274>

Q275: Do you disagree with any of the events that would qualify as ‘exceptional circumstances’? Please elaborate.

<ESMA_QUESTION_275>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_275>

Q276: Are there any additional ‘exceptional circumstances’ (e.g. reporting events or new fundamental information becoming available) that should be considered by ESMA? Please elaborate.

<ESMA_QUESTION_276>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_276>

Q277: What type of events might be considered under the definition of political and macroeconomic issues?

<ESMA_QUESTION_277>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_277>

Q278: What is an appropriate timeframe for determining whether exceptional circumstances no longer apply?

<ESMA_QUESTION_278>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_278>

Q279: What would be an appropriate procedure to restart normal trading activities (e.g. auction periods, notifications, timeframe)?

<ESMA_QUESTION_279>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_279>

Q280: Do you agree with this approach? If not, please elaborate.

<ESMA_QUESTION_280>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_280>

Q281: Would further clarification be necessary regarding what is "fair and non-discriminatory"? In particular, are there any cases of discriminatory access that should be specifically addressed?

<ESMA_QUESTION_281>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_281>

Q282: Would it be acceptable setting out any type of technological or informational advantages for participants in market making schemes for liquid instruments? If yes, please elaborate.

<ESMA_QUESTION_282>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_282>

Q283: In which cases should a market operator be entitled to close the number of firms taking part in a market making scheme?

<ESMA_QUESTION_283>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_283>

Q284: Do you agree that the market making requirements in Articles 17 and 48 of MiFID II are mostly relevant for liquid instruments? If not, please elaborate how you would apply the requirements in Articles 17 and 48 of MiFID II on market making schemes/agreements/strategies to illiquid instruments.

<ESMA_QUESTION_284>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf

<ESMA_QUESTION_284>

Q285: Would you support any other assessment of liquidity different to the one under Article 2(1)(17) of MiFIR? Please elaborate.

<ESMA_QUESTION_285>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_285>

Q286: What should be deemed as a sufficient number of investment firms participating in a market making agreement?

<ESMA_QUESTION_286>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_286>

Q287: What would be an appropriate market share for those firms participating in a market making agreement?

<ESMA_QUESTION_287>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_287>

Q288: Do you agree that market making schemes are not required when trading in the market via a market making agreement exceeds this market share?

<ESMA_QUESTION_288>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_288>

Q289: In which cases should a market operator be entitled to close the number of firms taking part in a market making scheme?

<ESMA_QUESTION_289>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_289>

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

Q290: Do you agree with the types of messages to be taken into account by any OTR?

<ESMA_QUESTION_290>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_290>

Q291: What is your view in taking into account the value and/or volume of orders in the OTRs calculations? Please provide:

<ESMA_QUESTION_291>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_291>

Q292: Should any other additional elements be taken into account to calibrate OTRs? If yes, please provide an explanation of why these variables are important.

<ESMA_QUESTION_292>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_292>

Q293: Do you agree with the proposed scope of the OTR regime under MiFID II (liquid cash instruments traded on electronic trading systems)?

<ESMA_QUESTION_293>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_293>

Q294: Do you consider that financial instruments which reference a cash instrument(s) as underlying could be excluded from the scope of the OTR regime?

<ESMA_QUESTION_294>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_294>

Q295: Would you make any distinction between instruments which have a single instrument as underlying and those that have as underlying a basket of instruments? Please elaborate.

<ESMA_QUESTION_295>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_295>

Q296: Do you agree with considering within the scope of a future OTR regime only trading venues which have been operational for a sufficient period in the market?

<ESMA_QUESTION_296>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_296>

Q297: If yes, what would be the sufficient period for these purposes?

<ESMA_QUESTION_297>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_297>

Q298: What is your view regarding an activity floor under which the OTR regime would not apply and where could this floor be established?

<ESMA_QUESTION_298>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_298>

Q299: Do you agree with the proposal above as regards the method of determining the OTR threshold?

<ESMA_QUESTION_299>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_299>

Q300: In particular, do you consider the approach to base the OTR regime on the ‘average observed OTR of a venue’ appropriate in all circumstances? If not, please elaborate.

<ESMA_QUESTION_300>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_300>

Q301: Do you believe the multiplier x should be capped at the highest member’s OTR observed in the preceding period?

<ESMA_QUESTION_301>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_301>

Q302: In particular, what would be in your opinion an adequate multiplier x? Does this multiplier have to be adapted according to the (group of) instrument(s) traded? If yes, please specify in your response the financial instruments/market segments you refer to.

<ESMA_QUESTION_302>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_302>

Q303: What is your view with respect to the time intervals/frequency for the assessment and review of the OTR threshold (annually, twice a year, other)?

<ESMA_QUESTION_303>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_303>

Q304: What are your views in this regard? Please explain.

<ESMA_QUESTION_304>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_304>

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

Q305: What factors should ESMA be considering in ensuring that co-location services are provided in a ‘transparent’, ‘fair’ and ‘non-discriminatory’ manner?

<ESMA_QUESTION_305>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_305>

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

Q306: Do you agree with the approach described above?

<ESMA_QUESTION_306>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_306>

Q307: Can you identify any practice that would need regulatory action in terms of transparency or predictability of trading fees?

<ESMA_QUESTION_307>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_307>

Q308: Can you identify any specific difficulties in obtaining adequate information in relation to fees and rebates that would need regulatory action?

<ESMA_QUESTION_308>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_308>

Q309: Can you identify cases of discriminatory access that would need regulatory action?

<ESMA_QUESTION_309>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_309>

Q310: Are there other incentives and disincentives that should be considered?

<ESMA_QUESTION_310>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_310>

Q311: Do any of the parameters referred to above contribute to increasing the probability of trading behaviour that may lead to disorderly and unfair trading conditions?

<ESMA_QUESTION_311>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_311>

Q312: When designing a fee structure, is there any structure that would foster a trading behaviour leading to disorderly trading conditions? Please elaborate.

<ESMA_QUESTION_312>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_312>

Q313: Do you agree that any fee structure where, upon reaching a certain threshold of trading by a trader, a discount is applied on all his trades (including those already done) as opposed to just the marginal trade executed subsequent to reaching the threshold should be banned?

<ESMA_QUESTION_313>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_313>

Q314: Can you identify any potential risks from charging differently the submission of orders to the successive trading phases?

<ESMA_QUESTION_314>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_314>

Q315: Are there any other types of fee structures, including execution fees, ancillary fees and any rebates, that may distort competition by providing certain market participants with more favourable trading conditions than their competitors or pose a risk to orderly trading and that should be considered here?

<ESMA_QUESTION_315>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_315>

Q316: Are there any discount structures which might lead to a situation where the trading cost is borne disproportionately by certain trading participants?

<ESMA_QUESTION_316>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf

<ESMA_QUESTION_316>

Q317: For trading venues charging different trading fees for participation in different trading phases (i.e. different fees for opening and closing auctions versus continuous trading period), might this lead to disorderly trading and if so, under which circumstances would such conditions occur?

<ESMA_QUESTION_317>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_317>

Q318: Should conformance testing be charged?

<ESMA_QUESTION_318>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_318>

Q319: Should testing of algorithms in relation to the creation or contribution of disorderly markets be charged?

<ESMA_QUESTION_319>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_319>

Q320: Do you envisage any scenario where charging for conformance testing and/or testing in relation to disorderly trading conditions might discourage firms from investing sufficiently in testing their algorithms?

<ESMA_QUESTION_320>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_320>

Q321: Do you agree with the approach described above?

<ESMA_QUESTION_321>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_321>

Q322: How could the principles described above be further clarified?

<ESMA_QUESTION_322>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_322>

Q323: Do you agree that and OTR must be complemented with a penalty fee?

<ESMA_QUESTION_323>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_323>

Q324: In terms of the approach to determine the penalty fee for breaching the OTR, which approach would you prefer? If neither of them are satisfactory for you, please elaborate what alternative you would envisage.

<ESMA_QUESTION_324>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_324>

Q325: Do you agree that the observation period should be the same as the billing period?

<ESMA_QUESTION_325>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_325>

Q326: Would you apply economic penalties only when the OTR is systematically breached? If yes, how would you define "systematic breaches of the OTR"?

<ESMA_QUESTION_326>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_326>

Q327: Do you consider that market makers should have a less stringent approach in terms of penalties for breaching the OTR?

<ESMA_QUESTION_327>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_327>

Q328: Please indicate which fee structure could incentivise abusive trading behaviour.

<ESMA_QUESTION_328>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_328>

Q329: In your opinion, are there any current fee structures providing these types of incentives? Please elaborate.

<ESMA_QUESTION_329>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_329>

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

Q330: Do you agree with the general approach ESMA has suggested?

<ESMA_QUESTION_330>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_330>

Q331: Do you agree with adopting the average number of daily trades as an indicator for liquidity to satisfy the liquidity requirement of Article 49 of MiFID II? Are there any other methods/liquidity proxies that allow comparable granularity and that should be considered?

<ESMA_QUESTION_331>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_331>

Q332: In your view, what granularity should be used to determine the liquidity profile of financial instruments? As a result, what would be a proper number of liquidity bands?

<ESMA_QUESTION_332>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_332>

Q333: What is your view on defining the trade-off between constraining the spread without increasing viscosity too much on the basis of a floor-ceiling mechanism?

<ESMA_QUESTION_333>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_333>

Q334: What do you think of the proposed spread to tick ratio range?

<ESMA_QUESTION_334>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_334>

Q335: In your view, for the tick size regime to be efficient and appropriate, should it rely on the spread to tick ratio range, the evolution of liquidity bands, a combination of the two or none of the above?

<ESMA_QUESTION_335>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_335>

Q336: What is your view regarding the common tick size table proposed under Option 1? Do you consider it easy to read, implement and monitor? Does the proposed two dimensional tick size table (based on both the liquidity profile and price) allow applying a tick size to a homogeneous class of stocks given its clear-cut price and liquidity classes?

<ESMA_QUESTION_336>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_336>

Q337: What is your view regarding the determination of the liquidity and price classes?

<ESMA_QUESTION_337>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf

<ESMA_QUESTION_337>

Q338: Considering that market microstructure may evolve, would you favour a regime that allows further calibration of the tick size on the basis of the observed market microstructure?

<ESMA_QUESTION_338>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_338>

Q339: In your view, does the tick size regime proposed under Option 1 offer sufficient predictability and certainty to market participants in a context where markets are constantly evolving (notably given its calibration and monitoring mechanisms)?

<ESMA_QUESTION_339>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_339>

Q340: The common tick size table proposed under Option 1 provides for re-calibration while constantly maintaining a control sample. In your view, what frequency would be appropriate for the revision of the figures (e.g., yearly)?

<ESMA_QUESTION_340>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_340>

Q341: In your view, what is the impact of Option 1 on the activity of market participants, including trading venue operators? To what extent, would it require adjustments?

<ESMA_QUESTION_341>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_341>

Q342: Do you agree that some equity-like instruments require an equivalent regulation of tick sizes as equities so as to ensure the orderly functioning of markets and to avoid the migration of trading across instrument types based on tick size? If not, please outline why this would not be the case.

<ESMA_QUESTION_342>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_342>

Q343: Are there any other similar equity-like instruments that should be added / removed from the scope of tick size regulation? Please outline the reasons why such instruments should be added / removed?

<ESMA_QUESTION_343>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_343>

Q344: Do you agree that depositary receipts require the same tick size regime as equities'?

<ESMA_QUESTION_344>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_344>

Q345: If you think that for certain equity-like instruments (e.g. ETFs) the spread-based tick size regime[1] would be more appropriate, please specify your reasons and provide a detailed description of the methodology and technical specifications of this alternative concept.

<ESMA_QUESTION_345>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_345>

Q346: If you generally (also for liquid and illiquid shares as well as other equity-like financial instruments) prefer a spread-based tick size regime2 vis-à-vis the regime as proposed under Option 1 and tested by ESMA, please specify the reasons and provide the following information:

<ESMA_QUESTION_346>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_346>

Q347: Given the different tick sizes currently in operation, please explain what your preferred type of tick size regulation would be, giving reasons why this is the case.

<ESMA_QUESTION_347>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_347>

Q348: Do you see a need to develop a tick size regime for any non-equity financial instrument? If yes, please elaborate, indicating in particular which approach you would follow to determine that regime.

<ESMA_QUESTION_348>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_348>

Q349: Do you agree with assessing the liquidity of a share for the purposes of the tick size regime, using the rule described above? If not, please elaborate what criteria you would apply to distinguish between liquid and illiquid instruments.

<ESMA_QUESTION_349>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_349>

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[1] Please see the description of Option 2 regarding tick sizes below.
[2] Please see the description of Option 2 regarding tick sizes below.

Q350: Do you agree with the tick sizes proposed under Option 2? In particular, should a different tick size be used for the largest band, taking into account the size of the tick relative to the price? Please elaborate.

<ESMA_QUESTION_350>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_350>

Q351: Should the tick size be calibrated in a more granular manner to that proposed above, namely by shifting a band which results in a large step-wise change?

<ESMA_QUESTION_351>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_351>

Q352: Do you agree with the above treatment for a newly admitted instrument? Would this affect the subsequent trading in a negative way?

<ESMA_QUESTION_352>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_352>

Q353: Do you agree that a period of six weeks is appropriate for the purpose of initial calibration for all instruments admitted to the pan-European tick size regime under Option 2? If not, what would be the appropriate period for the initial calibration?

<ESMA_QUESTION_353>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_353>

Q354: Do you agree with the proposal of factoring the bid-ask spread into tick size regime through SAF? If not, what would you consider as the appropriate method?

<ESMA_QUESTION_354>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_354>

Q355: Do you agree with the proposal to take an average bid-ask spread of less than two ticks as being too narrow? If not, what level of spread to ticks would you consider to be too narrow?

<ESMA_QUESTION_355>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_355>

Q356: Under the current proposal, it is not considered necessary to set an upper ceiling to the bid-ask spread, as the preliminary view under Option 2 is that under normal conditions the risk of the spread widening indefinitely is limited (and in any event a regulator may amend SAF manually if required). Do you agree with this view? If not, how would you propose to set an upper ceiling applicable across markets in the EU?

<ESMA_QUESTION_356>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_356>

Q357: Do you have any concerns of a possible disruption which may materialise in implementing a review cycle as envisioned above?

<ESMA_QUESTION_357>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_357>

Q358: Do you agree that illiquid instruments, excluding illiquid cash equities, should be excluded from the scope of a pan-European tick size regime under Option 2 until such time that definitions for these instruments become available? If not, please explain why. If there are any equity-like instruments per Article 49(3) of MiFID II that you feel should be included in the pan-European tick size regime at the same time as for cash equities, please list these instruments together with a brief reason for doing so.

<ESMA_QUESTION_358>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_358>

Q359: Do you agree that financial instruments, other than those listed in Article 49(3) of MiFID II should be excluded from the scope of the pan-European tick size regime under Option 2 at least for the time being? If not, please explain why and which specific instruments do you consider necessary to be included in the regime.

<ESMA_QUESTION_359>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_359>

Q360: What views do you have on whether tick sizes should be revised on a dynamic or periodic basis? What role do you perceive for an automated mechanism for doing this versus review by the NCA responsible for the instrument in question? If you prefer periodic review, how frequently should reviews be undertaken (e.g. quarterly, annually)?

<ESMA_QUESTION_360>
Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association ("FIA EPTA"), as submitted by FIA EPTA on our behalf
<ESMA_QUESTION_360>

5. Data publication and access

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

Q361: Do you agree that the guidance produced by CESR in 2010 is broadly appropriate for all three types of DRS providers?

<ESMA_QUESTION_361>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_361>

Q362: Do you agree that there should also be a requirement for notification of significant system changes?

<ESMA_QUESTION_362>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_362>

Q363: Are there any other general elements that should be considered in the NCAs' assessment of whether to authorise a DRS provider?

<ESMA_QUESTION_363>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_363>

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

Q364: Do you agree with the identified differences regarding the regulatory treatment of ARMs.

<ESMA_QUESTION_364>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_364>

Q365: What other significant differences will there have to be in the standards for APAs, CTPs and ARMs?

<ESMA_QUESTION_365>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_365>

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

Q366: Do you agree with the proposal to define machine-readability in this way? If not, what would you prefer?

<ESMA_QUESTION_366>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_366>

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?

<ESMA_QUESTION_367>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_367>

Q368: Are there other factors or considerations regarding data publication by the CTP that are not covered in the standards for data publication by APAs and trading venues and that should be taken into account by ESMA?

<ESMA_QUESTION_368>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_368>

Q369: Do you agree that CTPs should be able to provide the services listed above? Are there any others that you think should be specified?

<ESMA_QUESTION_369>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_369>

5.5. Data disaggregation

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

<ESMA_QUESTION_370>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_370>

Q371: Do you agree that venues should be obliged to disaggregate their pre-trade and post-trade data by asset class?

<ESMA_QUESTION_371>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_371>

Q372: Do you believe the list of asset classes proposed in the previous paragraph is appropriate for this purpose? If not, what would you propose?

<ESMA_QUESTION_372>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_372>

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?

<ESMA_QUESTION_373>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_373>

Q374: Are there any other criteria according to which it would be useful for venues to disaggregate their data, and if so do you think there should be a mandatory or comply-or-explain requirement for them to do so?

<ESMA_QUESTION_374>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_374>

Q375: What impact do you think greater disaggregation will have in practice for overall costs faced by customers?

<ESMA_QUESTION_375>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_375>

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)

Q376: Please describe your views about how to improve the current trade reporting system under Article 27(4) of MiFID Implementing Regulation.

<ESMA_QUESTION_376>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_376>

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?

<ESMA_QUESTION_377>
Before we respond in detail to the questions raised by ESMA with respect to non-discriminatory access, we take this opportunity to provide a high level overview of the approach taken in this response on that topic.

By way of introduction to all of our answers on non-discriminatory access (i.e. questions 377 to 452 of the Discussion Paper):

- Save where otherwise indicated, all responses are directed at the clearing of derivatives (both listed derivatives and swaps) rather than the clearing of transferable securities or money market instruments
- While trading venues and CCPs will use their best endeavours to provide non-discriminatory access to their services, there are differing views, capabilities, resources and experiences which means that a single position cannot be represented in many parts of our response
- Based on feedback previously received from ESMA, our understanding is that it would be most helpful to ESMA if we highlight these different perspectives and, bearing in mind differentiation in industry roles, who holds which views. We trust that ESMA find this transparent approach informative and useful as they seek to form their own policy views on the various questions raised
- In general, our members contributing to this response are positive about non-discriminatory access and, while there are real technical challenges that need to be resolved for certain instruments and there are differences in view on the magnitude of the issues raised by non-discriminatory access (and the time necessary to provide it), they believe that the majority of issues highlighted in this response will ultimately be capable of being met in most if not all cases. There are some market infrastructures that may be less confident about their ability to overcome the challenges and cautious about risk and operational outcomes. Those outcomes, if significant and not capable of being overcome, could provide grounds for justifying the denial of a request for non-discriminatory access or affect the terms of that access
- It is critically important that clearing members are engaged in any dialogue as to the basis on which non-discriminatory access will be provided insofar as they will need to be assured that there will be no exacerbation in risk for them in the process and, in this context, it is understood that *clearing members* will not be compelled to clear transactions in particular assets or from particular trading venues as a result of the non-discriminatory access arrangements between a CCP and a trading venue
- In the case of key decisions relevant to non-discriminatory access, particularly where it is terminated or refused, those decisions should be accompanied by a statement of reasons
- We would take this opportunity of emphasising that CCPs and trading venues are, of course, licensed and regulated entities and that is a factor should be taken fully into account by ESMA when it considers its approach to developing applicable technical standards i.e. the presumption should be that these entities are "fit and proper" and not the other way around and
- On the subject of non-discriminatory access to benchmarks, all FIA Europe members that fed into this response will be complying with the Level I provisions, although, as stated above, some aspects do give rise to potential concerns. We have sought in this response to highlight some additional items for ESMA to consider further, in order to assist ESMA in giving full effect to that Level 1 text.

All of our members that inputted into this response agree with ESMA that exceeding the planned capacity of the CCP may, in principle, be a reason for a CCP to deny access.

They all consider that it is important to note that whilst both trading venues and CCPs are commercial entities, it is absolutely in their interests and the interests of the broader financial system that they operate in robust markets and establish and maintain very strong and prudent risk management standards and controls.

The time limits in MIFIR Article 35 (3) (in conjunction with the specific conditions under Article 35(6)) provide a six month period in which to respond in writing to a request, but if the access request requires capacities or functionalities (or any other kind of material investments to scale systems and operations) beyond existing capabilities, this will, in many cases, require more than the three months provided for in Article 35(3).

Our members do, however, have different views on how to implement a planned capacity test in practice:

View of members who already have access arrangements outside of their vertically integrated models

These members consider that the measure by which such capacity is likely to be exceeded should also be taken into account, based on fair and reasonable criteria.

With due deference to its desire to meet the overriding objective of establishing and maintaining strong and prudent risk management standards, a CCP is commercially incentivised to attract greater flow of trading. An access arrangement between a new trading venue and an existing CCP is one way a CCP can seek to increase its flow. Any access arrangement would require significant due diligence and on-going compliance of rules by members of the trading venue and its own clearing members. It would also involve significant commercial and operational evaluations prior to implementation of the access arrangement.

Accordingly, it is important that any reasons to deny access on the grounds of capacity should apply without discrimination as between a trading venue that has close links with the CCP and a second trading venue that operated outside of the vertically integrated model to which access is requested. Failure to do so risks incentivising the increase of capacity for the trading venue with close links to the CCP, but not for trading venues outside the vertically integrated model.

RECOMMENDATION: These members would recommend that CCPs in vertically integrated models or which have close links with non-affiliated venues should include their own volume projection when estimating their capacity limits.

They consider that it would be unfair and contrary to the purpose of the non-discriminatory access provisions (as noted in Recital 40 of MiFIR) for vertically integrated CCPs to deny access on the grounds that its own integrated trading venue will utilise its planned and future capacity (and this may be an issue also for CCPs with close links with non-affiliated venues). On the other hand, the uncertainty of potential future access requests from other trading venues could make it difficult for a CCP in a vertically integrated model to plan with any degree of certainty on its capability of meeting future levels of trading activity from its integrated trading venue – and as such could fail to meet EMIR requirements.

Views common to all members that input into this response:

Where the extent of the excess over planned capacity is *readily* capable of resolution in order to meet the access request, then we would not anticipate CCPs using the mere fact that the request exceeds planned capacity as a ground for denying access in practice. What one therefore needs to consider is:

- the cost/benefit of affording access (see further the response to Q. 379);
- the extent by which the access request results in planned capacity being exceeded;
- the extent to which additional capacity can nonetheless be built by the CCP sufficient to meet this access request in time to accommodate the increased anticipated volume, without any reduction in the risk management standards of the CCP; and
- the extent to which additional redundant capacity can built_by the CCP to enable it to meet future access requests and how quickly that additional capacity can be put in place.

It is important that CCPs consider their systems' operational reliability and scalable capacity when reviewing any access request. In principle, our members agree that having regard to planned capacity is the most appropriate way to use anticipated volume as a means of determining whether or not an access request should be granted, but we query how the planned capacity threshold will operate in practice – we would be concerned if there was no discretion in the threshold and if the proposal is for such threshold to be rigid and absolute.

RECOMMENDATION: If facilitating the access request would exceed the planned capacity of the CCP, its assertion that it is not able to build the required additional capacity in time

to go live for the access request per Article 35(3) of MiFIR will be a relevant consideration for the national competent authority, but should not *per se* be a ground to deny access in and of itself.

Neither ESMA nor any National Competent Authority should assume that just because the CCP has been authorised/recognised under EMIR, its operations are by definition sufficiently scalable to meet any access request within the time limits mandated by MiFIR.

We note the opening sentence of paragraph 9 on page 343 of the DP - "*ESMA preliminarily considers that access should be given whenever it does not give rise to risks that cannot be effectively managed or adequately mitigated*". It is unclear to us whether this sentence is proposed by ESMA to be a principles-based test that would apply to any access request to a CCP, over and above the 4 specific grounds identified in Article 35(6)(a). If so, we would not be in favour of the inclusion of such a principles-based test, as the grounds on which it could be used to deny such a request are not sufficiently identifiable nor specific. Further, we note that a principles-based approach would be inconsistent with MiFIR Article 35(6)(a), which requires ESMA to develop RTS to specify "(a) the *specific* conditions under which an access request may be denied by a CCP…"

RECOMMENDATION: Per MiFIR Article 35(6)(a), the grounds on which access may be refused by a CCP must be specific, rather than merely principles-based, but they will need to be sufficiently flexible to cover other unexpected risk factors.

Reference is made in paragraph 13 on page 344 of the Discussion Paper to Article 9(1) of the Commission Delegated Regulation (EU) No. 153/2013 [http://www.cysec.gov.cy/Downloads/Events/EuropeanIssues/EMIR/Regulation%20(EU)%20No%2015 3-2013.pdf], which requires CCPs to maintain "sufficient redundant capacity". We note that ESMA omitted to set out the full text of Article 9(1) on page 344 of the Discussion Paper - the words of Article 9(1) that immediately follow the words that were published in the Discussion Paper significantly narrow the scope of the circumstances in which sufficient redundant capacity is required under Article 9(1): such redundant capacity is *not* required so as to facilitate the clearing of new trades from new trading venues (not surprisingly, given this article relates to EMIR rather than MiFIR, no reference is made to access in Article 9(1)) – such capacity is merely required "to allow the system to process all remaining transactions before the end of the day in circumstances where a major disruption occurs".

Accordingly, the aim of Article 9(1) of the CDR is to look at the effectiveness of IT systems intra-day *in the context of stressed markets and major disruption events*. It was not drafted with non-discriminatory access in mind, either explicitly or implicitly.

We agree, however, a CCP may not accept new business that uses up all of its redundant capacity because it could then be in breach of the EMIR obligation to retain sufficient redundant capacity to process transactions at times of market stressed or when there are major disruption events.

However, we note that "sufficient redundancy capacity" is not defined in that Commission Delegated Regulation, so it remains to be seen in practice how such capacity will be determined in practice, by whom and how often such capacity has to be assessed. As neither the European Commission nor ESMA have mandated how much redundant capacity should be considered "sufficient", there is a significant risk that different CCPs (and the National Competent Authorities that supervise them) could take differing approaches. While this may be justified on risk-based grounds, it is equally possible that such different approaches and the application of different standards in individual EU jurisdictions could hinder competition and the ability to access CCPs across Europe. There is a concern that by the time ESMA is aware of the inconsistent standards being applied by the different NCAs, it is already too late.

In an EMIR context, it is noted that scalability and redundancy of capacity are complimentary issues. The concept of redundant capacity should not be stretched to provide for the additional new classes of instruments without regard for the need to have further redundant capacity as a result of their inclusion; however, it should be acknowledged that systems need to be scalable.

RECOMMENDATION: ESMA review the tools at its disposal to ensure a level playing field across Europe as regards how sufficient redundant capacity is measured, but leaving the setting of detailed levels, which will be market-specific, to the NCAs.
<ESMA_QUESTION_377>

Q378: How would a CCP assess that the anticipated volume of transactions would exceed its capacity planning?

<ESMA_QUESTION_378>
There are a number of ways CCPs can assess the anticipated volume of transactions in a business as usual environment and in stressed conditions.

In the event that the trading venue operates a pre-existing market place in the financial instrument that it would like to clear at the CCP, the CCP will conduct a forecast as to the potential share of the pre-existing market at the trading venue that may be routed to the CCP in normal and peak markets, and identify any factors that may cause significant growth in the volume of the financial instrument (such as, for example, portfolio margining at the CCP).

In the event that the trading venue is looking to facilitate clearing for a financial instrument for which the trading venue has not previously facilitated trading, the CCP may seek to anticipate volume by identifying and evaluating the nearest comparable instruments/market places, including their liquidity and past trading volumes under similar market conditions.

With regards to transferable securities and money market instruments, inter-operating CCPs for cash must also follow Guideline and Recommendation 3: Identification, Monitoring and Management of Risks (of Article 52(1)(a), (b) and (c) and Article 52(2) of Regulation (EU) No. 648/2012) to ensure that the CCP's operational arrangements, processing capacity and risk management arrangements are sufficiently scalable and reliance for both the current and projected peak volumes of activity processed through the interoperable link and the number of CCPs involved in the interoperability arrangement.

Among other steps, the CCP:

- for existing trading venues, carries out historical analysis;
- may discount stated anticipated volumes to cater for the fact that the trading venue may have an overly optimistic view of future volumes;
- will consider the impact of algorithmic / high frequency trading on anticipated volumes at the trading venue;
- will commonly expect to see the trading venue's own calculations, as well as carrying out its own independent analysis

In the context of access requests under MiFIR, at least some CCPs would expect that the trading venue submitting the access request to provide as part of its application its own calculations and methodologies by which it has assessed anticipated volumes.
<ESMA_QUESTION_378>

Q379: Are there other risks related to the anticipated volume of transactions that should be considered? If so, how would such risks arise from the provision of access?

<ESMA_QUESTION_379>
Should the need for a CCP to build additional redundant capacity for *future* ***access requests be a ground for denying access?***

It is noted that CCPs are required *at all times* to have sufficient redundant capacity. Accordingly, regard needs to be had not only to whether the CCP *currently* has sufficient redundant capacity, but whether, immediately following the implementation of the access request, the CCP has further increased its capacity by developing sufficient *new* redundant capacity.

Access therefore requires three things:

- use of available capacity to deal with the *current* access request
- building new capacity to cope with potential *future* access requests
- sustaining sufficient additional redundant capacity to operate at times of market stress

If an access request would absorb a significant part of the current redundant capacity, there is an increased likelihood that building further additional redundant capacity for future access requests will be required on a greater scale.

Two of our members who does not currently operate an access arrangement outside of their vertically integrated model consider that a CCP should <u>never</u> be required to reduce redundant capacity to within 5-10% of its minimum required levels of redundancy because this could put compliance with the EMIR requirement at risk.

Conversely, another member that does currently operate such an access arrangement strongly feels that no threshold around planned/future capacity should be proscribed.

A fourth (investment bank) member notes that since the CCP's system is required to be scalable, the CCP could and should add capacity, but being scalable doesn't only mean that a new server is immediately plugged into a rack – there could be additional servicing, load balancing, telecoms requirements etc. They consider that the need to be scalable should be addressed fairly, to take account of these issues, but a request for access should not be denied on the basis that effort would be required to meet the request.

We take this opportunity to highlight to ESMA that a CCP may identify limitations in its ability to build sufficient new redundant capacity in a timely manner to cope with potential *future* access requests and this could be a ground for denying a *current* access request.

RECOMMENDATION: ESMA explicitly acknowledges that to the extent that an access request would absorb a significant majority of current planned capacity, the CCP should determine whether it can reasonably increase capacity and, if so, set out how it proposes to do so.

An analysis of anticipated volumes should be conducted by the applicant trading venue.

Whilst the vast majority of our members feel that the downside of publishing the fact that an access request has been made and/or the details of such request would outweigh the benefits, one of our members that does not currently have connectivity outside of its vertically integrated model considers that, in the interests of transparency, this analysis should be made public, together with the details of the access request. That same member considers that the CCP receiving the access request should be entitled to conduct an independent review to validate this analysis if it considers that such a review would be appropriate.

<u>Should minimum anticipated volume/liquidity be a ground for denying access?</u>

Our members have different views about the economic consequences of access being sought and granted if volumes in respect of the relevant financial instrument are low.

The Level 1 text and the Discussion Paper both envisage problems being caused by large numbers of transactions being introduced to the CCP as a result of it granting the access request. The grounds on which the CCP can decline the access request are therefore predominantly risk management/operational-based.

But what remains to be addressed is the situation where the new trading venue would introduce *too little* volume for the enormous expense and resource that would be consumed by giving effect to the access request?

If a CCP receives one or more requests for access from trading venues with very low volumes, there is a risk that the CCP will be put in the position of committing a disproportionate amount of its financial and human resources towards considering/granting the access request, for very little benefit for anyone.

Some of our members consider that failure to meet a minimum level of anticipated volume/liquidity should be a ground for denying access where it would lead to fragmented and less efficient markets or enhance the risk of market manipulation and other abusive behaviours or the cost/benefit analysis of affording access does not justify the granting of the access request. Whilst ESMA notes in paragraph 9 on page 343 of the Discussion Paper that risk grounds are the main reason on which access should be denied, the core part of Article 35(6)(a) ("the specific conditions under which an access request may be denied, including...") does not make any reference to risk or operational issues, so ESMA is granted the discretion by the Level 1 text to specify such specific non-risk/operational grounds for denying an access request as it may choose.

Another member that already has an access arrangement in place strongly considers that low predicted volume in itself is not a reason to deny access. That member believes that denial of access should be on a commercial analysis of the access request and the extent to which a CCP can recover costs (either through payment or expected revenues).

An investment bank member notes that it cannot be reasonable for access to be sought to a CCP if the CCP is not able to recover its costs involved in meeting the access request – however, the cost impact on *clearing members* should also be considered i.e. if clearing members have to adapt their own systems to support new arrangements, but it is unlikely that those clearing members will recover their investments, then it could be just as unreasonable to expand the financial instruments being cleared by the CCP. The principal to be applied (in the view of this investment bank member) is that the access arrangement must be economically viable for all impacted parties.

The existing venues', clearing members' and end users' perspectives

As alluded to immediately above, when discussing the topic of access, there is a danger that one only considers the risks from the perspective of the trading venue seeking access and the CCP from whom access is requested. There are other market constituents whose risks also need to be duly considered:

It is generally recognised that the provision of access by a CCP to an applicant trading venue must not put existing venues already cleared by that CCP at risk of, or result in existing venues not being able to meet their regulatory requirements.

Trading members of the trading venue: to the extent that the access request significantly increases volumes and liquidity, the trading members will need to update their systems to cater for this additional volume. This may take time, but is in the normal course of establishing a new market or connection to a CCP.

Members of the CCP: members of the CCP will potentially be expected to clear for additional classes of financial instrument or clients as a result of the access request. It will take time to agree legal documentation with those clients if they are new to the clearing member, but, in most cases, it should be within the normal process of on-boarding new clients. The clearing member will also need to take written instruction as to whether those new clients wish to open a separate client omnibus account or an individually segregated account, per Article 39(5) of EMIR. If the anticipated volumes of trades are extremely high, across a wide number of new clients, thoughts need to be given to the ability of the clearing members of the CCP in respect of which access is being requested to support the clearing of that high volume of trades. Significant operational systems testing will also be needed before "go live" of the new connection.

An investment bank member notes that it is important that the standards that are applied in respect of members of the CCP and their clients are not weakened. That member also considers that the impact on members of the CCP should be identified and assessed as part of the evaluation of the risks that could arise from the introduction of additional financial instruments or financial instruments from additional trading venues. If a trading venue requests access to a CCP for the clearing of a particular financial instrument, but clearing members of the CCP are uncomfortable accepting transactions with respect to it (based on their own risk assessments), then clearing members could decline to accept transactions submitted by their clients, on the basis that their risk issues have not been addressed. On this view, it will always be in the general interest to ensure that clearing members' concerns are identified and addressed.

It is understood that clearing members will not be compelled to clear transactions in particular financial instruments or from particular trading venues as a result of the non-discriminatory access arrangements between a CCP and a trading venue This means that, firstly, clearing members will need to be very involved in any dialogue as to whether or not access should be granted so that they can fully understand the potential risks to them and, secondly, if only a few clearing members are prepared to clear the products in question, the potential concentration risk will need to be assessed in order to determine whether or not to grant access.

End users: again, end users will need to update their systems and their trading practises and ensure that their systems can cope with any increase in trading volume that follows the grant of the access request - and this may take time. They will potentially have to confirm their choice of clearing venue at the point of execution and will need to upgrade their systems to reflect the choice of CCPs for that trading venue. This, in turn, means that end users will be evaluating the quality and capabilities of CCPs in terms of any consequential risks that may accrue to them and they will, of course, need to establish either direct clearing memberships or become clients of clearing members.

RECOMMENDATION: That ESMA expressly acknowledge that a CCP may be able to deny an access request on duly justified risk grounds that relate to risk management/operational concerns of other trading venues with existing clearing relationships with the CCP, the trading venues' members and clearing members (i.e. not just for which the CCP already clears), and/or end users.

Physically settled commodities

Regarding commodity derivatives, if physically delivered contracts are in scope, the CCP would need to ensure arrangements to make physical settlements. This, in turn, means that the question of affording access would have to extend beyond access to the CCP but, in the case of metals or "softs", and, potentially, other commodities to the related exchange-operated warehouse.

The delivery of a system associated with trading and commodity derivatives which are required to be settled physically may be quite distinct from any existing system that a CCP would already have in place. Where a CCP would be required to clear trades that require physical settlement, it would need to ensure that it and its members were also members of the relevant delivery system. Where a new delivery system is required, all members would be impacted as they would be required to test and install the relevant system in order to continue trading at that venue. The CCP should take into account whether the implementation of additional systems is required when considering whether to permit an access request. They should be permitted to refuse a request from a trading venue, in circumstances where granting the request would otherwise require the CCP to materially and significantly amend its existing delivery systems or where access would generate significant operational risk.
<ESMA_QUESTION_379>

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

<ESMA_QUESTION_380>

We understand this question differs from Question 377 on the basis that whilst Question 377 is looking at the planned capacity from a *volume of transactions* perspective, question 380 is looking at planned capacity from a *number and type of users* perspective.

It should be noted that granting a trading venue access to a CCP would not necessarily increase the number of clearing members of that CCP - all the members of that trading venue could, in principle, choose to clear through an existing clearing member. What would potentially increase significantly is the number of individually segregated client accounts ("ISAs") and/or client omnibus accounts that are required to be opened and maintained by the CCP pursuant to Article 39 of EMIR.

The view of FIA Europe's Clearing Committee (comprised of members of the Operations departments of all the major clearing members in Europe) is that not a single European CCPs' ISA offerings are sufficiently scalable today. The major CCPs within FIA Europe's membership do not share the views of that Committee with respect to their own CCPs, notwithstanding that there is a risk that access could be denied on the basis that the number of end users for whom a CCP anticipates being required to open ISAs is greater than its planned capacity. The question is then whether the CCP (and other key third parties, including clearing brokers, custodians and asset servicing firms) is able to increase its capacity in time for go live of the access request (being no later than 6 to 9 months after the date of the original access request, per Article 35(3) of MiFIR).

Our members agree that forcing a CCP to clear the positions of a large number of new end users, in an amount that *significantly* exceeds the existing capacity planning of that CCP, would be a negative end result for all concerned (including the end user, trading venue, clearing member and CCP). If the trade is cleared but the CCP is not able to support the increased number of users that the new trading venue would bring, that could result in poor risk management for all concerned and introduce significant default risk, both on the part of the end user/clearing member and the CCP.

Where excess over planned capacity is de minimis and capable of use in a timely manner in order to meet the access request, then we would not anticipate the mere fact that the request exceeds planned capacity would provide a ground for denying access.

RECOMMENDATION: ESMA explicitly acknowledges that to the extent that an access request would absorb a significant part of current planned capacity, the CCP should determine whether it can accommodate the anticipated capacity and, if so, how it will do so and inform the trading venue of any related costs that would be incurred by the venue for obtaining access.

An analysis of anticipated volumes should be conducted by the applicant trading venue.

While most of our members feel that the downside of publishing the fact that an access request has been made and/or the details of such request would outweigh the benefits, one of our members with a vertically integrated model that does not currently have connectivity outside of that model considers that, in the interests of transparency, this analysis should be made public, together with the details of the access request. That same member considers that the CCP receiving the access request should be entitled to conduct an independent review to validate this analysis if it considers that such a review would be appropriate.

An investment bank member notes that since the CCP's system is required to be scalable, the CCP could and should add capacity when required, but scalable does not mean only that a new server is immediately plugged into a rack – there could be additional servicing, load balancing, telecoms requirements etc., which should be taken into account as practical considerations. They consider that the need to be scalable should be addressed fairly, to take account of these issues, but a request for access should not be denied on the basis that effort would be required to meet the request. **Neither ESMA nor any National Competent Authority should assume that just because the CCP has been authorised/recognised under EMIR, its operations are by definition sufficiently scalable to meet any access request.**

<ESMA_QUESTION_380>

Q381: How would a CCP assess that the number of users expected to access its systems would exceed its capacity planning?

<ESMA_QUESTION_381>

Existing trading venues

For existing trading venues, the CCP would have regard to the number of end users who are trading on the trading venue (rather than looking simply at the number of exchange members). As each end user would potentially need to clear the trade, they would each need to be offered the choice of levels of segregation under Article 39 of EMIR (i.e. omnibus / individual client segregation). It is that which primarily drives the scalability considerations, so it is the number of end users that one needs to consider.

Whilst each end user would not necessarily need to "access its systems" (per the question), it would none-theless increase the risk and operation burden on the CCP.

New trading venues

In the event that the trading venue is looking to facilitate clearing for a financial instrument for which the trading venue has not previously facilitated trading, the CCP may seek to anticipate the number and type of users by identifying the nearest comparable instruments/market places and past number/type of users for such instruments/market places.

With regards to transferable securities and money market instruments, inter-operating CCPs for cash must also follow Guideline and Recommendation 3: Identification, Monitoring and Management of Risks (of Article 52(1)(a), (b) and (c) and Article 52(2) of Regulation (EU) No. 648/2012) to ensure that the CCP's operational arrangements, processing capacity and risk management arrangements are sufficiently scalable and reliance for both the current and projected peak volumes of activity processed through the interoperable link and the number of CCPs involved in the interoperability arrangement.

RECOMMENDATION: An analysis of anticipated number and type of users should be con-ducted by the applicant trading venue.

Whilst the vast majority of our members feel that the downsides of publishing the fact that an access request has been made and/or the details of such request would outweigh the benefits, some members that do not currently have connectivity outside of their vertically integrated models consider that, in the interests of transparency, this analysis should be made public, together with the details of the access request. That same member considers that the CCP receiving the access request should be entitled to conduct an independent review to validate this analysis if it considers that such a review would be appro-priate.

<ESMA_QUESTION_381>

Q382: Are there other risks related to number of users that should be considered? If so, how would such risks arise from the provision of access?

<ESMA_QUESTION_382>

The primary concern is ensuring the scalability of the operational and risk infrastructure of the CCP. The question is "can the CCP cope with the operational requirements if all new clients clearing on that CCP opted for individually segregated accounts under Article 39 of EMIR (or asked for their own omnibus accounts) and can the CCP duly risk management the positions that the new users would introduce to the CCP, both prior to and immediately following any default of a member of the CCP (or, indeed, any default of the CCP itself)?".

RECOMMENDATION: Neither ESMA nor any National Competent Authority should assume that just because the CCP has been authorised/recognised under EMIR, its operations are by definition sufficiently scalable to meet any access request.

The view of FIA Europe's Clearing Committee (comprised of members of the Operations departments of all the major clearing members in Europe) is that not a single European CCPs' ISA offerings are sufficiently scalable today. One CCP that is not part of a vertically integrated clearing model does not accept that view on the basis that it asserts that its offerings are scalable. The major CCPs comprised within FIA Europe's membership do not share the views of that committee with respect to their own CCPs.
<ESMA_QUESTION_382>

Q383: In what way could granting access to a trading venue expose a CCP to risks associated with a change in the type of users accessing the CCP? Are there any additional risks that could be relevant in this situation?

<ESMA_QUESTION_383>
In order to allow a user to trade a financial instrument with the intent to clear it at the CCP, the trading venue must first validate that the CCP has operational support to clear for the identified user. Granting access to a trading venue, in general, would not expose the CCP to risks (reputational or otherwise) associated with a change in the type of users, as EMIR imposes strict requirements on member eligibility criteria.

The time it takes to obtain netting opinions

One risk that we can foresee relates to close-out netting: if there is a new type of user at the trading venue that wishes to become a clearing member of the CCP, the CCP will (for risk and default management purposes) need to obtain a legal opinion from external counsel that confirms that both pre-default payment netting and (following the default of either the clearing member or the CCP) post-default close out netting is valid, binding and enforceable against that new clearing member.

Such opinions take significant amounts of time to obtain – often longer than the 3 to 6 months that the CCP is granted pursuant to MiFIR Article 35(3) to grant or deny the access the request.

Accordingly, there is a material risk that the CCP (purely because of there being insufficient time for it to carry out a full payment/close out netting analysis to its satisfaction) will have no choice but to decline an access request from a trading venue if that trading venue potentially brings with it a number of new clearing members to the CCP that are of a type, and/or are located in a jurisdiction, which cannot be safely accommodated within the CCP's existing membership criteria or any reasonable adaptation of that criteria.

The type of users who increase the operational burden on CCPs

Users who require their own accounts at the CCPs

Pension funds, investment funds, collective investment schemes and corporates tend to be the main types of end users who elect for individually segregated accounts at the CCPs. Accordingly, if the access request would result in a significant number of these types of end users accessing the clearing services of the CCP through a clearing broker, we can foresee an increase in the risk that the CCP does not have the scalability to offer account segregation to such a high number of those types of end users.

The PRODUCT for which access is requested has an impact on CCPs

The take-up of ISAs under EMIR Article 39 varies by financial instrument
It is anticipated that end users that currently clear interest rate swaps on a voluntary basis are likely to opt for individually segregated accounts at the CCP, but, with regard to users of exchange-traded derivatives, notwithstanding that they may request and use individually segregated accounts, there may be a greater tendency or readiness to opt for net omnibus accounts. The cost of opting for individual segregated accounts may incentive end users to settle for cheaper alternative to individually segregated accounts, particularly against the background of greater supervisory oversight of all forms of segregation.

But, while there are certainly end users requesting and using individual segregated accounts in the European listed derivatives market, there may be a greater tendency or readiness to opt for net omnibus accounts.

Accordingly, whilst the level 1 text rightly focuses on the volume of transactions, the number and type of users and arrangements for managing operational risk/complexity, the “other factors creating significant undue risks” (per Article 35(6)(a)) should also include the type of products for which access is requested, as dependent upon the product type in question, there may be a significant increase in the operational burden and risks of the CCP.

Obligations owed by CCPs to trading venues vary by product

For exchange traded cleared swaps, the responsibility of the exchange would typically cease as soon as the trade has been accepted for clearing by the applicable CCP.

For exchange traded listed derivatives, the exchange typically has obligations for the entire life of the financial instrument (which may stretch to several years), including but not limited to the obligation to monitor and report open interest, to monitor settlement (including physical deliveries upon exercise/expiration of the financial instrument). For these products, the CCP and the exchange therefore need to have an ongoing relationship and open communication for the duration of the life of such product. In connection with an access request for such a product, the CCP will be required to put in place a wide range of operational features that it may not have had to cater for before access was granted.

It is appropriate for CCPs to co-operate with trading venues in line with their respective regulatory responsibilities. It is worth emphasising that it is the trading venue that retains responsibility for monitoring and reporting open interest and ensuring fair and orderly settlement for its contracts. Whilst a CCP can provide information to allow this responsibility to be discharged, and should be required to do so, the trading venue cannot delegate this responsibility to a CCP.

In addition, some of these obligations may be extremely complex (for example, how does a CCP monitor open access of positions if the trading venue can clear trades at multiple venues or if it is the sole CCP for multiple trading venues). Unless the CCP has prior experience in this area, there is a material risk that it may be exposed to undue risks as a result of not having sufficient time to implement such operational and risk management systems from scratch (noting that Article 35(3) requires the CCP to “go live” with the access arrangement within 6 to 9 months of the original request).

Further to Article 35(6)(a) of MiFIR, we respectfully request that ESMA itself considers further whether they agree that the type of product for which access has been requested could be a ground for which an access request may be denied by a CCP, if the clearing of that product would expose the CCP to undue risks.

A CCP that does not currently have access arrangements in place outside its vertically integrated model observes that there are, in addition, many areas where it is important for a trading venue to have in place procedures, arrangements and controls to avoid undue risk to the CCP and existing trading venues, including equivalence of the trading venue’s risk monitoring systems and controls or disciplinary, investigatory and enforcement procedures to those of existing venues, controls on exposure to financial crime (anti-money laundering, sanctions policies, etc.), compatibility of IT systems, legal enforceability of contracts, adequacy of dispute procedures, etc.

<u>The existing venues’, trading members’, clearing members’ and end users’ perspectives</u>

When discussing the topic of access, there is a danger that one only considers the risks from the perspective of the trading venue seeking access and the CCP from whom access is requested. There are other market constituents whose risks also need to be duly considered:

Existing venues: The provision of access to an applicant trading venue must not put existing venues (i.e. trading venues for which the CCP already clears) at risk, or result in existing venues not being able to meet their regulatory requirements.

Trading members of the trading venue: to the extent that the access request significantly increases volumes and liquidity, the trading members will need to update their systems to cater for this additional volume. This may take time, but is in the normal course of establishing a new market or connection to a CCP.

Members of the CCP: members of the CCP will potentially be requested to clear for additional classes of financial instruments or clients as a result of the access request. It will take time to agree legal documentation with those clients if they are new to the clearing member, but in most cases it should be within the normal process of on-boarding new clients. The clearing member will also need to take written instruction as to whether those new clients wish to open a separate client omnibus account or an individually segregated account, per Article 39(5) of EMIR. If the anticipated volumes of trades are extremely high, across a wide number of new clients, thoughts need to be given to the ability of the clearing members of the CCP in respect of which access is being requested to support the clearing of that high volume of trades. Significant operational systems testing will also be needed before "go live" of the new connection. Adding a new CCP to the list of clearing venues that can clear a trade executed on the trading venue that is seeking access has enormous implications for that trading venue, and its members/their clients. If not already done, the trading venue will need to consider numerous issues when adding a new CCP:

- how should its order book be restructured:
    - keep one order book and maintain one price for the relevant financial instrument, regardless of the clearing venue?
    - Support two order books: i.e. one for each clearing venue? Would this involve the trading venue maintaining different prices for the relevant financial instruments?
- should the trading venue adopt a preferred clearer model or facilitate the trading member's ability to choose their own CCP at which the relevant financial instrument will be cleared?
- if the various CCPs connected to the trading venue have different trade acceptance models, how should the trading venue cater for that?
- do different approaches need to be taken with respect to the different products for which access has been granted, further adding to the complexity?

All of these issues have a direct impact on how a financial instrument is traded by the trading member. Accordingly, when considering the risks related to an access request, one need to have due regard not only to the anticipated volume of trades that will be traded/cleared following that access request, but also the impact on trading members from an operational, trading and IT perspective.

It is understood that clearing members will not be compelled to clear transactions in particular assets or from particular trading venues as a result of the non-discriminatory access arrangements between a CCP and a trading venue.

End users: again, end users will need to update their systems and their trading practises. They will need to ensure that their systems are upgraded to cope with any increase in trading volume that follows the grant of the access request, which may take time. They will potentially have to confirm their choice of clearing venue at the point of execution and will need to upgrade their systems to reflect the choice of CCPs for that trading venue.

RECOMMENDATION: That ESMA expressly acknowledge that a CCP may be able to deny an access request on duly justified risk grounds that relate to risk management/operational concerns of existing trading venues (i.e. for which the CCP already clears), the trading venue's members, its clearing members (not just risk management/operational concerns relating to the CCP itself) and/or end users.
<ESMA_QUESTION_383>

Q384: How would a CCP establish that the anticipated operational risk would exceed its operational risk management design?

<ESMA_QUESTION_384>
A CCP that does not currently have access arrangements in place outside its vertically integrated model observes that there are a range of situations which could result in operational risk exceeding risk management, including the following:

- *New products*: Since a CCP may not have the necessary expertise, resources, risk management systems or procedures to provide clearing services in a new product, it should not be required to provide clearing services in respect of that product, that it is not already clearing, simply because the CCP is authorised to clear it. For example, a CCP authorised to clear commodities contracts relating to metal should not automatically be expected to accept all access requests to clear any type of metal. Level 1 provides for non-discriminatory treatment of all trading venues by a CCP. In other words that a CCP provide a clearing service on equivalent terms to all trading venues irrespective of ownership. That does not equate to providing "open access" under which a CCP must be obliged to clear anything within its generic EMIR authorisation, e.g. an authorisation to clear FXX OTC derivatives should not automatically allow a trading venue to require a clearing service for Thai Baht swaps. We strongly disagree with any suggestion that Level 1 precludes such a common sense reading.

- *Changes to the operating model of the CCP*: Since a CCP's operating business model and procedures are the basis of its regulatory approval, while a trading venue requesting access could request changes to be made, the CCP should not be required to make those changes if they put its regulatory approval at risk or would generate either an unacceptable level of increased risk or the kind of capacity problems referred to earlier in this response. (CCPs that already have access arrangements in place outside their vertically integrated model strongly disagree with this – they note that in practice (if a trading venue/CCP were to successfully apply to its national competent authority to make use of the 30 month opt-out period for exchange traded derivatives) these obligations would not apply to such trading venues and CCPs until approximately the second half of 2019, which should give all trading venues and CCPs sufficient time to prepare their operational systems and update their risk management procedures to cater for access from multiple trading venues/CCPs. In turn, the counter arguments to this are that (I) CCPs have no expectation that any such request for delay will be approved by their national competent authority and (II) given that different venues use different systems, there is only so much that a trading venue/CCP can do to prepare itself for an access request). Accordingly ESMA should use all the mechanisms at its disposal to ensure that national competent authorities treat applications in a fully consistent way to ensure identical application of the rules within the single market. There is nothing in the level 1 text that implicitly or explicitly requires changes to existing clearing business in relation to non-discriminatory access.

- *Arrangements necessary for fulfilling regulatory responsibilities*: trading venues are required to satisfy MiFID requirements relating to contract settlement and position reporting. Non-discriminatory access arrangements must continue to facilitate these requirements.

A CCP that does not have access arrangements in place outside of its vertically integrated model observes that a CCP would establish such excess through an assessment of the applicant trading venue based on fair and reasonable criteria. It considers that the parameters that a CCP should consider are: number and complexity of products; product delivery/settlement mechanism; post trade events such as corporate actions; trading hours and trading calendar.

Its current practice is that a CCP establishes a certification protocol that a trading venue must pass prior to being operationally live with the CCP. Amongst other things, the certification test seeks to ensure that connectivity has been established, that the trading venue has the proper technological infrastructure to support the instruments it wishes to clear at the CCP and that the trading venue has the appropriate processes to facilitate straight-through-processing with the CCP.

With regards to transferable securities and money market instruments, inter-operating CCPs for cash must also follow Guideline and Recommendation 3: Identification, Monitoring and Management of Risks (of Article 52(1)(a), (b) and (c) and Article 52(2) of Regulation (EU) No. 648/2012) to ensure that the CCP's operational arrangements, processing capacity and risk management arrangements are sufficiently scalable and reliable for both the current and projected peak volumes of activity processed through the interoperable link and the number of CCPs involved in the interoperability arrangement.
<ESMA_QUESTION_384>

Q385: Are there other risks related to arrangements for managing operational risk that should be considered? If so, how would such risks arise from the provision of access?

<ESMA_QUESTION_385>
A CCP that does have access arrangements in place outside its vertically integrated model considers that trading venues and CCPs should have sufficient and qualified staff and management oversight. Additionally, CCPs may be subject to operational risk due to potential simultaneous access requests. The CCP may not be sufficiently staffed to manage multiple access requests and the all-access on-boarding requirements. That CCP is of the opinion that a “controlled phasing” approach should be adopted to manage such an eventuality (e.g. through waves of trading venues connecting to a CCP, on a quarterly/semi-annual/annual cycle).

It is generally agreed that there are other risks that should be considered and which may, if significant, provide legitimate grounds for denying access. Examples include exposure to financial crime (anti-money laundering, sanctions policies, etc.), compatibility of IT systems, legal enforceability of contracts, equivalence with the trading venue's risk monitoring systems and controls or its disciplinary, investigatory and enforcement procedures, execution of business outside the scope of the CCP's coverage, etc.

CCPs should draw up objective and non-discriminatory operational standards (including risk management standards) and apply these standards, as set out in Article 35(1) of MiFIR. Further, that per the penultimate paragraph of Article 35(1) of MiFIR, there should be an over-arching principle that a CCP should not be required to lower its risk management standards.
<ESMA_QUESTION_385>

Q386: Given there will be costs to meeting an access request, what regard should be given to those costs that would create significant undue risk?

<ESMA_QUESTION_386>
If costs can be evidenced, it is anticipated that the trading venue submitting the access request would pay all, or at least a material percentage, of the CCP's costs relating to the access request (i.e. that a "pay to play" model would exist with respect to access requests). A CCP that has access in place outside its vertically integrated model notes that another option is for the cost of meeting the access request to be commercially recoverable from the CCP (i.e. potentially for it to be partially or fully compensated if the new link results in additional revenues). Accordingly and in general, it is not envisaged that the costs relating to an access request would be so substantial as to create significant undue risk.

It should be highlighted that paragraph 37 of the Discussion Paper currently omits charges made to the trading venue by the CCP. Such costs should be included as relevant costs. This category of costs should also include costs of any additional capital or other resource requirements.

With reference to the response to Question 384, a CCP should not be required to make material changes to its existing operating business model or procedures by a trading venue requesting access if the proposed changes would generate the same kind of problems and risks identified in the second indent to the answer to Q. 384 or put its regulatory approval at risk. CCPs that already have access arrangements in place outside their vertically integrated model strongly disagree with this – they note that in practice (if a trading venue/CCP were to successfully apply to its national competent authority to make use of the 30 month opt-out period for exchange trade derivatives) these obligations would not apply to such trading venues and CCPs until approximately the second half of 2019, which should give all trading venues and CCPs

sufficient time to prepare their operational systems and update their risk management procedures to cater for access from multiple trading venues/CCPs. In turn, the counter arguments to this are that (I) CCPs have no expectation that any such request for delay will be approved by national competent authorities and (II) given that different venues use different systems, there is only so much that a trading venue/CCP can do to prepare itself for an access request. Accordingly ESMA should use all the mechanisms at its disposal to ensure that national competent authorities treat applications in a fully consistent way to ensure identical application of the rules within the single market. There is nothing in the Level 1 text that implicitly or explicitly requires changes to existing clearing business in relation to non-discriminatory access.
<ESMA_QUESTION_386>

Q387: To what extent could a lack of harmonization in certain areas of law constitute a relevant risk in the context of granting or denying access?

<ESMA_QUESTION_387>
It can be expected that, in general terms, this should not be significant in the EEA context because of common rules in MiFIR and EMIR. However, in a global business, there are and will be third country linkages in terms of products and services where a lack of legal or regulatory harmonisation could generate the kind of risk envisaged in the question.

For example, indirect clearing under EMIR and MiFID II/R is not yet supported by the underlying laws in one or more member states in Europe. This lack of harmonization between EU law and the laws of underlying member states risks undermining the effectiveness of European regulation. From a CCP perspective, a CCP would potentially have concerns about granting access to users who require the CCP to facilitate indirect clearing at a time when the underlying legal framework at a national level does not support indirect clearing.

RECOMMENDATION: So as to facilitate indirect clearing under EMIR (which obligation is anticipated to go live in A1 2015) and under MiFIR, we strongly encourage ESMA to speak to member states so as to ensure that all jurisdictions' insolvency laws fully support indirect clearing on or prior to the date that the EMIR clearing obligation goes live. We are aware that ESMA is already aware of the issue, but are not seeing any developments within any affected member states that suggest this issue will be remedied in time. We are also not aware of the member states that ESMA has identified as having local laws that are incompatible with indirect clearing.

As a related point, if access jeopardises a CCP's regulatory status in any other country, or if the CCP does not have the regulatory status necessary to clear a contract and those kind of issues are not capable of being resolved, that could offer legitimate grounds for denying access.
<ESMA_QUESTION_387>

Q388: Do you agree with the risks identified above in relation to complexity and other factors creating significant undue risks?

<ESMA_QUESTION_388>
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Q389: Q: Are there other risks related to complexity and other factors creating significant undue risks that should be considered? If so, how would such risks arise from the provision of access?

<ESMA_QUESTION_389>
Lack of available time to hire in the necessary expertise and set up the relevant systems

Given the expectation in the final sentence of paragraph 24 on page 346 of the Discussion Paper that CCPs will obtain the necessary authorisation with respect to an access request that is outside the scope of cur-

rently authorised products, one of the main risks will be whether the CCP is able to hire sufficiently experienced staff that are familiar with the new products and then for them and the CCPs members to get up to speed with the particular offering on that specific CCP by the time access has been granted. No two products are risk-managed in identical ways, so the trading venue and regulators should not underestimate the amount of additional IT, operational, risk and legal work involved in setting up to clear a new product. Amendments may need to be made to the existing rulebook of the CCP to facilitate clearing of the new products – these amendments take time to draft and to be approved by regulators.

A CCP that does not currently have access arrangements in place outside its vertically integrated model considers that a CCP required to clear a contract that it does not currently clear may encounter additional elements of complexity and added operational and risk management aspects if its resources are diluted or its expertise spread too thinly as a result. Authorisation may typically cover a wide range of contracts not currently cleared by a CCP and no assumption of expertise should be made on the basis that a CCP is authorised to clear such contracts.

CCPs that already have access arrangements in place outside their vertically integrated model note that in practice (if a trading venue/CCP were to successfully apply to its national competent authority to make use of the 30 month opt-out period for exchange traded derivatives) these obligations would not apply to such trading venues and CCPs until approximately the second half of 2019, which should give all trading venues and CCPs sufficient time to prepare their operational systems and update their risk management procedures to cater for access from multiple trading venues/CCPs. In turn, the counter arguments to this are that (I) CCPs have no expectation that any such request for delay will be approved by national competent authorities and (III) given that different venues use different systems, there is only so much that a trading venue/CCP can do to prepare itself for an access request). Accordingly ESMA should use all the mechanisms at its disposal to ensure that national competent authorities treat applications in a fully consistent way to ensure identical application of the rules within the single market. There is nothing in the Level 1 text that implicitly or explicitly requires changes to existing clearing business in relation to non-discriminatory access.

It is unclear to us whether the final sentence of paragraph 24 on page 346 is intended to provide that a CCP may immediately, without any further review, reject an access request on the grounds that it is not currently authorised under EMIR to clear that product – we would welcome clarification.

RECOMMENDATION: It should not be assumed that because a CCP has authorisation under EMIR to clear a product, it is automatically capable of clearing that product where it does not already provide a clearing service for it.

Choice/conflict of law

The final sentence in paragraph 28 on page 346 states that "legal risk stemming from choice of law and conflict of laws within the EEA will rarely justify a decision to refuse access".

RECOMMENDATION: Irrespective of expectations concerning the rarity of such circumstances, in any situation where legal risk is created by conflicts of law arising from an access request, then this should be grounds for denial of access.

Pre-execution checks - moral hazard when clearing outside the group

Another area of focus is pre-execution checks: CCPs are concerned to ensure that the pre-execution checks carried out for a trade executed at an applicant trading venue do not result in any overall reduction or dilution in risk controls. In particular, for exchange traded derivatives, such pre-trade execution checks should be no less diligent than those carried out by existing trade venues and compatible with the controls in place at existing trade venues. The particular importance for this requirement for exchange-traded derivatives is a consequence of the particular regulatory responsibilities of trading venues (including existing trading venues) relating to such contracts.

On the basis that trading venues are licensed entities and deemed to be "fit and proper", it can be expected that trading venues would not allow their diligence and surveillance obligations to become less exacting in the case of trades being cleared outside of its group and that they would continue to observe high standards of controls and systems (as prescribed in Article 49 of MiFID II). However, it is a risk that should be monitored closely. Some of our members would highlight a potential moral hazard that arises at the point of execution if the trading venue feels less compelled to carry out appropriate diligence because the trade is being cleared outside of its group. A CCP that does not currently clear outside of its vertically integrated model considers that such risks exist, and for exchange-traded derivatives, trading venues should have in place compatible pre-execution surveillance procedures which do not lead to overall standards being reduced because of non-discriminatory access arrangements. Otherwise, the consequential increase on risks would impact the CCP and existing trading venues as well as the applicant trading venue. Conversely, a CCP that does provide clearing outside its vertically integrated model notes that trading venues are subject to the highest standards of controls and systems, as prescribed in Article 49 of MiFID II. They consider this is outside the scope of access, and within the regulatory and supervisory relationship between a trading venue/CCP and its National Competent Authority.

Pre-execution checks - race to the bottom for trading venues that clear the same CCP

We would make the same observations with regard to maintaining rigorous pre-execution checks and avoiding any race to the bottom which could be generated by trading venues competing to be the least intensive venue on which to execute a given financial instrument that is capable of execution at two or more trading venues.

A clearing house should not be permitted to lower its standards as a result of poor pre-execution checks being carried out by the trading venues to which it has provided access.

A CCP that does not currently have an access arrangement outside its vertically integrated model considers that such risks exist, and that for exchange-traded derivatives trading venues should have in place compatible pre-execution surveillance procedures which do not lead to overall standards being reduced because of non-discriminatory access arrangements. Otherwise, the consequential increase in risks would impact the CCP and existing trading venues as well as the applicant trading venue. Conversely, a CCP that has an access arrangement in place outside its vertically integrated model today notes that trading venues are subject to the highest standards of controls and systems, as prescribed in Article 49 of MiFID II. They consider this is outside the scope of access, and within the regulatory and supervisory relationship between a trading venue/CCP and its National Competent Authority.

In the circumstances, a CCP should set out objective and non-discriminatory operational technical standards, including risk management standards, and all access requests should meet those standards, otherwise a CCP should not be required to give access.

RECOMMENDATION: We encourage ESMA and the National Competent Authorities to monitor the quality and scope of pre-execution checks closely.

A CCP that does not currently provide a clearing arrangement outside its vertically integrated model considers that monitoring by ESMA and NCAs is unlikely to provide sufficient assurance on its own as neither competent authorities nor the MiFID regime itself provide for a "no failure" regime and therefore no blanket assumption can be made about complete compliance with all relevant rules for all authorised entities involved in an access arrangement under Article 35 or 36 of MiFIR. A CCP should set out objective and non-discriminatory operational and technical standards, including risk management standards. All access requests should meet such standards. If not, this could be a basis for denial of an access request.
<ESMA_QUESTION_389>

Q390: Do you agree with the analysis above and the conclusion specified in the previous paragraph?

<ESMA_QUESTION_390>

Broadly, yes we agree.

Complete overhaul required to move from having just one CCP to multiple CCPs clearing for a single trading venue

For exchange traded derivatives, the main challenge arises as a result of asking the trading venue to connect to two or more CCPs. The fact that these changes have to occur in a very compressed timeframe (due to Article 36(3) of MiFIR) further adds to the risks and challenges. If the trading venue currently only connects to one CCP, the trading venue's trading, operational and IT systems will require *complete overhaul* (as will its rulebook) to facilitate clearing on multiple CCPs. Depending upon how clearing is facilitated on multiple CCPs, this could potentially involve:

- Splitting order books by CCP;
- Specifying different prices for the same product quoted on the exchange, depending upon which CCP the counterparties wish to clear;
- Creating a "preferred clearer" methodology and infrastructure;
- Updates to middleware systems to facilitate the selection of clearing venue at the point of submission of the trade to clearing; and/or
- For exchange-traded derivatives, the trading venue would need to ensure that it is able to monitor open interest, which would be particularly more challenging where the instrument is cleared on two or more CCPs.

A CCP that does not currently have an access arrangement outside its vertically integrated model considers that is important to ensure that trading venues are not exposed to undue increased risks. For example, access should be capable of being denied if it can reasonably be expected to generate a significant increase in disputes over the legitimacy of a trade or legal enforceability problems, lack of compatibility of IT systems, unresolvable inconsistency over dispute resolution arrangements, undue exposure to financial crime or market abuse, non-compliance by the trading venue and/or existing CCPs with applicable regulatory requirements etc.

Members also query whether it is operationally feasible to expect trading venues to change their operational systems along the above lines within the 6 to 9 months of the date of the access request that MiFIR Article 36(3) envisages. There is a significant risk that access requests will be denied on the basis that there is not sufficient time to fully implement the access arrangement within 3 months of providing a positive response to the access request, as is required by MiFIR Article 36(3). This can to some extent be mitigated by having extensive dialogue and engaging in, where possible, proprietary work between the CCP and the trading venue before the access request is formally submitted, but it is noted that there is no requirement in MiFIR Article 36 for trading venues to have a specific project plan in place AHEAD of receiving an access request – both exchanges and CCPs do not feel it is realistic to expect such a plan to be created from scratch, project managed and fully executed within 9 months of the access request being received.

RECOMMENDATION: We ask ESMA to acknowledge these material concerns and to anticipate that these risk and operational issues could result in a trading venue electing to deny access if they are incapable of resolution within the 6 to 9 months allowed by MiFID Article 36(3) to "go live" with access upon receipt of the access request.

We note that even where a trading venue is able to meet its mandatory timescales, the CCP, which is under no corresponding timing obligation, need not implement the relevant systems within any particular timeframe. This in turn could lead to significant levels of wasted costs and time on the part of the trading venue. It is unclear to us what the consequences would be where a trading venue has used best efforts to grant access within the timeframe specified in the level 1 text but has been unable to do so as a result of events beyond its reasonable control, including but not limited to process/technology issues or other issues faced by the CCP that has requested access.

A CCP that does not currently have an access arrangement outside its vertically integrated model considers that, in any case, access should be capable of being denied if it leads to any possibility of disputes over

legitimacy of a trade or legal enforceability, lack of compatibility of IT systems, lack of consistency of dispute resolution arrangements, exposure to financial crime, ability of the trading venue and existing CCPs to continue to meet regulatory requirements etc.
<ESMA_QUESTION_390>

Q391: To what extent would a trading venue granting access give rise to material risks because of anticipated volume of transactions and the number of users? Can you evidence that access will materially change volumes and the number of users?

<ESMA_QUESTION_391>
A CCP that is not part of a vertically integrated business model believes that the only situation in which this could occur would be if the addition of the new CCP was so beneficial to users that the volumes traded by the exchange or number of users trading on that venue increased to levels not previously anticipated. In their view, this seems reasonably unlikely, as one of the key reasons why trading venues have provided the feed to CCPs is to grow the volume and number of trading participants traded on the venue. If this was the case then they presume that the trading venue would regard providing access as a top priority and would address the capacity shortfall as soon as was practicable.

They consider that this should not be a risk as long as a proper due diligence process is in place to establish whether the CCP has the appropriate standards to perform its task. Setting up an additional CCP does not necessarily mean additional trading members or traded volume. If the trading venue believes the connection to a new CCP may give rise to increased volume/transactions/users, it should be comfortable to have enough bandwidth in its trading system and the necessary risk register in place to deal with the additional flow.

The extent of the risks would in part be driven by the correlation between the members/users of the CCP and the members/users of the trading venue. In principle, the higher the correlation, the lower the risk, because the incremental increase is in transaction volumes, not in extra members that require connectivity that did not exist prior to the access request being granted.

While transparency is important, the perspectives of our exchange and CCP membership vary as to whether the analysis of anticipated volumes and numbers of members should be made public and whether or not access requests (and details relating thereto) should be made public, bearing in mind that elements of that information could be commercially confidential.

Reference was made earlier in this response to the issue of whether the anticipated volume of transactions or numbers of users meeting a minimum threshold in order to ensure that an access arrangement is economically viable. If it is too low, this could lead to needless fragmentation and inefficiencies, which could be a particular problem for some of the smaller markets. Some CCPs disagree with the concept of a minimum threshold, but, in any event, anticipated volumes should be the subject of analysis by the applicant CCP.

The trading venue should be entitled to conduct an independent review to validate that analysis, where appropriate.
<ESMA_QUESTION_391>

Q392: To what extent would a trading venue granting access give rise to material risks because of arrangements for managing operational risk?

<ESMA_QUESTION_392>
A CCP that does not currently have an access arrangement outside its vertically integrated model considers that access would give rise to material risks if the CCP does not have in place systems and controls at least as stringent as existing CCPs. For example:

- Compatible IT systems, security arrangements and business continuity systems
- Robust and compatible rules which provide a legal basis for contract formation, allocation, error trades, trade reporting, etc.

- Compatible dispute resolution arrangements and termination rights, including winding own/transfer arrangements.

Conversely, a CCP which is not part of an integrated business model believes that the only situation in which this could occur would be if the addition of the new CCP was so beneficial to users that the volumes traded by the exchange or number of users trading on that venue increased to levels not previously anticipated. In their view, this seems reasonably unlikely, as one of the key reasons why trading venues have provided the feed to CCPs is to grow the volume and number of trading participants traded on the venue. If this was the case then they presume that the trading venue would regard providing access as a top priority and would address the capacity shortfall as soon as was practicable.

They consider that this should not be a risk as long as a proper due diligence process is in place to establish whether the CCP has the appropriate standards to perform its task. Setting up an additional CCP does not necessarily mean additional trading members or traded volume. If the trading venue believes the connection to a new CCP may give rise to increased volume/transactions/users, it should be comfortable to have enough bandwidth in its trading system and the necessary risk register in place to deal with the additional flow.

They also note that risk may arise where the CCP's risk management procedures imposed demands on the trading venue that the trading venue was not confident that it could adhere to (for example an aggressive timeline for disabling a user in extremis) or where the CCP's trade registration rules led to a risk of trade rejection inconsistent with either regulation or the trading venue's rules.

The potential for a significant exacerbation in operational risk could arise:

- in the area of physically settled contracts where access may generate capacity problems in supporting the physical settlement of contracts on the trading venue;

- in the case of trading venues which permit trading through more than one medium e.g. by telephone and electronically, significant ongoing costs may be incurred by both the CP and the trading venue which could significantly impact the economics of affording access;

- in the case of bringing new contracts to market or introducing innovations insofar as it may generate increased complexity where there is more than one CCP associated with a particular trading venue and where change will be dictated by the slowest CCP.

<ESMA_QUESTION_392>

Q393: Given there will be costs to meeting an access request, what regard should be given to those costs that would create significant undue risk?

<ESMA_QUESTION_393>
In practice, it is anticipated that the CCP submitting the access request would pay all, or at least a material percentage, of the trading venue's costs relating to the access request (i.e. that a "pay to play" model would exist with respect to access requests). Accordingly, it is not envisaged that the costs relating to an access request would be so substantial as to create significant undue risk.

Any such fee schedule should be transparent and the CCP submitting the access request should not be expected to cover future costs for connectivity by other CCPs to the same trading venue.

For reasons already given, a trading venue should not be required to make significant changes to its existing operating business model in order to afford access to a trading venue, particularly where this will undermine its regulatory approval and/or generate additional significant levels of risk or where there is inherent incompatibility with the trading venue. This view is supported by a number of trading venues with a vertically integrated model.

Trading venues that already have access arrangements in place outside their vertically integrated model

strongly disagree with this – they note that in practice (if a trading venue/CCP were to successfully apply to its national competent authority to make use of the 30 month opt-out period for exchange traded derivatives) these obligations would not apply to such trading venues and CCPs until approximately the second half of 2019, which should give all trading venues and CCPs sufficient time to prepare their operational systems and update their risk management procedures to cater for access from multiple trading venues/CCPs. In turn, the counter arguments to this are that (I) trading venues have no expectation that any such request for delay will be approved by their national competent authority and (II) given that different venues use different systems, there is only so much that a trading venue/CCP can do to prepare itself for an access request). Accordingly ESMA should use all the mechanisms at its disposal to ensure that national competent authorities treat applications in a fully consistent way to ensure identical application of the rules within the single market. There is nothing in the level 1 text that implicitly or explicitly requires changes to existing clearing business in relation to non-discriminatory access.

In the case of a trading venue which is owned, partially or wholly, by a third party entity, there may be additional budgetary issues, analysis and consents that may take time and will make it difficult to meet an access request with any degree of financial certainty within the mandatory timeframes, bearing in mind also that CCPs are not required to give trading venues prior notice of an access request.
<ESMA_QUESTION_393>

Q394: Do you believe a CCP's model regarding the acceptance of trades may create risks to a trading venue if access is provided? If so, please explain in which cases and how.

<ESMA_QUESTION_394>
Yes, we do believe it could create undue risks if access is provided and trade acceptance rules are not harmonised.

The only situation that we envisage that risks could arise is where the CCPs trade registration rules led to a risk of trade rejection inconsistent with either regulation or the trading venue's rules.

Currently, within the European cleared swaps market there are a number of trade acceptance models operated with respect to various CCP services. There are a number of different service providers that provide the middleware platforms relating to these trade acceptance models (e.g. MarkitWire, Bloomberg, TradeWeb). Many of those middleware platforms already facilitate trade acceptance for a variety of different CCPs.

A trading venue that does not currently have an access arrangement outside its vertically integrated model reiterated the point that, while an external trading venue may request material changes to a CCP's existing operating business model, it should not be required to make those changes where it would put its regulatory approval at risk or generate significant increased risks for any of the reasons given earlier in this paper on this issue. A trading venue's operating business model is the basis of its regulatory approval and operational procedures, and it is unreasonable to expect the trading venue to change its model except on a voluntary basis.

Trading venues that already have access arrangements in place outside their vertically integrated model strongly disagree with this – they note that in practice (if a trading venue/CCP were to successfully apply to its national competent authority to make use of the 30 month opt-out period for exchange traded derivatives) these obligations would not apply to such trading venues and CCPs until approximately the second half of 2019, which should give all trading venues and CCPs sufficient time to prepare their operational systems and update their risk management procedures to cater for access from multiple trading venues/CCPs. In turn, the counter arguments to this are that (I) trading venues have no expectation that any such request for delay will be approved by their national competent authority and (II) given that different venues use different systems, there is only so much that a trading venue/CCP can do to prepare itself for an access request). Accordingly ESMA should use all the mechanisms at its disposal to ensure that national competent authorities treat applications in a fully consistent way to ensure identical application of the rules within the single market. There is nothing in the level 1 text that implicitly or explicitly requires changes to existing clearing business in relation to non-discriminatory access.

Members query whether it is operationally feasible to expect trading venues to change their operational systems along the above lines within the 6 to 9 months of the date of the access request that MiFIR Article 36(3) envisages. There is a significant risk that access requests will be denied on the basis that there is not sufficient time to fully implement the access arrangement within 3 months of providing a positive response to the access request, as is required by MiFIR Article 36(3). This can to some extent be mitigated by having extensive dialogue between the CCP and the trading venue before the access request is formally submitted, but it is noted that there is no requirement in MiFIR Article 36 for trading venues to have a specific project plan in place AHEAD of receiving an access request – both exchanges and CCPs do not feel it is realistic to expect such a plan to be created from scratch, project managed and fully executed within 9 months of the access request being received and, for example, in the case of one infrastructure provider trading and clearing metals, it could take up to 18-24 months. In this context, it should be noted that the needs of physically settled contracts and for a CCP and its clearing members to be members of the relevant delivery system could further complicate the timescales.
<ESMA_QUESTION_394>

Q395: Could granting access create unmanageable risks for trading venues due to conflicts of law arising from the involvement of different legal regimes?

<ESMA_QUESTION_395>
A CCP that does not currently have an access arrangement outside its vertically integrated model notes that unmanageable risks could be created. For example:

- if the CCP does not have in place arrangements which allow the trading venue to meet its compliance with relevant financial sanctions regimes, anti-money laundering or anti-corruption requirements, position management requirements or other regulatory requirements; or

- if access exposes the trading venue to third country regulation that adversely affects the trading venue.

<ESMA_QUESTION_395>

Q396: Are there other risks related to complexity and other factors creating significant undue risks that should be considered? If so, how would such risks arise from the provision of access?

<ESMA_QUESTION_396>
It should be borne in mind that granting access is not just a matter for the trading venue and the clearing house. Such connectivity has an enormous impact on existing CCPs, the exchange and clearing house members, as well as end users. The exchange/clearing house members will need to update their IT and operational systems to cater for the new connectivity. They will also have to review and consider any changes to the rulebooks of either venue. These risks should be carefully assessed an addressed with respect to any access request.

A trading venue that does not currently have an access arrangement outside its vertically integrated model observes that in addition, for example, the CCP arrangements must:

- provide systems for reporting to the trading venue to ensure it continues to operate proper market supervision, position management, position reporting and other regulatory obligations;
- protect the trading venue's regulatory status in third countries;
- have in place the necessary security and licensing arrangements;
- meet the terms of any other regulatory or legal requirements which must be met by the trading venue (e.g. public procurement processes); and
- be able to give suitable assurances regarding data security.

Reference has already been made to the operational risks that can be generated in the case of physically settled contracts, but a CCP wishing to clear trades executed on a trading venues platform would have to

ensure that it and its clearing members were also members of the relevant delivery system and that could take considerable time and incur material costs taking the process beyond the proscribed 9 months.

Recognising the considerable publicity and concern around the security and reliability of benchmarks, the trading venue should be permitted to refuse access to a CCP to access its trade data if it can fairly and reasonably be anticipated that it would have an adverse significant impact on the viability and affordability of the systems and controls surrounding the creation and operation of particular benchmarks.
<ESMA_QUESTION_396>

Q397: Do you agree with the conditions set out above? If you do not, please state why not.

<ESMA_QUESTION_397>
Whilst we broadly agree with the conditions, we have the following comments and queries on the detail:

Keeping information up to date

Paragraph 35(i) - We understand the words "relevant entity" to actually refer to “each entity”, i.e. the obligation to keep information up to date applies to both parties, not just the party that made the access request.

RECOMMENDATION: The specific timeframe in which one entity should inform the other of material changes should be specified in the access agreement as a matter of contract, not by way of regulation in the RTS. Equally, the remedy for falling to keep that information up to date or to notify the other party of material changes should be governed by the contract/governing law of the contract, not the RTS.

Confidentiality – contractual provision

35(ii) - We kindly request clarification as to the basis on which usage/sharing is proposed to be "strictly forbidden" - is it proposed to be forbidden by the RTS or by contract? If by the RTS, what would the consequences be for breach thereof?

RECOMMENDATION: Given that the inclusion of confidentiality provisions such as these are common practice in any documentation of this type, we recommend that the terms and scope of the confidentiality provisions be left to the contractual agreement between the trading venue and the CCP and, accordingly, that the remedy for breach also be governed by the contract/governing law of the contract. We note that paragraph 35(ii) implies that only the venue requesting access would be subject to the confidentiality obligations – in practice, both parties would be subject to the same.

Confidentiality – focus on “development phase”

We notice the focus on the “development phase of financial instruments”. We do not believe that this specific issue merits individually singling out.

RECOMMENDATION: Should ESMA propose to set out a reference to confidentiality provisions in the RTS, we recommend that ESMA does not single out “the development phase of financial instruments” as meriting specific attention.

Should ESMA not be of the same view, we should be grateful if ESMA would clarify how the "development phase" should be determined with respect to the financial instrument and its rationale for the particular focus on this area. Note that we believe the development phase applies to the trading/clearing of the financial instruments on that particular venue rather than, as this paragraph of the Discussion Paper suggests, to the financial instruments themselves - it would only apply to the financial instruments themselves where they are genuinely new financial instruments, as opposed to merely being a new trading/clearing venue for existing financial products.

Principal terms of the access agreement – "should" vs "must"

35(iii) – we note the use of the word "should" in the opening line, but understand that it is ESMA's intention that this should be interpreted to read "must", i.e. items (a) to (g) are intended to be minimum procedures that ESMA *requires* an access agreement to address, rather than (a) to (g) merely setting out what ESMA considers to be *best practice* as to the procedures that an access agreement may address.

RECOMMENDATION: Should ESMA propose to set out the minimum content of access agreements in the RTS, we recommend that ESMA state that the access agreement "must, at a minimum" address the following procedures.

Principal terms of the access agreement – "reasonable" notice

We note the reference to "within a reasonable notice period" and "should be given a reasonable amount of time".

RECOMMENDATION: Should ESMA propose to set out the minimum content of access agreements in the RTS, we recommend that ESMA does not specify a specific time duration that would be considered "reasonable", but rather leave that to the contractual terms of the access agreement.

Principal terms of the access agreement – dispute resolution

Paragraph 35(iii)(d) states that the access agreement should contain procedures for resolving disputes.

RECOMMENDATION: We suggest that this be left to the parties. In some legal jurisdictions, the use of alternative dispute resolution is a common expectation: in others, the courts are favoured. There is no need for a standardised approach.

If the appropriate safeguards, operational standards and risk management requirements are set out sufficiently clearly (as provided for in Article 35.1) then this should limit the scope for disputes. The access arrangement should set out a procedure to resolve any remaining possibility of disputes.

Principal terms of the access agreement – grounds for termination

Termination of an access agreement may occur in various circumstances, including but not limited to:

(i) Upon notice;

RECOMMENDATION: The amount of notice that an entity may give to the other to terminate the access agreement should be specified in the contract

(ii) When required by a NCA to preserve the smooth and orderly functioning of the markets and/or mitigate systemic risk (see paragraph 53 on page 353, which stated that "[an NCA] may take necessary action, which may result in requiring the termination of the access arrangement")

This ground appears to permit termination in the sole and absolute discretion of the NCA. We query on what basis a trading venue or CCP could seek to challenge any such termination request and the precise proposed scope of the power that ESMA proposed be given to the NCAs in this regard.

We consider it important that the right balance be struck between (i) providing NCAs with the tools they need to maintain market integrity, ensure compliance with their rules and mitigate systemic risk; (ii) preserving the rights of market participants to enter into contractual arrangements with one another on

terms that are commercially acceptable to them; and (iii) ensuring that market infrastructure operators can maintain the smooth and orderly functioning of their markets.

If it were proposed to given NCAs the power to *demand* termination of an access agreement, this would set a precedent that would concern market participants. It is disproportionate to single out access arrangements between trading venues and CCPs as an agreement for which regulators can force the termination. It is unclear to us why this is considered necessary, when none of the following contractual relationships (all of which could be considered to contain some degree of systemic risk) have ever been proposed to be subject to such regulatory termination requirement:

- a trading/clearing venue and one or more of its members
- a trading/clearing venue and one of its third party vendors
- a CCP and its settlement/custodian banks
- a trading/clearing member and one or more of its clients

Further, if the concern is the smooth and orderly functioning of the markets / systemic risk, it suggests that NCAs would expect termination extremely quickly. If these are the only venues in Europe at which the applicable financial instruments are capable of being traded/cleared, then termination may cause significant market disruption / systemic problems (e.g. the lack of ability to hedge going forward and the lack of ability to close out existing positions).

Whether or not NCAs are given the power to demand termination of an access agreement, it is critical that their exercise of this or any other similar power by an NCA is exercisable on notice to the market infrastructure operators and full consideration is given to market consequences and whether or not there are alternative steps that may be taken which could reduce the risk of those consequences. Any notice of termination or NCA unilateral action should be accompanied by a full statement of reasons.

(iii) Upon an increase in risk that would have justified a denial of access in the first instance

Paragraph 35(iii)(e) states that termination should be allowed if risks increase in a way that would have justified denial of access in the first instance - members are concerned that this introduces moral hazard to the relationship and that this could be vexatiously cited as a grounds for termination. What are the proposed remedies available to a party that finds the access arrangement purportedly terminated by its counterparty in this manner, if it disagrees with the assessment that risks have so increased?

RECOMMENDATION: To mitigate the moral hazard risk, we recommend that any termination of the access request that is made on the grounds of an increase in risk only be permitted upon agreement by the NCA of the terminating party that the risks have so changed.

If the entity that seeks termination on this ground is not able to persuade its NCA that the risks have so changed, it could always just give non-default contractual notice to terminate. It is acknowledged that such termination by notice may take longer to effect than any purported termination on account of a change in risks.

(iv) Upon breach of the agreement.

Paragraph 35(iii)(e) states that termination should not be triggered by "minor breaches".

RECOMMENDATION: Termination rights for breach (be they minor or major breaches) should be left to the contract/ law governing the contract.

To do otherwise (i.e. to list out what breaches are or are not "minor" for such purpose) would be unduly onerous, hamper and delay commercial negotiation of the access agreement for no material benefit and go much further than parties would ordinarily go when negotiating contracts of this type.

Principal terms of the access agreement – effect of termination

As well as the grounds for termination, thought needs to be given to the *effect* of such termination, i.e. what is the impact on trades that are already cleared at the affected CCP? Should they be required to be moved to a new CCP within a given timeframe, failing which terminated? Or should the termination just affect *future* transactions, with the existing transactions left at the affected CCP?

RECOMMENDATION: The impact of termination on trades that are already cleared at the CCP in respect of which the access arrangement is purported to be terminated should be left to the contractual terms of the access agreement, rather than mandated as a matter of regulation.

Fetters on other access arrangements

Paragraph 35(iv)(e) refers to the ability to restrict future access arrangements on "duly justified" risk grounds.

We agree with this proposal - a venue can only deal with so many access requests at a time and there is nothing in the Level 1 text or this consultation paper that sets out how two or more requests should be prioritised by the recipient of the access request.

A CCP that currently has an access arrangement in place outside its vertically integrated model is of the opinion that a "controlled phasing" approach should be adopted to manage such eventuality (e.g. through waves of trading venues connecting to a CCP, on a quarterly / semi-annual / annual cycle).

Risk management standards

Paragraph 35(iii)(g) on page 350 states that the CCP should ensure the access arrangement does not cause the CCP to reduce its risk management standards, especially when there are two or more CCPs involved in the access arrangement.

RECOMMENDATION: The words "especially when there are two or more CCPs involved in the access arrangement" should be deleted. The CCP should not be expected or required to reduce its risk management standards in any circumstances.

We understand that this paragraph (g) is really driving at the need to avoid a "race to the bottom" in risk management standards when two or more CCPs clear for the same trading venue.

As indicated earlier, CCPs are licensed and regulated entities and therefore deemed fit and proper to perform their role, so it should not be assumed that they would reduce their risk management standards in order to gain a greater market share. It is, of course, a possibility, but regulatory oversight, the priority being given by users to the safety of clearing, oversight by clearing members and the CCP's own high priority given to effective systems and controls argue that there would only ever be a "race to the top" when it comes to risk management - not a "race to the bottom" i.e. it is not just cost that drives the choice of clearing venue - the risk management approach and standards are a key determinant of that choice.
<ESMA_QUESTION_397>

Q398: Are there any are other conditions CCPs and trading venues should include in their terms for agreeing access?

<ESMA_QUESTION_398>
Monitoring open interest/settlement for listed derivatives

For listed derivatives (but not cleared swaps), the trading venue is required to monitor the open interest in positions executed at its venue and monitor the settlement of those contracts.

Part of the access arrangements between a trading venue and a CCP will need to include the procedures to be followed whereby the CCP can provide the necessary information to the trading venue on the positions outstanding at the trading venue in order to enable to trading venue to fulfil its regulatory requirements to monitor open interest and settlement. It should be highlighted, however, that close-out of a contract traded at one venue with a contract traded at another venue, cleared by the same CCP, would result in there being no possibility of calculating the open position pertaining to either of the two venues. Consequentially, neither venue would be able to meet its regulatory requirements. There is no information which can be provided by a CCP which would overcome this issue. The only resolution would be to either deny access or to refrain from closing out contracts traded at one trading venue with those traded at an existing venue.
<ESMA_QUESTION_398>

Q399: Are there any other fees that are relevant in the context of Articles 35 and 36 of MiFIR that should be analysed?

<ESMA_QUESTION_399>
Yes - fees charged by a CCP to a trading venue in connection with that CCP clearing trades executed on that venue.

It is generally recognised that trading and clearing fees should not be so bundled together as to make it impossible for a market participant to determine how the fees are calibrated and in respect of what service they are being charged (e.g. execution or clearing). They should also be fairly reflective of the costs of the relevant service and avoid any anti-competitive cross-subsidy between services. Equally, while some differentiation in clearing and trading fees is inevitable because of differences in costs, every effort should be made to ensure that they are not anti-competitive as against one group of market markets over another group or between trading venues where the underlying costs are comparable.

It is recognised that a CCP will, in responding to an access request, incur additional costs related to IT, connectivity, staffing resources, administration, capital, increased guarantee fund charges and legal fees and it should not be prevented from seeking recovery of those fees from the trading venue which, in turn, may seek to recover those fees from its members. This does not preclude the possibility of a CCP recovering costs in another manner, e.g. a revenue share agreement with the requesting trading venue.
<ESMA_QUESTION_399>

Q400: Are there other considerations that need to be made in respect of transparent and non-discriminatory fees?

<ESMA_QUESTION_400>
Predictable vs ascertainable

We note the reference in paragraph 38 on page 350 of the Discussion Paper to the fees charged being "predictable". We assume that ESMA in fact intended to say that they fees should be "ascertainable".

“Non-discriminatory” ≠ “the same”

We also highlight that the fees must be *non-discriminatory* - contrary to ESMA’s specific assertion in paragraph 39 on page 351 of the Discussion Paper, that does *not* mean that the fees must be *the same* for each clearing member or each venue.

Where the service that a CCP provides to one trading venue differs from the service provided to another trading venue that clears on that CCP (or one venue agrees an upfront charging structure whereas another prefers to spread costs over time), there may be grounds for the CCP charging differently, even if the two contracts traded on each trading venue are fundamentally the same/similar.

If the services provided are identical and the trading venue making the request is willing to receive an identical service to that received by an existing trading venue connected to that CCP, the fees should be the same, so as to be non-discriminatory.

RECOMMENDATION: We ask that ESMA acknowledge that there are grounds for different pricing to apply to different trading/clearing members and different venues.

It is also common for CCPs that are establishing a new clearing service to offer incentive pricing to the initial group of clearing members, with a view to encouraging participation and thereby growing potential competition amongst clearing venues that clear the same/similar products. While incentive pricing must not distort order flow or generate artificial liquidity, it is an important mechanism for generating sufficient interest in new platforms and products and generating competition with existing incumbent venues.

RECOMMENDATION: Given that the purpose is to further the aims of the European Commission to *increase* competition among CCPs, we ask ESMA to explicitly confirm that proportionate incentive pricing for early adopter clearing members does not constitute discriminatory pricing.

Further to earlier observations about the importance of unbundling clearing and trading fees and sustaining fees' transparency, while it is accepted that the existing canon of EU and member states' national competition laws are sufficient to address concerns regarding anti-competitive behaviours in what will be an increasingly more competitive environment, there is the risk of undue cross-subsidy between clearing and execution so the issue of fees and how they are calibrated and apportioned does merit close monitoring by NCAs.
<ESMA_QUESTION_400>

Q401: Do you consider that the proposed approach adequately reflects the need to ensure that the CCP does not apply discriminatory collateral requirements? What alternative approach would you consider?

<ESMA_QUESTION_401>
The overall approach to acceptable collateral is governed by regulation and it should be open to a CCP to determine, subject to compliance with those overarching requirements (e.g. as to high liquidity and loss resistance), which type of collateral is most appropriate for which types of products, risks and users.

Economic equivalence

We do agree that if a contract cleared by a CCP that was traded on one trading venue has the same risk profile as a contract traded on another trading venue cleared by that CCP, such that the only difference between the two contracts is simply the trading venue, then the collateral requirements should be the same. This is not likely to be an issue when multiple trading venues clear a product through one CCP as it is likely that products will be designed as close as possible, if not identical, to provide full netting or fungibility at the clearing level. The instances where different collateral requirements may be justified are where the contracts are not fungible and liquidity on one exchange is manifestly greater than another, or where the risk profiles are not identical.

RECOMMENDATION: We strongly recommend that economic equivalence (for the purposes of netting) be very narrowly determined, so that it is used solely in the context of two *identical* contracts, where the only difference between the contracts is their trading venue.

We note that the term "economically equivalent" is not defined anywhere in the level 1 text or the Discussion Paper. Accordingly, we have no guidance as to the scope of the equivalence, nor who determines such equivalence (a CCP or an NCA?). We assume that the CCP is expected to make the determination and to discuss such determinations with its NCA, ahead of implementing any cross-product margining.

We caution against taking a one-size-fits-all approach to collateral. The appropriateness of having different margining methodologies for economically equivalent contracts turns on precisely how "economically equivalent" they are - if the contracts are completely fungible by virtue of being identical, then we agree

that the margining methodologies should not be different. However, if the two trades are economically equivalent but have differences in some core (or even non-core) provisions such as size, corporate action provisions etc. then there may be grounds for its being appropriate to use differing margin methodologies and for considering that (contrary to the assertion in paragraph 44 on page 351 of the Discussion Paper) the two economically equivalent contracts do not have the same risk characteristics. We do agree that the methodology should be driven by the characteristics of the product, not the trading venue.

A CCP that currently does not have an access arrangement in place outside its vertically integrated model is of the opinion that there should be clear policies set out relating to the principle of non-discriminatory treatment of collateral by CCPs. CCPs should only apply non-discriminatory treatment to collateral requirements for all products, based on the risk profile of the product. In particular, a CCP should apply the same collateral policies across all instruments with the same risk assessments, and accept the same instruments/security as collateral and apply the same haircuts thereto.
<ESMA_QUESTION_401>

Q402: Do you see other conditions under which netting of economically equivalent contracts would be enforceable and ensure non-discriminatory treatment for the prospective trading venue in line with all the conditions of Article 35(1)(a)?

<ESMA_QUESTION_402>
For transferable securities and OTC derivatives, the location and choice of the trading venue should be largely irrelevant (although there may be some differences surrounding settlement and delivery), – the jurisdiction under which the CCP operates is much more relevant when it comes to bankruptcy/insolvency. Whether or not the trading venue is operating under the same jurisdiction or not is irrelevant as the contract only becomes "live" when it is cleared.

There is one potential caveat to that view – the contract created at the CCP results from a novation from the trading venue. If the contract executed at the trading venue could be set aside for some reason (e.g. upon successful challenge from the bankruptcy official of a trading member of the trading venue), then there would be a potential risk that the CCP contract would also have to be set aside, on the grounds that there was no contract that was capable of novation to the CCP in the first place.

One CCP which is not part of a vertically integrated business model does not see other conditions under which netting of economically equivalent contracts would be enforceable and agrees with the rest of ESMA's analysis.

For exchange-traded derivatives, for which the terms of the contract are by their very nature determined by the trading venue, and continue to be so until expiry, the situation is different. For such contracts, the trading venue on which the contract is traded is a significant factor in netting and other considerations.

Economic equivalence

We note that the term "economically equivalent" is not defined anywhere in the level 1 text or the Discussion Paper. Accordingly, we have no guidance as to the scope of the equivalence, nor who determines such equivalence (a CCP or an NCA?). We assume that the CCP is expected to make the determination and to discuss such determinations with its NCA, ahead of implementing any cross-product netting.

What do we mean by "netting"?

We tend to mean:

(A) the following entirely separate <u>pre-default</u> processes:

(i) *Payment netting*: Where two or more payments are owed between counterparties on the same day in the same currency, this is the process by which one of the two counterparties agrees to make a single "net" payment to the other, instead of the counterparties paying each individual

"gross" payment to one another. It reduces settlement risk and the absolute amount of cash that is required to move from one party to another.

(ii) *Position closure/netting. For transferable securities and OTC derivatives, we believe that this is likely to lead to few difficulties. For exchange-traded derivatives, the issues set out above are likely to preclude the position closure/netting and exchange-traded derivative contracts traded on one venue will not close out those traded on another:* In certain situations, a CCP is able to eliminate the exposure from a contract by the netting of the contract with an identical but opposite contract. The position is in this way irrevocably expunged.

(iii) *Position offset:* In certain situations, the way in which the exposure from a contract that is cleared at a CCP can be reduced or eliminated is not by terminating that contract but rather by entering into an equal but opposite transaction (e.g. to eliminate the risk from a contract where you agree to buy x lots of copper, you would enter into the same contract of the same specification as a seller). The CCP will in such cases leave these two offsetting contracts open in its books and records until expiry/the termination; and

(B) Close-out netting: Upon a default of one of the parties, all obligations under all open contracts are accelerated, terminated and then netted down to a single net cash sum (a "close out amount") payable by one party to the other. This process is largely governed by insolvency law and procedures.

Each of these pre-default netting scenarios merit separate consideration:

(i) *Payment netting*:

RECOMMENDATION: we are in favour of payment netting the payments relating to a contract executed at one trading venue with the payments relating to a contract executed at another trading venue. Pre-default payment netting is a legitimate requirement under the non-discriminatory access arrangements, which CCPs should be required to provide if requested by a trading venue.

(ii) *Position closure/netting*:

For listed derivatives, this is not as straightforward as for cleared swaps, for the following reasons:

(a) For listed derivatives the terms of the contract are by their very nature determined by the trading venue, and continue to be so until expiry. For this reason, two exchange traded derivatives are never absolutely identical; and

(b) Also for listed derivatives (but not cleared swaps), the trading venue is required to monitor the open interest in positions executed at its venue and monitor the settlement of those contracts. In relation to non-discriminatory access, this applies to both the applicant trading venue and to existing trading venues.

RECOMMENDATION: We are in favour of non-discriminatory practices being followed by CCPs in relation to position closure / netting, but recognise that differences in contract terms may make this more difficult to achieve as between comparable listed derivative contracts traded on different trading venues. The issues set out above are likely to preclude the position closure / netting of a listed derivative contract traded on one trading venue with a listed derivative contract traded on a different trading venue.

(iii) *Position offset:* We believe that position offset, along the lines set out above, can overcome the difficulties relating to position closure / netting as described above. We also believe that this approach should be combined with a non-discriminatory approach to cross-margining.

Under such a netting approach, a trading venue will continue to be able to identify positions relating to the trading venue. The access arrangements between a trading venue and a CCP will need to set out the procedures to be followed for the CCP to provide the necessary information to the trading venue on the positions outstanding at the trading venue.

RECOMMENDATION: We are in favour of facilitating the use of position off-setting, in conjunction with a CCP providing cross-margining, consistent with EMIR.

RECOMMENDATION: Regardless of whether a CCP or an NCA considers two financial instruments to be economically equivalent, no two different financial instruments should be *required* as a matter of regulation to be netted (be that via position offset, pre-default payment net or close-out net) unless and until the NCA, the CCP or the clearing members (either collectively or individually) of the CCP have obtained a legal opinion to their satisfaction from a reputable international law firm that confirms that such netting is valid, binding and enforceable for regulatory capital purposes under CRD IV and for balance sheet netting purposes under IAS 32 and that such netting would not lead to any impairment in the ability of the CCP or its existing venues to meet their regulatory obligations.
<ESMA_QUESTION_402>

Q403: The approach above relies on the CCP's model compliance with Article 27 of Regulation (EU) No 153/2013, do you see any other circumstances for a CCP to cross margin correlated contracts? Do you see other conditions under which cross margining of correlated contracts would be enforceable and ensure non-discriminatory treatment for the prospective trading venue?

<ESMA_QUESTION_403>
These proposals only seem to require the CCP to offer cross product margining for the new trading venue where the CCP is ALREADY providing cross product margining with respect to trades executed on another trading venue.

RECOMMENDATION: We should be grateful if ESMA would kindly confirm that nothing in this provision should be construed as giving a trading venue the ability to force the CCP to offer margin offsets/cross product margining, unless it is already offering such a service for an incumbent trading venue.
<ESMA_QUESTION_403>

Q404: Do you agree with ESMA that the two considerations that could justify a national competent authority in denying access are (a) knowledge it has about the trading venue or CCP being at risk of not meeting its legal obligations, and (b) liquidity fragmentation? If not, please explain why.

<ESMA_QUESTION_404>
Whilst we understand that consideration of historic breaches of legal obligations needs to take into account materiality, it is vital that looking forward, the access arrangements do not lead to risk of a CCP or trading venue not meeting its legal obligations. It is highly unlikely that a NCA would permit arrangements to be put in place which could lead to a risk of a CCP being in breach of any legal obligation – major or minor. The CCP or trading venue would be expected to rectify the situation. It should be an absolute requirement that access should not lead a CCP, trading venue, existing venue or existing CCP to be at risk of not meeting their legal obligations. This should be upheld rigorously.

We believe that minor *historic* breaches of legal obligations that do not threaten operations or risk management should not be grounds for denying access, if they do not impact the ability of the trading venue or CCP to offer the relevant service. Any historic breach should be considered in the context in which it occurs. Such breaches should not lead the national competent authorities to conclude automatically that a CCP or trading venue would threaten the smooth and orderly functioning of the markets nor adversely affect systemic risk. However, we agree that the arrangements under which access is granted should not lead to any increased risks of a trading venue or CCP not meeting their relevant legal obligations.

In addition, a CCP that does not currently have an access arrangement outside of its vertically integrated model considers that in certain circumstances, non-discriminatory access could result in increased risks to existing trading venues and existing CCPs, and the inability of existing venues and existing CCPs to meet their regulatory requirements, For these reasons, in their view, the scope of organisations that the National Competent Authority should consider in determining whether access should be granted should specifically include existing venues and existing CCPs.

We further agree that the National Competent Authority should be permitted to refuse access where it considers that granting access would result in liquidity fragmentation.

RECOMMENDATION: The considerations which could justify a National Competent Authority denying access are:

- **Knowledge of a material breach in the trading venue or CCP in meeting its legal obligations;**
- **Knowledge that, as a consequence of granting access, there would be an increased and significant risk of the trading venue, CCP, existing trading venue or existing CCP not meeting their legal obligations;**
- **Liquidity fragmentation; and**
- **The only solution to correcting an issue is for the NCA to deny access.**

<ESMA_QUESTION_404>

Q405: How could the above mentioned considerations be further specified?

<ESMA_QUESTION_405>
We do not believe that it is possible or appropriate to specify further at this stage.
<ESMA_QUESTION_405>

Q406: Are there other conditions that may threaten the smooth and orderly functioning of the markets or adversely affect systemic risk? If so, how would such risks arise from the provision of access?

<ESMA_QUESTION_406>
Sanctions, cybersecurity breaches, changes in legislation and force majeure events (including but not limited to terrorism and civil unrest) would not arise from the provision of access per se, but may be reasons why a venue would want to terminate the access arrangement.

A CCP that currently has an access arrangement outside its vertically integrated model considers that it is again important here to limit the potential cross-subsidy between trading and clearing fees. The reason for this is that given the absence of interoperability in exchange traded derivatives, CCPs will in effect not be directly competing with each other. As a result, pricing power will be fully transferred to CCPs, whilst trading venues will be in competition. There is the risk that a vertically integrated CCP will increase its fees with a commensurate reduction in the trading fees of the vertically integrated trading venue and this ties into the need for close NCA monitoring and sufficient transparency as between clearing and trading fees.

We would further suggest that the National Competent Authority takes into consideration the impact that the CCP would have on the trading venues' ability to innovate and remain competitive and relevant within the market. Trading venues are subject to constant national and global competition, so that, in order to remain relevant and competitive within a particular market, it is necessary for them to adapt and innovate. The pace of innovation will be significantly affected and the cost vastly increased, where there is more than one CCP associated with a particular trading venue. For example, a trading venue would only be able to update its IT systems where the new systems are compatible with all CCPs. The trading venues will be reliant on the CCP to introduce the changes and therefore the pace of any change will be dictated by the slowest CCP. This may result in European trading venues becoming out-of-date and irrelevant in a fast-changing market, which will lead investors to seek more efficient trading mechanisms in third countries or

OTC. Should the national competent authority have concerns that permitting the request will be to the detriment of a trading venue in this regard, then the request can be denied.
<ESMA_QUESTION_406>

Q407: Do you agree with ESMA's proposed approach that where there are equally accepted alternative approaches to calculating notional amount, but there are notable differences in the value to which these calculation methods give rise, ESMA should specify the method that should be used?

<ESMA_QUESTION_407>
This approach would appear to contradict ESMA's own guidance in para 66 on page 355, which states that "ESMA considers that the calculation of a trading venue's annual notional amount should be conservative" - which would suggest the LOWER value be used, not the higher one that is advocated in paragraph 67 on page 356.

In many cases, notional is a meaningless metric. For example, a 30 year bond contract with notional EUR 100,000 leads to a greater exposure to a given shift in interest rates than a short term interest rate contract of notional EUR 1 million. For interest rate instruments, notional could be calculated on a 10 year equivalent basis or similar, which would more accurately reflect the risk than pure notional.
<ESMA_QUESTION_407>

Q408: Do you agree that the examples provided above are appropriate for ESMA to adopt given the purpose for which the opt-out mechanism was introduced? If not, why, and what alternative(s) would you propose?

<ESMA_QUESTION_408>
We disagree with ESMA's assertion in paragraph 63 on page 355 that "it is unclear that there are commonly agreed ways to calculate notional amount for all types of exchange traded derivatives"
<ESMA_QUESTION_408>

Q409: For which types of exchange traded derivative instruments do you consider there to be notable differences in the way the notional amount is calculated? How should the notional amount for these particular instruments be calculated?

<ESMA_QUESTION_409>
We disagree with ESMA's assertion in paragraph 63 on page 355 that "it is unclear that there are commonly agreed ways to calculate notional amount for all types of exchange traded derivatives". Notional may be calculated in the following ways:

Futures: traded price x contract size x quantity traded
Options: strike price x contract size x quantity traded

Contract size is also called a multiplier.

In general there are no differences between equity, fixed income and commodity derivatives in our view. For interest rate instruments, notional could be calculated on a 10 year equivalent basis or similar, which would more accurately reflect risk than pure notional.
<ESMA_QUESTION_409>

Q410: Are there any other considerations ESMA should take into account when further specifying how notional amount should be calculated? In particular, how should technical transactions be treated for the purposes of Article 36(5), MiFIR?

<ESMA_QUESTION_410>
We are not able to respond to this question as we do not understand what is meant by the term "technical transaction".
<ESMA_QUESTION_410>

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

Q411: Do you agree that trading venues require the relevant information mentioned above? If not, why?

<ESMA_QUESTION_411>
By way of overview to our comments on this section:

Purpose of article 37: We agree with ESMA's assessment in paragraph 41(ii) that Article 37 is part of a legal solution encompassing Article 35 and 36, to empower EU investors in derivatives markets (both ETD and OTCD) through enhanced choice, better service, lower costs, greater capital efficiency, innovation and to avoid the concentration of risk in closed FMI. The need for this is also noted in EMRI recital 36 and in the CSFI report on EU Post-trade infrastructure.

Information required by TVs/CCPs: Trading venues / CCPs need access to the same set of data and information that is commercially available to market participants and sufficient to provide a well-functioning market, surveillance and risk margining (e.g. calculation of margins). The frequency depends on the nature of the index and the frequency of calculation and publication and the type of information/data concerned. The method of access should be reliable (preferable, non-proprietary) and data should be made available in a standard format, although what constitutes the latter will be open to debate.

IP rights/confidentiality: In our view, the relevant IP for indices consists mainly of the trademarks associated with them. A standard licence agreement usually contains a series of restrictions and practical measures in place to protect the IPRs, including any trademark. Standard confidentiality provisions around the licensor's data and information should be included.

Conflicts of interest: Licences should be at an arms' length and on the same basis as similar commercial arrangements made by independent providers. Where the owner of proprietary rights to a benchmark is integrated (i.e. with close links with a trading venue or CCP or FMI provider), it is important that the trading venue/CCP accesses the benchmark on an unbundled basis with no cross-subsidy, so as to enable third party trading venues/CCPs to obtain access on comparable commercial terms.

Our response to Question 411 is as follows:

We agree that a trading venue intending to act as a venue for the execution of transactions in financial instruments referencing a benchmark may need certain confidential information to be disclosed to it, in order to make an initial assessment of the characteristics of the benchmark, market the relevant product and support on-going market surveillance activities. However, we would like to highlight the following considerations in general:

1. It is not entirely correct to use the language of "licensing" in this context, since it is possible that not all of the elements of a benchmark will be subject to intellectual property rights. For example, a benchmark could consist of data that is submitted by a set of contributors. Although the individual submissions of contributors could possibly be compiled in a database, the data elements themselves are unlikely to be protected by copyright or other recognised intellectual property rights. The algorithm or formula used to derive the benchmark rate may not be protected by copyright, patents or other recognised intellectual property rights. The name or other distinguishing marks associated with the service of providing the benchmark rate could be protected by trademark rules, while a person may be under obligations of confidentiality with respect to information disclosed to it as part of the process of generating the benchmark rate; possibly as trade secrets, but also simply on the basis of contractual undertakings or rules connected with that person's role.

This distinction is significant, because arrangements for the access to and use of information are not always going to be as straight-forward as having the owner of intellectual property rights permit their use on commercial terms. The rights and interests of third parties, including the providers of inputs used to derive benchmarks, and the obligations of those called upon to make disclosures, need to be taken into account.

2. It should be clarified that the "product" that the trading venue will market in due course is not the benchmark itself but transactions in financial instruments which make reference to the benchmark. Consequently, a trading venue's need to "use" any trademarks associated with the benchmark will be limited.

There are a number of considerations to be kept in mind, when dealing with a licence for a trademark:

- The rights of the trademark owner in respect of a trademark registered or recognised under national rules will be limited generally to the relevant jurisdiction. For example, if a trademark is registered only in France, then the ability of a licensee to use the trademark in Italy is not assured.

- Licensors can be expected to want to ensure that their trademarks are used subject to strict controls. For example, licensors might require a notice to be given to third parties of their ownership of the trademark, which they should be able to do as a condition of granting a licence. To make use of those controls, licensees may wish to have rights of audit and inspection, which will come with costs, particularly when they need to be exercised on a cross-border basis or when translations are required of materials published in languages other than the national language of the licensor.

- Licensors, particularly in the context of compulsory licensing arrangements, might wish to have disclaimers added to materials making use of their trademarks, in order to bring to the notice of readers that they are not associated with or endorsing the products or services of the licensee. Licensors would not expect that the grant of what is essentially a compulsory licence would lead them to incur legal obligations towards third parties; for example, investors in financial instruments making reference to the relevant benchmark.

- Many trademarks have textual and graphical elements or versions of them. The ability of a licensee to refer to the textual element of a trademark is distinguishable from its ability to make use of graphic elements, and it should be clarified that any compulsory licensing of the use of a trademark refers to the textual element or version only. Licensing of graphical elements should be a matter of commercial negotiation and agreement between the licensor and licensee.

<ESMA_QUESTION_411>

Q412: Is there any other additional information in respect of price and data feeds that a trading venue would need for the purposes of trading?

<ESMA_QUESTION_412>
Yes. In principle, a trading venue needs access to the same set of data and information that is commercially available to market participants and sufficient to perform proper assessment of the marketability of the product, as well as controls required under the relevant regulatory framework.

We agree with ESMA's analysis in paragraph 16 that "trading purposes" covers all the functions exercised by a trading venue in relation to the trading of a benchmark product, namely product development, market operations and surveillance. For the purpose of evaluating product marketability, a trading venue needs a broad range of information, including historical series of the index value, methodology (including the formula for index and expiry calculation, selection and rebalancing methodology, weighting rules), the actual composition, historical changes to the index composition and conditions for the availability of such information to market participants. This information will also permit assessment of whether an index has proper characteristics to support the development of a derivatives market that is sound and has integrity.

On an on-going basis, certain information (as described below) should be available in a timely fashion in order to properly monitor the regular functioning of the market, in particular when the trading venue for the exchange traded product is also managing the market where the underlying is traded.

The following data and feeds are required:

1. a data stream of the index values and expiry prices – this may be real-time, periodic or end of day, according to the type of index and frequency of its calculations and publication.
2. a feed of and/or access to any corrections / recalculations/restatements of a benchmark value

At least daily:

1. data files containing relevant corporate action information
2. index value at end of day
3. open and closing price files
4. exchange rate data files
5. access to historical index values for the last 2 years

<ESMA_QUESTION_412>

Q413: Do you agree that CCPs require the relevant information mentioned above? If not, why?

<ESMA_QUESTION_413>
Yes. We would also reiterate our comments noted in Q. 411 in relation to this proposal, namely:

- It is not entirely correct to use the language of "licensing" in this context, since it is possible that not all of the elements of a benchmark will be subject to intellectual property rights and the rights and interests of third parties, including the providers of inputs used to drive bench marks, and the obligations of those called upon to make disclosures, need to be taken into account;

- A "product" that the trading venue will market in due course is not the benchmark itself, but transactions in financial instruments which make reference to the benchmark.

For example, a benchmark could consist of data that is submitted by a set of contributors. Although the individual submissions of contributors could possibly be compiled in a database, the data elements themselves are unlikely to be protected by copyright or other recognised intellectual property rights. The algorithm or formula used to derive the benchmark rate may not be protected by copyright, patents or other recognised intellectual property rights. The name or other distinguishing marks associated with the service of providing the benchmark rate could be protected by trademark rules, while a person may be under obligations of confidentiality with respect to information disclosed to it as part of the process of generating the benchmark rate; possibly as trade secrets, but also simply on the basis of contractual undertakings or rules connected with that person's role.

This distinction is significant, because arrangements for the access to and use of information are not always going to be as straight-forward as having the owner of intellectual property rights permit their use on commercial terms. The rights and interests of third parties, including the providers of inputs used to derive benchmarks, and the obligations of those called upon to make disclosures, need to be taken into account.

It should be clarified that the "product" that the trading venue will market in due course is not the benchmark itself but transactions in financial instruments which make reference to the benchmark.

There are a number of considerations to be kept in mind, when dealing with a licence for a trademark:

- The rights of the trademark owner in respect of a trademark registered or recognised under national rules will be limited generally to the relevant jurisdiction. For example, if a trademark is registered only in France, then the ability of a licensee to use the trademark in Italy is not assured.

- Licensors can be expected to want to ensure that their trademarks are used subject to strict controls. For example, licensors might require a notice to be given to third parties of their ownership of the trademark, which they should be able to do as a condition of granting a licence. To make use of those controls, licensees may wish to have rights of audit and inspection, which will come with costs, particularly when they need to be exercised on a cross-border basis or when translations are required of materials published in languages other than the national language of the licensor.

- Licensors, particularly in the context of compulsory licensing arrangements, might wish to have disclaimers added to materials making use of their trademarks, in order to bring to the notice of readers that they are not associated with or endorsing the products or services of the licensee. Licensors would not expect that the grant of what is essentially a compulsory licence would lead them to incur legal obligations towards third parties; for example, investors in financial instruments making reference to the relevant benchmark.

- Many trademarks have textual and graphical elements or versions of them. The ability of a licensee to refer to the textual element of a trademark is distinguishable from its ability to make use of graphic elements, and it should be clarified that any compulsory licensing of the use of a trademark refers to the textual element or version only. Licensing of graphical elements should be a matter of commercial negotiation and agreement between the licensor and licensee.

<ESMA_QUESTION_413>

Q414: Is there any other additional information in respect of price and data feeds that a CCP would need for the purposes of clearing?

<ESMA_QUESTION_414>
We note that the approach of ESMA is outcomes driven rather than prescriptive as to precisely what information has to be provided by the benchmark owner. Accordingly, it may be more appropriate to consider whether "a trading venue require(s) any information over and above that required for it to make an initial assessment of the characteristics of the benchmark, market the relevant product and support ongoing market surveillance activities?"

Whilst this will ultimately depend on the relevant market, we anticipate that the following data and feeds may be required:

1. a data stream of the index values and expiry prices – this may be real-time, periodic or end of day, according to the type of index and frequency of its calculations and publication.
2. a feed of and/or access to any corrections / recalculations/restatements of a benchmark value

At least daily:

1. data files containing relevant corporate action information
2. index value at end of day
3. open and closing price files
4. exchange rate data files
5. access to historical index values for the last 2 years

<ESMA_QUESTION_414>

Q415: Do you agree that trading venues should have access to benchmark values as soon as they are calculated? If not, why?

<ESMA_QUESTION_415>

No, the requirement to supply benchmark values should allow for validation checks to be completed in order to mitigate the risk of errors. We agree that the benchmark values should be provided on a non-discriminatory basis, i.e. at the same point in time at which they are available to other licensees.
<ESMA_QUESTION_415>

Q416: Do you agree that CCPs should have access to benchmark values as soon as they are calculated? If not, why?

<ESMA_QUESTION_416>
Benchmark values and any information concerning any issue in calculating and disseminating the index value should be promptly notified to the trading venue or CCP following validation of the relevant values.

We agree with ESMA that the frequency in part depends on the nature of the index and the frequency of calculation and publication and the type of information/data concerned.

Some will be required real time, or periodically during the day or at end of day. Others according to the expiry cycle. Real time should be without any delay in publication, but, because there is always some delay to the extent that events are being measured in fractions of milliseconds, the governing principle shall be "as soon as reasonably practicable".

Standing information on the methodology, governance and composition should be available (NB where the composition is dynamic, it should be sufficient to provide the methodology as "standing information".)

Up-to-date index values must be available to the **trading venue**, **up to real-time values**, where such data are calculated by the index provider. Where the index is mainly used for settlement purposes, a daily data feed of index value could be considered sufficient.

Index values must be available on a **real-time basis to a CCP** calculate margins with reference to certain products (such as options). However where the index is mainly used for settlement purposes, daily feed of index value could be considered sufficient.

Index composition and any other relevant information that would influence the calculation of the index must be available on a daily basis.

Any change in the index composition as a result of periodic changes to the index composition, or a corporate action must be notified in advance where reasonably practicable.
<ESMA_QUESTION_416>

Q417: Do you agree that trading venues require the relevant information mentioned above? If not, why?

<ESMA_QUESTION_417>
Members agree that the "composition" of a benchmark should be defined as the constituents of the benchmarks and weightings, where the benchmark sees to measure, replicate or track a group of assets or class of financial instrument. This information would be relevant to a trading venue making use of a benchmark as a reference measure for the pricing of a financial instrument offered by the trading venue.
<ESMA_QUESTION_417>

Q418: Is there any other additional information in respect of composition that a trading venue would need for the purposes of trading?

<ESMA_QUESTION_418>
Other than the constituents of the benchmark and weightings, you would also need to know the time that the benchmark is calculated (as noted in para 27 on page 363), its tenor (e.g. in the case of an interest rate benchmark, is it the benchmark for 1 month, 3 month, 5 year etc.), its owner (so as to ensure all rights that the benchmark owner is free to license are licensed) and its operator (to ensure the trading venue has the right contacts for operational issues). In order to carry out back testing, the trading venue may also require

access not only to today's constituents of the benchmark, but all previous constituents (as noted in para 23 on page 362). As there will be costs associated with storing, retrieving and reformatting legacy data, the licensee should be able to charge a reasonable commercial price, either included in its licence fee or as a separate charge.

For a trading venue, information around index composition is particularly relevant for the initial assessment of the characteristics of the index. Availability of such information is also useful to support on-going market surveillance activities by the trading venue, especially where it also manages the market in the underlying for the relevant derivatives contract.

Daily - Open and closing composition information file

For each constituent - the parameters used to determine the weight of its contribution to the index (e.g. for equity indices, the adjusted number of shares used to the purposes of the index calculation–eventually including free float and capping adjustments)

As appropriate - Files containing details of any composition reviews and additions, deletions or changes made as a result

On every expiry - data files to facilitate the expiry calculation

We note the outcomes based approach expressed by ESMA in para 16 on page 360 and that ESMA has not opted for a more prescriptive approach. Whilst broadly in favour of such an approach, we should be grateful if ESMA would clarify what options would ultimately be available to the trading venue if the person with the proprietary rights to the benchmark was not prepared to licence information that the trading venue reasonably considered necessary to make the assessment specified in that paragraph. Do ESMA propose any formal mechanism to enable them to intermediate such a dispute and/or to force such licensing, where it considered that the owner of the proprietary interest was acting in breach of its obligations? If so, how does ESMA propose such a mechanism would operate?

While it would fall within the jurisdiction of the NCA to judge whether the holder of the proprietary interests was in breach of its regulatory obligations in failing to grant a license, a putative licensee should take any claims concerning a licence or associated services for adjudication to a competent court, bearing in mind particularly that the outcome may be of importance across the union and will likely involve commercial and legal issues that are outside of the normal domain of a national competent authority.

<ESMA_QUESTION_418>

Q419: Do you agree that CCPs require the relevant information mentioned above? If not, why?

<ESMA_QUESTION_419>
Members agree that the "composition" of a benchmark should be defined as the constituents of the benchmarks and weightings, where the benchmark sees to measure, replicate or track a group of assets or class of financial instrument. This information would be relevant to a trading venue making use of a benchmark as a reference measure for the pricing of a financial instrument offered by the trading venue.
<ESMA_QUESTION_419>

Q420: Is there any other additional information in respect of composition that a CCP would need for the purposes of clearing?

<ESMA_QUESTION_420>
We note the outcomes based approach expressed by ESMA in para 17 on page 360 and that ESMA has not opted for a more prescriptive approach. Whilst broadly in favour of such an approach, we should be grateful if ESMA would clarify what options would ultimately be available to the CCP if the person with the proprietary rights to the benchmark was not prepared to licence information that the CCP reasonably considered necessary to perform the risk management specified in that paragraph. We anticipate that,

subject to the CCP being able to demonstrate that it reasonably requires the relevant information, it would be appropriate for ESMA to establish a formal mechanism to enable them to intermediate in such a dispute and/or where appropriate, compel the license to be granted. How does ESMA propose such a mechanism would operate?

A CCP needs information relating to index composition to perform its stress-tests.

Information on index composition should include:

Real time – access to any published changes

Daily – open and closing composition information file including the list of constituents along with the adjusted number of shares (free float and eventually capping adjustment included)

On every expiry – data files to facilitate the expiry calculation

As appropriate – files containing details of any composition reviews and additions, deletions or changes made as a result
<ESMA_QUESTION_420>

Q421: Do you agree that trading venues and CCPs should be notified of any planned changes to the composition of the benchmark in advance? And that where this is not possible, notification should be given as soon as the change is made? If not, why?

<ESMA_QUESTION_421>
Yes, we agree. It is not clear to us in what circumstances such advance notification would not be possible, so we would encourage ESMA to specify that the owner of the benchmark should use all reasonable efforts to notify the trading venue / CCP in advance.
<ESMA_QUESTION_421>

Q422: Do you agree that trading venues need the relevant information mentioned above? If not, why?

<ESMA_QUESTION_422>
Yes, we agree, where this information is available. We encourage ESMA to apply the IOSCO principles for Benchmarks to all applicable areas within the DP, so as to promote standardisation of the regulatory approach to benchmarks across borders - such an approach may also facilitate cross-border recognition of the same.
<ESMA_QUESTION_422>

Q423: Is there any other additional information in respect of methodology that a trading venue would need for the purposes of trading?

<ESMA_QUESTION_423>
A trading venue requires full visibility of the index methodology in order to assess whether it represent a suitable benchmark to develop an index derivatives contract.

This information is particularly relevant for the initial assessment of the characteristics of the index. Availability of such information is also required to support on-going market monitoring and surveillance activities that a trading venue will need to have in place, especially where it also manages the market in the underlying for the relevant derivatives contract.

It is understood that the methodology of index and expiry calculation, the rulebook governing its composition and any factsheets relevant to composition should be made available, but any information made available in that regard which is confidential or proprietary should not be made available on a public basis; rather, where appropriate, it could be provided within the framework of the license agreement subject to appropriate confidentiality terms.

<ESMA_QUESTION_423>

Q424: Do you agree that CCPs require the relevant information mentioned above? If not, why?

<ESMA_QUESTION_424>
Yes, we agree.
<ESMA_QUESTION_424>

Q425: Is there any other additional information in respect of methodology that a CCP would need for the purposes of clearing?

<ESMA_QUESTION_425>
A CCP needs full visibility on methodology to the extent it shall be able to assess whether the index could be used for clearing purposes and to manage stress tests.

Our response to question 426 (set out here) is also relevant:

We suggest that the principle should be that whatever a benchmark IPR owner would licence to a relevant third party to allow it to trade and/or clear products based on that benchmark, that is what should be provided. Here again, we would repeat the observations, as relevant, made in response to earlier ESMA questions on information and emphasise the need to respect the need for certain information to remain confidential or to be made available only in the framework of a licensing agreement with appropriate confidentiality terms.

It is not obvious to us what methodology information might be withheld.

A benchmark owner should not be required to provide the following information (though it is always free to do so by commercial agreement):

- Information that is not necessary for trading or clearing, as applicable.
- Information that it is legally restricted from disclosing to the relevant CCP or trading venue, whether by applicable law, regulatory requirements, contract, fiduciary obligations or otherwise. In this case, the CCP or trading venue should make its own arrangements to obtain the information.
- information which a potential licensee will not agree should be subject to appropriate confidentiality requirements and restrictions on use.

In addition to the issue of confidentiality referred to above, benchmark owners should not be required to divulge information to such an extent that its claim to the intellectual property rights and the benchmark is compromised.
<ESMA_QUESTION_425>

Q426: Is there any information is respect of the methodology of a benchmark that a person with proprietary rights to a benchmark should not be required to provide to a trading venue or a CCP?

<ESMA_QUESTION_426>
We suggest that the principle should be that whatever a benchmark IPR owner would licence to a relevant third party to allow it to trade and/or clear products based on that benchmark, that is what should be provided. Here again, we would repeat the observations, as relevant, made in response to earlier ESMA questions on information and emphasise the need to respect the need for certain information to remain confidential or to be made available only in the framework of a licensing agreement with appropriate confidentiality terms.

It is not obvious to us what methodology information might be withheld.

A benchmark owner should not be required to provide the following information (though it is always free to do so by commercial agreement):

- Information that is not necessary for trading or clearing, as applicable.

- Information that it is legally restricted from disclosing to the relevant CCP or trading venue, whether by applicable law, regulatory requirements, contract, fiduciary obligations or otherwise. In this case, the CCP or trading venue should make its own arrangements to obtain the information.

- information which a potential licensee will not agree should be subject to appropriate confidentiality requirements and restrictions on use.

In addition to the issue of confidentiality referred to above, benchmark owners should not be required to divulge information to such an extent that its claim to the intellectual property rights and the benchmark is compromised.
<ESMA_QUESTION_426>

Q427: Do you agree that trading venues require the relevant information mentioned above (values, types and sources of inputs, used to develop benchmark values)? If not, why?

<ESMA_QUESTION_427>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_427>

Q428: Is there any other additional information in respect of pricing that a trading venue would need for the purposes of trading?

<ESMA_QUESTION_428>
Yes, we agree with ESMA's interpretation of the Level I text that "pricing" covers the input data, i.e. the prices covered by the first section on "Relevant Price and Data Feed". This includes, as ESMA has noted:

- Information on types and sources of prices (e.g. last trade price, frequency of updates, trading venue) and index constituents used for index calculation.
- Real time values of index
- Expiry values of index
- Clear, objective and transparent pricing that is sufficiently certain and stable to enable the CCP to make risk management decisions.

In the case of options, the option model employed and whether it is a volatility or a premium. The value of the premium of the option will depend on the interest rates used and will be different for different strikes or deltas. There needs to be a clear explanation as to how option premiums are derived.
<ESMA_QUESTION_428>

Q429: In what other circumstances should a trading venue not be able to require the values of the constituents of a benchmark?

<ESMA_QUESTION_429>
A benchmark owner should not be required to provide the following information (though it is always free to do so by commercial agreement):

- Information that is not necessary for trading or clearing, as applicable.

- Information that it is legally restricted from disclosing to the relevant CCP or trading venue, whether by applicable law, regulation, contract, fiduciary obligations or otherwise. In this case, the CCP or trading venue should make its own arrangements to obtain the information.

- Information which a potential licensee will not agree should be subject to appropriate confidentiality requirements and restrictions on use.

- In addition to the issue of confidentiality referred to above, benchmark owners should not be required to divulge information to such an extent that its claim to the intellectual property rights and the benchmark is compromised.

<ESMA_QUESTION_429>

Q430: Do you agree that CCPs require the relevant information mentioned above? If not, why?

<ESMA_QUESTION_430>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_430>

Q431: Is there any other additional information in respect of pricing that a CCP would need for the purposes of clearing?

<ESMA_QUESTION_431>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_431>

Q432: In what other circumstances should a CCP not be able to require the values of the constituents of a benchmark?

<ESMA_QUESTION_432>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_432>

Q433: Do you agree that trading venues require the additional information mentioned above? If not, why?

<ESMA_QUESTION_433>
We agree subject to appropriate agreements being in place. However we also consider that it may be impossible on a practical level to send the information simultaneously. The requirement could more appropriately be for the information to be sent as soon as reasonably practicable, rather than as soon as possible.
<ESMA_QUESTION_433>

Q434: Do you agree that CCPs require the additional information mentioned above? If not, why?

<ESMA_QUESTION_434>
We agree subject to appropriate agreements being in place. However we also consider that it may be impossible on a practical level to send the information simultaneously. The requirement could more appropriately be for the information to be sent as soon as reasonably practicable, rather than as soon as possible.
<ESMA_QUESTION_434>

Q435: Is there any other information that a trading venue would need for the purposes of trading?

<ESMA_QUESTION_435>

A trading venue managing an index-based derivative contract requires to be promptly and accurately informed by an index provider of:

- **any inaccuracy** in the calculation of the index, identified by the index provider, or of any issue in disclosing the index data to market participants, especially when the index is calculated and disseminated on a real time basis;
- any planned change to the index **methodology**;
- any change in the **index composition** as a result of periodic changes to the index composition, or a corporate action.

In general, we also believe that a level playing field among trading venues shall be ensured to allow proper competition on trading services for an index based derivatives contract. To this purpose, despite any minimum set of information that will be determined to be necessarily included in an index licence agreement, a trading venue should be entitled to access, on a commercially reasonable basis, to other additional information that the index provider makes available to any market participants in relation to such index, which is reasonably required for trading or clearing purposes.

The technical characteristics of the data feed (e.g. data dissemination protocol and technology used, format of data, backup solution) should be agreed in advance, and any change of the technical features of such data feed should be disclosed to the trading venue with proper advance notice, if reasonably practicable in the circumstances.

We have already commented on the kind of information that should be made available in previous questions covering this point.

<ESMA_QUESTION_435>

Q436: Is there any other information that a CCP would need for the purposes of clearing?

<ESMA_QUESTION_436>
A **CCP requires** to be promptly and accurately informed by an index provider of:

- any inaccuracy in the calculation of a benchmark, or of any issue in disclosing the index data to market participants;
- any planned change to the index methodology;
- any change in the index composition as a result of a corporate action.

A CCP should also be made aware of and kept informed of the governance arrangements operated by the index provider in relation to the index and its management and be notified promptly of any corrections/recalculations/restatements of a benchmark value.

The index provider does not generally provide any calculation of derivative product value or pricing, so is not involved in calculation of any margin or other financial aspect. Where this is not undertaken by the trading venue as part of the information it transmits to the CCP for performance of clearing activities, the CCP will need access to the underlying trading data from the trading venue in order to make its calculations.

Where relevant, a trading venue/CCP should be given access to any proprietary software that is typically distributed under license by the benchmark owner in conjunction with the benchmark and that is necessary to use the benchmark (or understand its constituents) effectively for clearing purposes.

<ESMA_QUESTION_436>

Q437: Do you agree with the principles described above? If not, why?

<ESMA_QUESTION_437>
Yes, recognising the benchmark arrangements are striving to establish a balanced approach.
<ESMA_QUESTION_437>

Q438: Do users of trading venues need non-publicly disclosed information on benchmarks?

<ESMA_QUESTION_438>
We cannot identify circumstances under which users of trading venues would properly require non-publicly available information on benchmarks.
<ESMA_QUESTION_438>

Q439: Do users of CCPs need non-publicly disclosed information on benchmarks?

<ESMA_QUESTION_439>
We understand the question to be whether direct licensing agreements or indirect sublicensing agreements are appropriate for information to be provided the users of trading venues/CCPs. We suggest that both options should be available, and that it should be up to the licensor to determine on which approach it is prepared to license its IP or disclose its confidential information. We cannot identify circumstances under which users of CCPs would properly require non-publicly available information on benchmarks. As such, there should not be any obligation on benchmark owners to provide this information and it should be a matter to be agreed at their discretion.
<ESMA_QUESTION_439>

Q440: Where information is not available publicly should users be provided with the relevant information through agreements with the person with proprietary rights to the benchmark or with its trading venue / CCP?

<ESMA_QUESTION_440>
This should be decided at the discretion of the licensor.
<ESMA_QUESTION_440>

Q441: Do you agree with the conditions set out above? If not, please state why not.

<ESMA_QUESTION_441>
The licensing of intellectual property rights and the disclosure of confidential information should be on commercial terms and conditions, which have been negotiated and agreed between the parties to the agreement. With respect to the specific provisions which ESMA suggests should be included, we would offer the following comments:

Information provided to be kept up-to-date throughout the duration of the access arrangement, and material changes should be notified (including information that "could have a reputational impact")

From the standpoint of a licensor, it is essential to know who the licensee is at all times; that it has the substance and standing to meet its obligations on an initial and ongoing basis; and that it is acting in accordance with the terms and conditions of the licence agreement.

Information provided and IP licensed, including trademarks, should only be used for the specific purpose for which they were conveyed or licensed. "The information covered by this confidentiality would be all non-public and commercially sensitive information"

We agree with ESMA's proposal.

Use of licensed IP must not cause any threat of, or damage to the licensor, nor should it have the potential to or diminish its commercial value

We agree with ESMA's proposal subject to the suggested amendments which ensure sufficient robustness to protect the licensor's interest.

Agreed procedures for:

- Communications between the parties to ensure its timely, reliable and secure nature
- Consulting where any change to operations is likely to have material impacts on the licence agreement or risks to which the other party is exposed
- Reasonable prior notice of such changes, if the impact is unlikely to be significant
- Resolving disputes
- Termination in a clear and orderly manner that does not expose the other party to additional risks unduly
- Termination being triggered by non-minor breaches with a reasonable amount of time to remedy breaches that do not give rise to immediate termination.

With respect to the termination of the licence agreement, it is important to ensure that sufficient discretion is afforded to licensors to address issues that are specific to them, the benchmark and their circumstances and the overarching provisions should not be overly prescriptive. It is clearly important to achieve a balance between the rights and interests of the licensor and licensee and to ensure that the licence addresses such commercial issues as insolvency of the licensee, unauthorised disclosure of confidential information, etc.

Although the failure to pay fees could be remedied through the application of late payment charges (such as interest at an appropriate rate), the persistent or repeated failure to pay should be able to rise to the level of materiality required for termination. By contrast, the unauthorised disclosure of confidential information is something that might happen incidentally but can cause irreparable harm.

The licensor should be able to terminate promptly in all other circumstances, in order to adequately protect its interests.

The licensor should also be able to transfer its rights in respect of the benchmark to a third party, with the licence arrangements also transferring.

<ESMA_QUESTION_441>

Q442: Are there any are other conditions persons with proprietary rights to a benchmark and trading venues should include in their terms for agreeing access?

<ESMA_QUESTION_442>
Licensees should be required to:

- communicate notices of ownership and disclaimers required by licensors.
- as appropriate, ensure that such disclaimers of liability are effective, require users to sign contractual waivers of liability.

<ESMA_QUESTION_442>

Q443: Are there any are other conditions persons with proprietary rights to a benchmark and CCPs should include in their terms for agreeing access?

<ESMA_QUESTION_443>
Licensees should be required to:

- communicate notices of ownership and disclaimers required by licensors.
- as appropriate, ensure that such disclaimers of liability are effective, require users to sign contractual waivers of liability.

<ESMA_QUESTION_443>

Q444: Which specific terms/conditions currently included in licensing agreements might be discriminatory/give rise to preventing access?

<ESMA_QUESTION_444>
We can only speculate as to what the range of existing arrangements covers – below are potential areas that might restrict the access provisions:

Such conditions would have to go beyond the standard scope of the terms of a licence (e.g. scope, control and termination). E.g. an explicitly restriction of an index provider from licensing an index to other trading venue or CCPs. Such a provision would need to be specifically added to the license agreement and could call into question issues of competition law. CCPs should only be required to provide details of relevant clearing participants rather than check, monitor and/or enforce that they have the necessary licences.

The licences between proprietary rights holders and associated trading venues and/or CCPs should be at arm's length and on the same basis as similar commercial arrangements made by independent providers. Internal cross charging/allocation arrangements should reflect these terms and prices and be transparent to trading venues/CCPs seeking access to a benchmark under this provision

CCP perspective: Where there is a benchmark provider integrated with a trading venue, it is important that the trading venue access the benchmark on an unbundled basis with no cross-subsidy, so as to enable third parties trading venues / CCPs to obtain access on comparable commercial terms.
<ESMA_QUESTION_444>

Q445: Do you have views on how termination should be handled in relation to outstanding/significant cases of breach?

<ESMA_QUESTION_445>
A distinction needs to be made between termination of licenses (i.e. permission to make use of property which would not otherwise be allowed) and the provision of benchmark services. There may be circumstances in which the continued use of information that has already been provided could be permitted under a license, but ongoing benchmark services (e.g. the provision of benchmark fees or notice of changes) could be terminated. However, in cases where the reason for termination of the license arrangement involves the breaches of conditions on the use or disclosure of confidential information or use of intellectual property rights, then the licensor should not be compelled to provide either access to or use of its confidential information or intellectual property rights, on the one hand, nor services with a commercial benefit to the license, on the other. A trading venue that wishes to make use of a benchmark to offer trading in financial instruments which referred to that benchmark must respect the terms of its license agreement or risk losing the ability to offer such financial instruments. The consequences could include delisting of the intellectual instruments based on the benchmark or its replacement by a substitute benchmark.

Regarding termination, a licence may be terminated for convenience on sufficient notice (with licence to continue until the expiry of any existing Exchange Traded Products) or immediately on breach that is not cured by licensor within the required period (if it is capable of being cured) or if act of insolvency etc. occurs. The agreements will be expected to contain the usual provisions relating to termination for cause (un-remedied breach, irredeemable breach, change of control, insolvency etc.), but also some more specific termination events – e.g. termination because the licensee is in breach of applicable securities laws or has failed to build liquidity in the derivative contract.
<ESMA_QUESTION_445>

Q446: Do you agree with the approach ESMA has taken regarding the assessment of a benchmark's novelty, i.e., to balance/weight certain factors against one another? If not, how do you think the assessment should be carried out?

<ESMA_QUESTION_446>
Yes we agree with ESMA's approach.

<ESMA_QUESTION_446>

Q447: Do you agree that each newly released series of a benchmark should not be considered a new benchmark?

<ESMA_QUESTION_447>
In the case of options, benchmarks for different currencies on the same underlying commodity option, or on different strikes should not be considered "new". Benchmarks on options could be based on volatilities or premiums even though the underlying is the same. This should not be considered new either.
<ESMA_QUESTION_447>

Q448: Do you agree that the factors mentioned above could be considered when assessing whether a benchmark is new? If not, why?

<ESMA_QUESTION_448>
Yes we agree.
<ESMA_QUESTION_448>

Q449: Are there any factors that would determine that a benchmark is not new?

<ESMA_QUESTION_449>
Our initial view is that, the conditions identified in Article 37.2 are effective criteria in themselves:

Where a person with proprietary rights to a new benchmark owns an existing benchmark, it shall establish that compared to any such existing benchmark the new benchmark meets the cumulative criteria:

- *the new benchmark is not a mere copy or adaptation of any such existing benchmark and the methodology, including the underlying data, or the new benchmark is meaningfully different from any such existing benchmark; and*
- *the new benchmark is not a substitute for any such existing benchmark.*

The real test of a new benchmark is whether it is seen by the market and the users as sufficiently novel and related to its stated objective to be viable; there is unlikely to be interest in trading a "new" benchmark if it is not sufficiently different from an existing index. Therefore, ESMA should consider a qualitative test in relation to assessing whether a benchmark may be considered as new or not. That is, where a benchmark is of a different quality or perceived differently from existing benchmarks already existing in the market and is treated as such, then it should be deemed as "new" for the purpose of this regulation.
<ESMA_QUESTION_449>

6. Requirements applying on and to trading venues

6.1. Admission to Trading

Q450: What are your views regarding the conditions that have to be satisfied in order for a financial instrument to be admitted to trading?

<ESMA_QUESTION_450>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_450>

Q451: In your experience, do you consider that the requirements being in place since 2007 have worked satisfactorily or do they require updating? If the latter, which additional requirements should be imposed?

<ESMA_QUESTION_451>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_451>

Q452: More specifically, do you think that the requirements for transferable securities, units in collective investment undertakings and/or derivatives need to be amended or updated? What is your proposal?

<ESMA_QUESTION_452>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_452>

Q453: How do you assess the proposal in respect of requiring ETFs to offer market making arrangements and direct redemption facilities at least in cases where the regulated market value of units or shares significantly varies from the net asset value?

<ESMA_QUESTION_453>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_453>

Q454: Which arrangements are currently in place at European markets to verify compliance of issuers with initial, on-going and ad hoc disclosure obligations?

<ESMA_QUESTION_454>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_454>

Q455: What are your experiences in respect of such arrangements?

<ESMA_QUESTION_455>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_455>

Q456: What is your view on how effective these arrangements are in performing verification checks?

<ESMA_QUESTION_456>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_456>

Q457: What arrangements are currently in place on European regulated markets to facilitate access of members or participants to information being made public under Union law?

<ESMA_QUESTION_457>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_457>

Q458: What are your experiences in respect of such arrangements?

<ESMA_QUESTION_458>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_458>

Q459: How do you assess the effectiveness of these arrangements in achieving their goals?

<ESMA_QUESTION_459>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_459>

Q460: Do you agree with that, for the purpose of Article 51 (3) (2) of MiFID II, the arrangements for facilitating access to information shall encompass the Prospectus, Transparency and Market Abuse Directives (in the future the Market Abuse Regulation)? Do you consider that this should also include MiFIR trade transparency obligations?

<ESMA_QUESTION_460>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_460>

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

Q461: Do you agree with the specifications outlined above for the suspension or removal from trading of derivatives which are related to financial instruments that are suspended or removed?

<ESMA_QUESTION_461>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_461>

Q462: Do you think that any derivatives with indices or a basket of financial instruments as an underlying the pricing of which depends on multiple price inputs should be suspended if one or more of the instruments composing the index or the basket are suspended on the basis that they are sufficiently related? If so, what methodology would you propose for determining whether they are "sufficiently related"? Please explain.

<ESMA_QUESTION_462>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_462>

Q463: Do you agree with the principles outlined above for the timing and format of communications and publications to be effected by trading venue operators?

<ESMA_QUESTION_463>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_463>

7. Commodity derivatives

7.1. Ancillary Activity

Q464: Do you see any difficulties in defining the term ‘group’ as proposed above?

<ESMA_QUESTION_464>
FIA Europe has a broad membership, which means that for certain questions there are differing views - where that is the case, we have set out both points of view.

First view

The intent of the Level 1 text, which states that 'the main business is not the provision of investment services within [MiFID II] or banking activities under [the Banking Consultation Directive (BCD)]', is to debar EU subsidiaries of financial or banking groups with a footprint in the EU from using exemption (j). In accordance with this intent, 'group' should be read as meaning a parent and all its subsidiaries, regardless of where the group's ultimate parent is domiciled (i.e. the 'global group').

Moreover, the term 'group' as defined in MiFID II Art 4.34 referring to the Accounting Directive consists of an EU parent and all its subsidiaries, both within and outside the EU (the 'EU group'). This definition would mean that the non-EU activity of a group with an EU parent would also be included and it would not be possible to limit it to “activities of a group undertaken in the EU” as proposed by ESMA in paragraph 21, page 394. It is not understood that consolidation under the Accounting Directive operates in this way.

The Accounting Directive states the meaning of group to be 'a parent undertaking and all its subsidiary undertakings which it controls’. Holders of this view strongly support the interpretation of ‘control’ to mean a subsidiary undertaking of which the parent is a shareholder or member pursuant to a contract entered into or pursuant to a provision in its memorandum or articles of association. They do not support paragraph 19 (V) or the concept of 'influence' given that this does not have a firm legal definition.

Holders of this view do not support the proposal for only the activities of the EU-wide group to be taken into account when considering whether the activity is ancillary to the main business of the group. ESMA states that if the definition of group were to mean the EU group only, the hedging exemption in relation to commercial activities would also be applied on an EU basis only. This would be a significant problem for firms operating global commercial operations such as energy exploration and production who need to hedge their commercial risks on a global basis.

Second view

Holders of this view agree with ESMA's analysis regarding the definitions of "group", "parent undertaking" and "subsidiary" under MiFID II and the conclusion that the term "group" comprises the parent undertaking and all its subsidiary undertakings, where subsidiary undertakings include undertakings controlled by a parent undertaking in accordance with Article 22 of Directive 2013/34/EU.

The circumstances in which a parent undertaking would be considered to have "control" under Article 22 of Directive 2013/34/EU are already used in other directives and there is already an understanding on how these terms should be interpreted, so it is appropriate to refer to these circumstances in the definition of "group" (and also that this is consistent with the definitions set out in MiFID II).
<ESMA_QUESTION_464>

Q465: What are the advantages and disadvantages of the two alternative approaches mentioned above (taking into account non-EU activities versus taking into account only EU activities of a group)? Please provide reasons for your answer.

<ESMA_QUESTION_465>
It is noted that the text of Art. 2(1)(j) of MiFID II begins with the word 'persons'. It is thus clear that, when considering whether the activities of (a) dealing on own account, and (b) the provision of investment services in CD, EA and DEAs are, individually and in the aggregate, ancillary activities to the main business of the group, it is such activities of the person wishing to invoke the Art. 2(1)(j) exemption (under Recital 26 such persons could be either a 'natural and legal persons'), which should be taken into account, and not all such activities within EU or non-EU borders. In other words, the test is not meant to be defined by activities conducted within certain geographic boundaries, but rather by the activities of the legal entity invoking the exemption wherever such activities may be conducted. This can thus be the only approach that is in accordance with Level 1 text.

However, the term 'main business' is used in the context of debarring subsidiaries of financial or banking groups from invoking the Art. 2(1)(j) exemption (see our answer to Q464), and also in the context of defining when the activities of dealing on own account and provision of investment services can be regarded as 'ancillary'. The view of the 'group' to be used to determine its 'main business' should be kept consistent between the two contexts, and should be of the global group.

All members that have input into this response agree with ESMA (per paragraph 11 of section 7.1 of the DP) that the first approach, a global assessment, is the preferable approach. A group should be viewed as the parent undertaking along with all the subsidiary undertakings, including activities undertaken outside of the EU. Such a definition is consistent with the definition of group in EMIR and ensures consistency between the two regimes. Recital 21 of MiFID II makes it clear that the group definition under MiFID II should be read consistently with that under EMIR, as otherwise consistency in the interpretation of "intra-group transactions" would not be possible (it would not be consistent to look at the activities of the EU subsidiaries only under MiFID II, while excluding transactions entered into with members of the broader consolidation group in accordance with the "intra-group transactions carve-out under EMIR). The clearing threshold test in EMIR Article 10 is also a global test - given the close interactions between EMIR and MiFID II/R in the field of commodity derivatives, it makes sense for the assessment of a firm's group activities to be based on a global, rather than EU only, approach.

Furthermore, taking into account only the assets and activities carried out within the EU in relation to a firm's trading and other activities would disregard the global character of the physical commodities industry. As natural resources occur widely across the globe, many players in the industry have a global presence; for example a commodities group may have large extraction and refining operations in Russia, Africa and South America, while trading operations are concentrated where the most liquid trading venues are located, in the EU and the United States of America. Hence taking into account only the EU activities could significantly alter the true picture of a firm's activities and in turn provide a misleading assessment of which activities are truly ancillary to a firms' business.

First view

'Capital employed' could be applied as a metric to test whether an activity is ancillary or not.

Second view

Holders of this view agree with the above response but further consider that the consolidated financial statements of a parent undertaking is correctly identified by ESMA as being a key reference in defining how a "group" is constituted. Recital 40 EMIR makes it clear that the definition of "group" under EMIR covers groups which are consolidated in accordance with non-EU consolidation requirements.
<ESMA_QUESTION_465>

Q466: What are the main challenges in relation to both approaches and how could they be addressed?

<ESMA_QUESTION_466>
If the group is interpreted to be the 'global group ', an EU subsidiary of such a group that only undertakes the activities permitted under the (j) exemption would still not be able to utilise the (j) exemption if the main business of the 'global group' is MiFID II and/or BCD activity, even if the group conducted no other MiFID II or BCD activity within EU borders.

For example, if a banking group (i.e. one that employs more than 50% of its total of its global capital in banking activities) has no presence in the EU except for a small EU subsidiary which deals on own account in commodity derivatives to hedge exposures in precious metals, that subsidiary would not be able to use the (j) exemption because the main business of the global group is BCD activity.

ESMA indicates that if the definition of group were to mean the EU group only, the hedging exemption in relation to commercial activities would also be applied on an EU basis only. This would be a significant problem for firms operating global commercial operations such as exploration who need to hedge their commercial risks on a global basis.

A possible disadvantage of the world-wide approach is the difficulty in assessing the overall world-wide market size due to lack of available data and differing regional definitions of a 'commodity derivative'
<ESMA_QUESTION_466>

Q467: Do you consider there are any difficulties concerning the suggested approach for assessing whether the ancillary activities constitute a minority of activities at group level? Do you consider that the proposed calculations appropriately factor in activity which is subject to the permitted exemptions under Article 2(4) MiFID II? If no, please explain why and provide an alternative proposal.

<ESMA_QUESTION_467>
First view

Some parts of ESMA's proposed formulae for assessing whether an ancillary activity constitutes a minority of activity at group level are problematic and could lead to inappropriate outcomes. In addition, such formulae are not in line with the intention and stated text of Article 2 .4 of Level 1 of MiFID, which allows for the exemption of intragroup transactions which serve liquidity and/or risk management purposes and transactions in derivatives which are objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of that group. Recital 20 of MiFID II supports this approach as it states that "... where the obligation to provide liquidity on a venue is required by regulatory authorities in accordance with Union or national laws.... the transactions entered into to meet such an obligation should be *excluded* in the assessment of whether the activity is ancillary."

If one considers a standalone entity (i.e. without parents or subsidiaries) with total capital of 200, which uses half of this capital for dealing on own account and which uses all of its transactions entered into for its own account to fulfil regulatory obligations to provide liquidity, such a firm would be excluded from using exemption (j) under the ESMA formula.

Example

A (Capital for overall activity at group level) =200,
B (Capital for intra-group transactions) =0,
C (Capital for transactions in derivatives reducing risks) =0,
D (Capital to fulfil liquidity obligations) =100,
F (Capital for dealing on own account) =100,
G (Capital for provision of investment services) =0,

H (Capital sum for ancillary services)=100

The resulting calculation to test if the activity is ancillary produces is as follows;
(F+G) / [A-B-C-D)-(F+G)] = 100 / [(200-100)-(100)] = 100 / 0 = ∞

It is understood that it was not intended that such a firm would be excluded from using exemption (j).

Certain businesses are more capital intensive than others and the way in which capital is assigned to different activities may be more an issue of accounting than risk management. Accordingly ESMA should permit market participants to request exemptions on a case by case basis to accommodate situations where the outcome of the calculation does not provide the required result.

Second view

Although a quantitative approach may be more objective, whether or not activities are "ancillary activities" should be determined by reference to a combination of qualitative and quantitative criteria. MiFID II clearly requires an approach based on more than just quantitative criteria. Article 2(4) states that the relevant criteria shall take into account at least whether an activity constitutes a minority of activities at group level and goes on to state that the capital employed shall in no case be sufficient to demonstrate that the activity is ancillary to the main business of the group.

In addition, for activities to qualify as "ancillary activities" they should be truly ancillary to the main business (i.e. they should complement and provide necessary support to the main business). A business line which is merely incidental to or wholly unrelated to the main business of the group should not be considered to be "ancillary to the main business".

An approach based only on quantitative criteria is likely to lead to anomalous results. For example, in the context of a global group, 49% of the group's activities could constitute a significant business line relative to the main business of the group, but if only quantitative criteria were used as the formulae propose this business line would be considered to constitute ancillary activities.

However, if qualitative criteria are employed in combination with quantitative criteria then such qualitative tests could easily identify that the relevant business line is not "ancillary" and is in fact wholly unrelated to the main business.

If ESMA intends to apply quantitative criteria alongside qualitative criteria (or instead of qualitative criteria), then a 50% threshold is too high. This is discussed further in the response to Q469 by holders of the second view.

In the proposed calculations, the denominator should reflect the capital employed for the main activity at group level (calculated by deducting the capital employed for the sum of ancillary activities from the capital for the remaining activity as calculated in accordance with paragraph 24 of section 7 of the DP), as proposed by ESMA. The proposed calculations do appropriately factor in activity which is subject to the permitted exemptions under Article 2(4) MiFID II.

The denominator should not reflect the capital for overall activity at group level, as this would not appropriately factor in activity which is subject to the permitted exemptions under Article 2(4) MiFID II.

<ESMA_QUESTION_467>

Q468: Are there other approaches for assessing whether the ancillary activities constitute a minority of activities at group level that you would like to suggest? Please provide details and reasons.

<ESMA_QUESTION_468>
First view

Holders of this view support the approach used to assess the size of Trading Activity as provided on page 398 of the ESMA discussion paper since the rationale and exemptions are the same. Under this formula, the calculation for ancillary activity being considered a minority of activity at group level would be:

(F-B-C-D) / A < 50%
(G-B-C-D) / A < 50%
(F+G-B-C-D) / A < 50%

Second view

Whether or not activities are "ancillary activities" should be determined by reference to qualitative criteria (or by reference to a combination of qualitative and quantitative criteria). Examples of qualitative factors which ESMA could take into account compared to authorised entities and the entity's main business line include:

- Market presence;
- VaR used in the relevant activity;
- Compensation structure (e.g., do employees work to sales targets or receive bonuses based on level of business generated);
- Headcount;
- Whether or not the entity is a member of relevant exchanges or other trading venues.

<ESMA_QUESTION_468>

Q469: How should "minority of activities" be defined? Should minority be less than 50% or less (50 - x)%? Please provide reasons.

<ESMA_QUESTION_469>
First view

Any activity which constitutes less than 50% of the main activity of the group should be understood to be a minority of the activities of that group.

Second view

Whether or not activities are "ancillary activities" should be determined by reference to qualitative criteria (or by reference to a combination of qualitative and quantitative criteria). Whilst quantitative criteria can give a more objectively measureable result, given this test needs to be applied to a wide range of different businesses (in terms of their size, geographical scope and nature of their activities) it should not be a simple one-size fits all metric but will need to be more sophisticated.

However, if ESMA ultimately decides to apply quantitative criteria alongside qualitative criteria (or instead of qualitative criteria), then a 50% threshold is too high: "minority of activities" should be defined as a much lower percentage of a group's main business activity to ensure that any ancillary activities do fairly represent a minority of activities at group level. If the threshold is set at 50% or less, this would still permit entities to carry on a significant amount of "MiFID business" without being subject to regulation.

If a 50% threshold was applied alongside other qualitative criteria this may reduce the risk of anomalous results somewhat. However, whilst less than 50% may technically constitute a minority, it does not necessarily follow that a business line which makes up 49% of an entity's business should be considered to be an ancillary activity – it could (relative to the main business of the group) constitute a significant amount of "MiFID business" which would be unregulated.

In the context of a global group, 49% (or even a significantly lower figure, such as 20%) of the group's activities could constitute a significant business line relative to the main business of the group.

In addition, if you look at the business lines operated by an entity, the relevant activity might be the largest single business line at 49% of the total business, while other business lines are individually far smaller even if taken together they comprise 51% of the total business.

If ESMA does decide to use quantitative criteria, a significantly lower threshold would be appropriate, in conjunction with other qualitative criteria. A threshold in the region of 10 – 15% is suggested.
<ESMA_QUESTION_469>

Q470: Do you have a view on whether economic or accounting capital should be used in order to define the elements triggering the exemption from authorisation under MiFID II, available under Article 2(1)(j)? Please provide reasons.

<ESMA_QUESTION_470>
All members that contributed to this response agree that ESMA should provide more information on what it understands by the terms "economic capital" and "accounting capital".

First view

Accounting capital is understood to mean capital employed by a firm which is calculated from its balance sheet and which encompasses both equity and long term debt capital. Accounting capital is considered to generally be the most consistent measure to determine the ancillary activity as it is easily identifiable in company accounts and audited independently on an annual basis. However using accounting capital is also problematic in that it is not possible to identify ancillary activity versus non-ancillary activity as the capital figures represent pooled not disaggregated capital.

Using economic capital as a measure could be a useful however further clarity would be needed from regulators as economic capital typically uses a variety of stress test methodologies in its calculation which tends to be based on differing proprietary risk evaluation models. Consequently, using economic capital may not provide regulators with a consistent result across all market participants.

Second view

In order to provide a fully informed view on whether economic or accounting capital should be used, ESMA should provide more detailed information on what it means by accounting capital and economic capital.

ESMA should adopt an approach which does not only rely on a single metric in order to determine availability of the exemption. For example, ESMA could adopt an approach using accounting capital together with some economic capital metrics, measured against both the activity of the entity and that of the wider market, such as:

- headcount for the relevant activity compared with headcount;
- balance sheet usage / revenue / working capital employed
- VaR used in the relevant activity
- Compensation structure

ESMA would need to establish a standard formula for calculating each of these metrics.

ESMA has indicated in the DP that where an accounting capital measure is not available, an economic capital measure should be used. If ESMA intends to take this approach (or allow economic capital measures to be used), it would be useful to have a clear indication of what is meant by accounting capital and economic capital, so that it is clear how these measures should be calculated, the specific heads of economic capital which ESMA considers to be relevant and measureable and instances when accounting capital may not be available. In order to avoid creating loopholes, it should not be possible for entities to cherry-pick which approach they wish to use, based on the approach which gives them the best outcome.

<ESMA_QUESTION_470>

Q471: If economic capital were to be used as a measure, what do you understand to be encompassed by this term?

<ESMA_QUESTION_471>
As stated above, using economic capital as a measure would need further clarity from regulators as economic capital typically uses a variety of stress test methodologies in its calculation and tends to be based on differing proprietary risk evaluation models and will vary across activities between the trading and non-trading parts of the business
<ESMA_QUESTION_471>

Q472: Do you agree with the above assessment that the data available in the TRs will enable entities to perform the necessary calculations?

<ESMA_QUESTION_472>
We do not believe at this juncture that Trade Repositories will contain the data to assess risk-based trading activity as trade repositories will not have access to complete market information and will only collect data from transactions that are subject to EMIR.
<ESMA_QUESTION_472>

Q473: What difficulties do you consider entities may encounter in obtaining the information that is necessary to define the size of their own trading activity and the size of the overall market trading activity from TRs? How could the identified difficulties be addressed?

<ESMA_QUESTION_473>
Firms assess their overall trading activity and reconcile their daily positions using their own internal risk and back office systems. It is not foreseen that firms will use TRs to assess or reconcile their trading activity in terms of risk as it is unlikely that this information will be made available to firms by TRs. In addition TRs cannot provide a picture of overall EU and non-EU market activity given that under EMIR non-EU counterparties are not obliged to report their transactions. In addition third country repositories (e.g. SDRs in the US) are not currently obliged or indeed in some cases permitted to allow ESMA and other national EU regulators to access their swap data, so there will be a significant gap in available data. Permission to share US data with foreign regulators may require further legislation in the US to resolve indemnification issues.
<ESMA_QUESTION_473>

Q474: What do you consider to be the difficulties in defining the volume of the transactions entered into to fulfil liquidity obligations?

<ESMA_QUESTION_474>
First view

Firms do not identify transactions that serve for liquidity obligations separately from any other transactions so currently firms would be unable to measure volumes of such trades.

Second view

The "requirement" to fulfil liquidity obligations should be a clearly stated and defined regulatory obligation, whether the obligation is satisfied directly against counterparties or through a trading venue.

Commercial liquidity arrangements between venues and their participants should be explicitly excluded by ESMA, as these arrangements are entered into voluntarily by participants in return for commercial benefits and not purely in order to satisfy a regulatory requirement.
<ESMA_QUESTION_474>

Q475: How should the volume of the overall trading activity of the firm at group level and the volume of the transactions entered into in order to hedge physical activities be measured? (Number of contracts or nominal value? Period of time to be considered?)

<ESMA_QUESTION_475>
We support the measuring of overall trading activity at group level to mean the gross notional value of the contracts held by the entire group (minus hedging transactions).
<ESMA_QUESTION_475>

Q476: Do you agree with the level of granularity of asset classes suggested in order to provide for relative comparison between market participants?

<ESMA_QUESTION_476>
First view

The current granularity of asset classes detailed in the discussion paper is not suitable to assess trading activity thresholds in the commodity markets given that the proposal is that in exceeding a threshold in one asset class, a firm would automatically trigger a MiFID II obligation in all asset classes. For Example, in the Energy asset class, it is much easier to exceed a trading threshold in Gas due to nominal contract size than in Oil - even though volume of trading may be much smaller in Gas. Such a breach in what is in fact a small part of trading activity could trigger all trading activities to be within MiFID II. Similar issues could be seen with other smaller asset classes such as freight. For energy commodities it is strongly suggested that they be aggregated in one asset class called "Energy Commodities".

Second view

Holders of this view are sympathetic to the argument that these asset classes should not be too granular given that by exceeding a threshold in one asset class, a firm would automatically trigger a MiFID II obligation in all asset classes. It is noted that in the energy asset class it is much easier to exceed a threshold in Gas than in Oil, due to nominal contract size, even though volume of trading may be much smaller in Gas.

However, it is considered that grouping together a number of related asset classes may lead to arbitrary outcomes and may not fulfil the intention expressed by ESMA in paragraph 1 of section 7 of the DP, "to provide for a more narrow interpretation of allowed exempt entities thereby capturing within the scope of MiFID II a range of firms previously excluded".
<ESMA_QUESTION_476>

Q477: What difficulties could there be regarding the aggregation of TR data in order to obtain information on the size of the overall market trading activity? How could these difficulties be addressed?

<ESMA_QUESTION_477>
Given that only EU entities are subject to reporting requirements for derivative trades under EMIR, a large part of the commodity derivative market which is traded by non-EU entities bi-laterally and/or on markets external to the EU would not be reportable in the EU or be generally accessible by EU regulators. Therefore there would be no way of incorporating these non-EU transactions into the overall market trading activity data held in European TRs.

In addition, regulators should be clear on what type of information they need to determine overall trading activity and for what purpose. If it is for systemic risk purposes, we suggest that position data is the correct data to show overall market share. This is problematic particularly for ETD trades under EMIR, as there is no obligation to report position data.
<ESMA_QUESTION_477>

Q478: How should ESMA set the threshold above which persons fall within MiFID II's scope? At what percentage should the threshold be set? Please provide reasons for your response.

<ESMA_QUESTION_478>
First view

It is not currently possible to have a view on threshold percentages as these can only be sensibly assessed once all data on transactions and positions is made available. In order for an assessment to be made regarding any type of threshold, further clarification is needed from ESMA on the following fundamental points:

- What is ESMA's definition of commodity market
- What is ESMA's definition of commodity market size
- How does ESMA intend to measure market size (metrics and methodology)

In addition, significantly more information is required as to how thresholds will work according to asset class. For examples a percentage of a large asset class would have to be set at a potentially low level and a threshold for a much smaller asset class would be have to be set at a potentially higher level to allow for the difference in volumes traded in each asset class.

Second view

ESMA should assess the size of overall market trading activity in each relevant asset class and set a threshold that is appropriate for that asset class. These thresholds should be kept under periodic review to ensure that they remain appropriate for the size of overall market trading activity in the relevant asset class. The threshold should be set at a relatively low level to ensure that activities exempt from regulation under MiFID are truly ancillary when compared to the main business of the group.

ESMA's comments in paragraph 38 of section 7 of the DP indicate that persons seeking to rely on this exemption may need to determine the size of overall trading activity in the different asset classes themselves. In order to ensure that all persons relying on the exemption are using the same approach to calculating the size of overall trading activity, ESMA should either publish detailed guidance on this calculation or should publish indicative figures for overall trading activity that must be used in determining whether or not the exemption applies.

In particular, ESMA should consider leveraging the preliminary quantitative analysis (and any subsequent, more detailed analysis) that it has carried out in respect of the thresholds for assessing whether or not a firm should qualify as a systematic internaliser (discussed in section 3.3 of ESMA's CP), as well as the work that it has carried out in respect of position limits (discussed in section 7.2 of ESMA's DP).

ESMA should also ensure that when obtaining information from market participants it obtains information from unregulated market participants as well as from investment firms.

In relation to establishing the size of relevant markets under the position limits regime, ESMA has noted that this poses significant challenges. The same is also true for the definition of ancillary activities.
<ESMA_QUESTION_478>

Q479: Are there other approaches for determining the size of the trading activity that you would like to suggest?

<ESMA_QUESTION_479>
We suggest that position reports to be submitted under Art 58.1 could be a better measure for assessing trading activity than trade data reports from TRs. The only positions missing from such reports would be the pure bilateral trades (i.e. not traded on an RM, MTF or OTF)
<ESMA_QUESTION_479>

Q480: Are there other elements apart from the need for ancillary activities to constitute a minority of activities and the comparison between the size of the trading activity and size of the overall market trading activity that ESMA should take into account when defining whether an activity is ancillary to the main business?

<ESMA_QUESTION_480>
First view

It could be useful to take note of existing national legislative guidance on this topic, e.g. UK guidance found in the FCA handbook PERG 13.5 in response to Q45 '*What is an ancillary activity for these purposes?'*

FCA states that: 'for an activity to be ancillary for these purposes, in our view it must at least be both directly related to and subordinate to the main business of the group ....where for example a commodity producer buys or sells commodity derivatives for the purposes of limiting identifiable risk of its main business. For a person who is part of a group which owns and operates refineries or manufacturing or production operations, trading related commodity derivatives is integral to the group's business in terms of managing risk and therefore is directly related to albeit it subordinate to the main business of the group.

Second view

Other qualitative elements should be taken into account when determining whether or not an activity is ancillary to the main business (see the second view under our response to Q468 and Q470) and holders of this view support the view that ESMA should take into account how closely related a person's activities are to the main business. If the activity is integral to the main business it should be regarded as ancillary (e.g. if a trading house is trading for its own account as its main business). Similarly, an activity should not be regarded as ancillary if it is determined to be merely incidental or secondary to a person's main business.

As set out in the second view under our response to Q468, qualitative elements that ESMA should consider include:

- market presence in the relevant activity compared with authorised entities;
- VaR used in the relevant activity compared with the main activity of the entity;
- compensation structure in relation to the relevant activity of the entity (e.g. do employees work to sales targets or receive bonuses based on level of business generated);
- headcount for the relevant activity compared with headcount for the main activity of the entity;
- whether or not the entity is a member of relevant exchange or other trading venues in connection with the relevant activity.

<ESMA_QUESTION_480>

Q481: Do you see any difficulties with the interpretation of the hedging exemptions mentioned above under Article 2(4)(a) and (c) of MiFID II? How could potential difficulties be addressed?

<ESMA_QUESTION_481>
We are generally supportive of the interpretation of the hedging exemptions under Article 2 (4) (a) and (c) of MiFID II and believe that *Article 3* of Regulation EU 648/2012 is appropriate however we strongly believe that Article 10 of the Commission Delegated Regulation (EU) No 149/2013 supplementing EMIR should be taken into account in relation to transactions objectively mitigating risks relating to commercial or treasury financing activity.

First view

Holders of this view acknowledge that Recital 21 of MiFID II stipulates that hedging activities in MIFID II should be considered in a consistent way with EMIR. The EMIR definition, combined with the associated EMIR Level 2 measures, recognises that a variety of hedging strategies may be used by non-financial

counterparties. In particular, Recital (18) to the EMIR clearing RTS (Commission Delegated Regulation 149/2013) explicitly states that proxy, macro or portfolio hedging OTC derivative contracts may constitute hedging for the purposes of EMIR. The EMIR clearing RTS also makes clear that a contract may be a hedging contract even if it does not qualify as a hedging contract under IFRS accounting standards.

Holders of this view support the use of the wide definition and the reference to Article 3 of EMIR and the EMIR clearing RTS conditions described at paragraph 52 of the DP.

It would be beneficial to have additional clarity on the application of the hedging definition to hedging transactions which are common in the commodities industry. This is particularly important given the potential market impact if the hedging exemption is cast too narrowly. If typical hedging transactions in the commodities markets are not recognised appropriately in the Level 2 measures, a number of non-financial counterparties could be inadvertently brought within the scope of the investment firm authorisation requirement, with all of the market disruption and inconsistencies which would result.

It is therefore suggested that in addition to the EMIR clearing RTS conditions referred to above, a provision should be drafted which will expressly allow for certain types of hedging activity which are common in the commodities markets. This could be a standalone Recital or standard in the MiFID II Level 2 provisions, to perform a similar interpretative function to Recital (18) of the EMIR clearing RTS. Such a provision should clarify the position in relation to the following issues which commodities firms have encountered when interpreting the EMIR hedging criteria:

- certain physical commodities do not have any futures market available and hence the best available alternative is used for hedging (usually referred to as a 'cross hedge'). Although a hedge may not be closely correlated with the underlying physical commodity in such cases, if the hedges are not classified as risk-reducing under MiFID II, it would significantly limit the hedging possibilities resulting in reduced liquidity in the commodity markets and distorting the price setting mechanisms;

- Anticipatory Hedge Considerations: set out below are specific examples that aim to provide clarity as to ways producers and consumers hedge in the metals space:

  Producer Forward Selling

  In order to mitigate their risk producers will often sell forward on market rallies. This enables the producer to "lock in" sales vs cost differences (stabalising P+L movements) whilst also enhancing cash flow projections (when coupled with FX hedges, input cost hedges and others). In some cases producers are contractually obliged to sell forward as per the request of a financier (banks, investor consortiums etc.). Producers will rarely hedge forward 100% of capacity and/or projected production schedules. More often than not, they will weight the selling with greater volume on nearby months scaling lower towards the forward, thus making provisions for possible production disruptions. Because of the variance in production numbers Producers are often unable to receive hedge accounting treatment by both US and European accounting standards.

  Consumer Forward Buying

  Within the Base Metal space forward consumer buying in Aluminium is very common. Buying forward enables the consumer to "lock in" cost curve inputs and also differences in forward prices vs unit pricing schedules. Consumers have only small volatility in their projected sales forecasts vs. actual sales, so will hedge nearly all of their forward consumption requirements (on a price scaled out basis) to tenors as far as 60 months out. Due to the dynamics of the equity investor sector, consumers have very little resistance from investors regarding forward hedge programs. Therefore it is unlikely that this business practice will change in the near future.

  Price Conversions

In metal ore contracts between merchants and producers, there are instances where percentage pricing mechanisms are used instead of fixed prices. In essence the buyer would a pay a percentage to the seller of an underlying terminal market price, over a quotation period. It is often the case a merchant will allocate an entire purchase contract like this to a fixed priced sale, creating a fixed vs floating delta price risk. To mitigate this risk the merchant upon allocating this purchase would simultaneously buy forward futures on the relevant terminal market. As the percentage priced purchase remains contractually the same and only the delta risk between the two contracts has been hedged, it is extremely complicated for such a transaction to be given Hedge Accounting treatment.

Arbitrage

LME, CME and SHFE all have metals contracts that can be used for hedging and/or physical delivery. Although the contracts on each of these terminal markets have different specifications they behave and correlate in relative similar fashion. Basis each exchange runs as a domestic market (all be it that the LME generally is the most widely understood as a global benchmark) there are geographic underlying fundamentals which can create arbitrage opportunities. Sometimes there can be extended amounts of time during which these arbitrages appear. Cross continent physical contracts are often executed because of these differences and future positions need to be entered into to "lock in" or mitigate exposure between the exchanges. This eventually brings equilibrium back to the market.
<ESMA_QUESTION_481>

Q482: Do you agree with ESMA's proposal to take into account Article 10 of the Commission Delegated Regulation (EU) No 149/2013 supplementing EMIR in specifying the application of the hedging exemption under Article 2(4)(b) of MiFID II? How could any potential difficulties be addressed?

<ESMA_QUESTION_482>
We support that Article 10 of the Commission Delegated Regulation (EU) No 149/2013 supplementing EMIR should be taken into account in relation to transactions objectively mitigating risks relating to commercial or treasury financing activity. However, the response to question 10(c) on portfolio hedging in the ESMA Q&A states that there needs to be sufficient disaggregation in order to establish a clear link between the types of contracts entered into and the commercial or treasury activity of the group. We do not agree with this as commercial companies continuously use a variety of hedging instruments across multiple geographies, markets, products and time horizons to reduce firm wide risk on an overall aggregate basis. Disaggregating portions of this overall risk reducing activity could result in more complex risk reducing trades and hedging costs which ultimately may be passed on to the end consumer.
<ESMA_QUESTION_482>

Q483: Do you agree that the obligations to provide liquidity under Article 17(3) and Article 57(8)(d) of MiFID II should not be taken into account as an obligation triggering the hedging exemption mentioned above under Article 2(4)(c)?

<ESMA_QUESTION_483>
First view

No: if a firm is required to undertake position management by a trading venue under Article 57(8)(d) it should be allowed to apply the hedging exemption under Article 2(4)(c) given that it would not be able to control the direction and size of trading it would be required to undertake under liquidity obligations.

Second view

Yes, for the reasons given by ESMA in the DP.
<ESMA_QUESTION_483>

Q484: Could you provide any other specific examples of obligations of "transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue" which ESMA should take into account?

<ESMA_QUESTION_484>
First view

Holders of this view do not have a comment on this question.

Second view

As set out in our response to Q474, the "requirement" to fulfil liquidity obligations should be a cleared stated and defined regulatory obligation, whether the obligation is satisfied directly against counterparties or through a trading venue.

Commercial liquidity arrangements between venues and their participants should be explicitly excluded by ESMA, as these arrangements are entered into voluntarily by participants in return for commercial benefits and not purely in order to satisfy a regulatory requirement.

As a result, ESMA should take into account requirements to provide liquidity imposed by national competent authorities and should obtain information on the relevant requirements from those national competent authorities.
<ESMA_QUESTION_484>

Q485: Should the (timeframe for) assessment be linked to audit processes?

<ESMA_QUESTION_485>
First view

By 'linked to audit processes', it is understood that ESMA is proposing that the tests should applied to financial accounts or ledgers which have been subject to an audit. This would not be practical as, while the audit process would verify the reported numbers in the person's balance sheet and income statement, it would not (and indeed cannot) verify what proportion of that person's capital is employed specifically for dealing on own account or providing investment services in CDs, EAs, or DEAs, unless those are the person's *only* activities.

Second view

Yes. This should be an annual review signed off by auditors. The burden and cost to comply should fall on those companies looking to make use of the exemptions.
<ESMA_QUESTION_485>

Q486: How should seasonal variations be taken into account (for instance, if a firm puts on a maximum position at one point in the year and sells that down through the following twelve months should the calculation be taken at the maximum point or on average)?

<ESMA_QUESTION_486>
We strongly recommend the calculation to be taken on an average basis at points throughout a twelve month period. This approach would give a more accurate result and avoid distortions from possible sharp seasonally-related volatility spikes at a given point in time. This approach would also be consistent with similar calculations required under US securities law.
<ESMA_QUESTION_486>

Q487: Which approach would be practical in relation to firms that may fall within the scope of MiFID in one year but qualify for exemption in another year?

<ESMA_QUESTION_487>

We believe that firms should be assessed on a 3 year rolling average of their trading activity reported to regulators on an annual basis. We believe that trading activity data should be based on continual assessment throughout 12 months of the year and not based on a single snapshot at a given time. If a firm falls into MiFID II on this basis then a minimum 12 month transition period should be given to enable the firm to take the necessary operational steps to implement MiFID II.
<ESMA_QUESTION_487>

Q488: Do you see difficulties with regard to the two approaches suggested above?

<ESMA_QUESTION_488>
Given the implementation challenges around a firm becoming a MiFID firm (such as the possible restructuring of trading books/financial accounting methodologies) we believe that a minimum transition period of 12 months is required further to being deemed to be a MIFID firm.
<ESMA_QUESTION_488>

Q489: How could a possible interim approach be defined with regard to the suggestion mentioned above (i.e. annual notification but calculation on a three years rolling basis)?

<ESMA_QUESTION_489>
We would suggest a 2 year period for MIFID II implementation under the three year rolling methodology. Firms would start collecting MiFID data in 2017 and calculating trading activity in 2018 on this basis.
<ESMA_QUESTION_489>

Q490: Do you agree that the competent authority to which the notification has to be made should be the one of the place of incorporation?

<ESMA_QUESTION_490>
Yes we agree that competent authority in the place of incorporation of the entity invoking the (j) exemption should be notified should it be required. This is consistent with regulatory supervisory regimes already in place at a national level throughout the EU.
<ESMA_QUESTION_490>

7.2. Position Limits

Q491: Do you agree with ESMA's proposal to link the definition of a risk-reducing trade under MiFID II to the definition applicable under EMIR? If you do not agree, what alternative definition do you believe is appropriate?

<ESMA_QUESTION_491>
Regarding OTC contracts, we agree that hedges excluded from the position limits regime should remain consistent with hedges excluded from the clearing threshold under EMIR and, therefore, agree that the definition of risk reducing trade under MiFID II should be the same as under EMIR, i.e. article 10(3) of EMIR and article 10 of the EMIR regulatory technical standards (EU N° 149/2013).

We also think that, since position limits is a tool for maintaining orderly markets, the exemption should also cover trades on exchange and not just OTC. We note that the primary purpose of EMIR is risk mitigation and central clearing of OTC derivatives and that for this reason on-venue contracts are not covered. MIFID aims to apply to both on-venue and OTFC contracts.
<ESMA_QUESTION_491>

Q492: Do you agree with ESMA's proposed definition of a non-financial entity? If you do not agree, what alternative definition do you believe is appropriate?

<ESMA_QUESTION_492>

We agree that the definition of non-financial entity (NFE) under the MiFID II position limits regime should be aligned with the definition of non-financial counterparty (NFC) under article 2(9) of EMIR, which excludes entities which must obtain licence under existing European financial services legislation as set out in the definition of 'financial counterparty' under article 2(8) of EMIR (i.e. investment firms, credit institutions, insurance companies, UCITS and their asset management companies, AIFs and their management companies, pension funds).

However, we note with concern ESMA's proposal in paragraph 14 that MiFID II would use the existing comparable definition within EMIR of non-financial counterparty. The definition of NFE does not currently appear to consider application to third country entities. A third country credit institution with no presence in the EU will not be required to seek authorisation under the Banking Directive, and so under the current definition would qualify as a NFE. For the purpose of alignment with the EMIR NFC concept, the definition should be amended to cover entities established in the EU which are not required to seek authorisation under the relevant directives, and entities established outside the EU which would not have been required to seek authorization if they had been established in the EU.

We also note that if the definitions of economically equivalent OTC contracts and of netting are not sufficiently broad, an entity that may be required to be licensed under MiFID II (and which therefore would no longer be an NFE) will not be able to rely on the hedging exemption to the position limits regime and that this prohibition will materially limit its ability to manage the risks associated with its commercial activities effectively.
<ESMA_QUESTION_492>

Q493: Should the regime for subsidiaries of a person other than entities that are wholly owned look to aggregate on the basis of a discrete percentage threshold or on a more subjective basis? What are the advantages and risks of either approach? Do you agree with the proposal that where the positions of an entity that is subject to substantial control by a person are aggregated, they are included in their entirety?

<ESMA_QUESTION_493>
In principle, we agree that the notion of control should be the basis of the proposed regime for aggregation of group positions and support the view that provided controlled undertakings can demonstrate through objective criteria that they operate independently from their parent company, they should be able to disaggregate.

On disaggregation, we particularly agree with the statement of ESMA that aggregation with fellow subsidiaries of a mutual parent or ultimate holding company should not be required.

We also call for the development of other exemptions from aggregation for: (1) certain limited partners, shareholders or other commodity pool participants; (2) accounts held by investment firms, brokers, and similar market intermediaries; (3) accounts carried by an independent account controller; (4) positions held in connection with underwriting activity or a broker-dealer acquired in the normal course of business; and (5) information sharing where prohibited by law or regulation.

In the draft RTS dated 20 March 2014 under the revised Transparency Directive (2013/50/EU amending 2004/109/EC) - for the purpose of shareholdings calculation notably through derivatives - ESMA proposes that the parent undertaking of an entity wishing to benefit from the exemption in relation to holdings sets a list of the effectively controlled entities with their competent authorities and a statement that these controlled entities do not receive any direct or indirect instructions from the parent undertaking in the exercise of the voting rights. In addition, we understand that the exemption applies to non-EU groups and non-EU controlled undertakings where it can be demonstrated that the relevant undertaking's market making and trading activities as well as its asset management activities meet the independence criteria on an on-going basis as set out in the draft RTS under the Transparency Directive.

Although the purpose of the Transparency Directive is different from the MiFID position limits regime (exercise of voting rights versus positions on commodities), we believe that the definitions of the aggrega-

tion of positions at a group level should be aligned. We however do not support that any ownership percentage between 50% and 100% automatically involves aggregation of positions between the parent undertaking and the subsidiary without any consideration to independence in investment strategies or trading businesses.

<ESMA_QUESTION_493>

Q494: Should the regime apply to the positions held by unconnected persons where they are acting together with a common purpose (for example, "concert party" arrangements where different market participants collude to act for common purpose)?

<ESMA_QUESTION_494>
In principle, we support rules aiming at tracking 'concert parties'.

We note that the Level 1 text sets out in article 57(12) of MiFID II that ESMA is required to draft RTS only in respect of limited circumstances. Specifically with respect to aggregation, it is required to draft "*the methods to determine when positions of a person are to be aggregated within a group*".

As this notion of 'concert parties' is not referenced in article 57(12), ESMA may not be able to introduce level 2 measures on this point. In any case, if ESMA was to introduce such rules, we would support alignment with principles that were enforced under the legislative texts that already use this concept. We also believe that "*the circumstances where it is appropriate to aggregate positions even for unconnected persons where they are tied together in a common purpose*" (page 409 of the Discussion paper, Paragraph 20) must be proved by the competent authority in charge of enforcing the position limits regime.
<ESMA_QUESTION_494>

Q495: Do you agree with the approach to link the definition of economically equivalent OTC contract, for the purpose of position limits, with the definitions used in other parts of MiFID II? If you do not agree, what alternative definition do you believe is appropriate?

<ESMA_QUESTION_495>
Position limits apply to commodity derivatives contracts covered by the MiFID II definition of financial instruments (as stated in article 57 as well as recitals 127, 130 and 131).

However to accurately reflect the net risk-exposure of market participants, underlying physical positions, including non-derivative contracts, should be taken into account.

With this in mind, we highlight the following points:

ESMA should set a list of EU listed contracts subject to the limits in order to bring legal certainty to the scope of the position limits regime.

It is essential that written contracts from different location should have the same notion of equivalence to ensure that the commodity risk exposures are accurately reflected. Since position limits will apply to net positions, netting must be allowed also between underlying physical (non-derivative) contracts and the on-venue contract subject to the position limits.

ESMA should not impose an artificial restriction on the ability to net cash-settled and physically-settled non-derivative contracts if the contracts are economically equivalent. The level 1 text accurately sets that the economic equivalence is in the heart of the calculation of a position and not a legal equivalence. The purpose of level 1, clearly stated in article 57.1 (a), is to 'prevent market abuse' and 'support orderly pricing and settlement conditions'. These objectives go with a definition of netting that reflects the reality of these global markets.

The industry strongly supports a mechanism that is sufficiently broad and legally clear (i.e. measurable). In this respect we believe that the first approach is not sufficiently broad because the criteria are cumula-

tive. We also think that the implementation in the European Union of the second approach would need to be tailored to meet a much broad pool of contracts rather than the list of 28 contracts but potentially to all on-venue contracts. But we believe that the second approach offers a more practicable set of equivalence criteria by setting out the specific types of contracts which could be considered to be equivalent and that this type of approach would facilitate implementation. We suggest that ESMA considers defining qualitative criteria (which may be the same for certain commodities) per asset class, i.e. a) Oil, b) Gas and power, c) Metals, d) Agriculture.

We note with concern that ESMA's comments in the discussion paper indicate that it intends to interpret economically equivalent OTC contracts as meaning only MiFID financial instruments. In order to ensure a workable netting regime, market participants should be allowed to net against the underlying physical positions, including contracts that are not commodity derivatives (e.g., certain REMIT instruments and other physical contracts, e.g. coal and oil, or spot contracts). This greater pooling of positions and the provision of netting to allow bona fide hedges to be offset against physically settled transactions would therefore facilitate the accurate presentation of commodity risk levels.

In addition, a wider definition along the lines noted above is consistent with how the market hedges physical transactions which generally do not qualify as MiFID financial instruments (for example, (i) physically delivered metal forwards and options not traded on an MTF, not being for commercial purposes or having characteristics of other derivative financial instruments are hedged with LME futures; (ii) wholesale energy products subject to the REMIT carve out are hedged with power futures on European power exchanges; and (iii) OTC physically settled Loco London good delivery gold can be hedged with COMEX (non-EU venue) futures).

Also, we encourage ESMA to consider the need for "proxy hedging" when considering economically equivalent OTC contracts. Proxy hedging occurs when a risk related to a particular product is managed by hedging with a different product. For example, a participant may choose to hedge jet fuel exposure with ICE Europe Gas Oil Futures Contracts, since this ICE futures contract is both a key price determinant in European jet fuel markets and a highly liquid risk management tool. For the market to function as efficiently as possible and for all participants to have the ability to continue to offer, and benefit from, price risk management services, the position limit regime should allow for netting between proxy hedging contracts as economically equivalent contracts.

We recognise that there are challenges in defining proxy hedging contracts and in this regard refer ESMA to the CME Group rules and guidance on Exchange for Related Position (EFRP) transactions. EFRP's are used by market participants to establish, move or liquidate exchange positions by executing the exchange product versus an OTC. There are several types of EFRPs, including an Exchange of Futures for Physical (EFP), which is defined as, "the simultaneous execution of an Exchange futures contract and a corresponding physical transaction or a forward contract on a physical transaction." In determining what may qualify for the physical component of the EFP the CME Group provides the following in its guidance (see link provided):

"The related position component of the EFRP must involve the product underlying the Exchange contract or a by-product, related product or OTC derivative instrument that is reasonably correlated to the corresponding Exchange instrument.

The related position component of an EFRP may not be a futures contract or an option on a futures contract.

Where the risk characteristics and/or maturities of the related position differ from the instrument underlying the Exchange contract, the parties to the EFRP may be required to demonstrate the correlation between the products and the methodology used in equating the futures to the related position. In all cases, the related position transaction must be comparable with respect to quantity, value or risk exposure of the corresponding Exchange contract."

http://www.cmegroup.com/tools-information/lookups/advisories/market-regulation/files/RA1311-5.pdf

The CME group rules and guidance highlight both the need for proxy hedging capabilities and a general level of accepted market practice. ESMA requests suggested amendments to the second approach to determining economically equivalent OTC contracts (see Q497). We suggest that the CME Group rules and guidance on EFP transactions could be considered as the basis of an additional proxy hedging criterion for economically equivalent OTC contracts under the second approach.
<ESMA_QUESTION_495>

Q496: Do you agree that even where a contract is, or may be, cash-settled it is appropriate to base its equivalence on the substitutability of the underlying physical commodity that it is referenced to? If you do not agree, what alternative measures of equivalence could be used?

<ESMA_QUESTION_496>
We generally agree that it would be appropriate to base equivalence on the substitutability of the underlying commodity for such contracts. This is consistent with the legislative text in MiFID II which calls for a determination of *economic* equivalence. We emphasise that there must be genuine *economic* substitutability, i.e. fungibility, between cash-settled and physical-delivery contracts. Netting across cash-settled and physical delivery contracts is critical as segregating cash settled and physically delivered contracts could fragment the market and could push liquidity towards fewer markets
<ESMA_QUESTION_496>

Q497: Do you believe that the definition of "economically equivalent" that is used by the CFTC is appropriate for the purpose of defining the contracts that are not traded on a trading venue for the position limits regime of MiFID II? Give reasons to support your views as well as any suggested amendments or additions to this definition.

<ESMA_QUESTION_497>
See our response to question 495:

Position limits apply to commodity derivatives contracts covered by the MiFID II definition of financial instruments (as stated in article 57 as well as recitals 127, 130 and 131).

However to accurately reflect the net risk-exposure of market participants, underlying physical positions, including non-derivative contracts, should be taken into account.

With this in mind, we highlight the following points:

ESMA should set a list of EU listed contracts subject to the limits in order to bring legal certainty to the scope of the position limits regime.

It is essential that written contracts from different location should have the same notion of equivalence to ensure that the commodity risk exposures are accurately reflected. Since position limits will apply to net positions, netting must be allowed also between underlying physical (non-derivative) contracts and the on-venue contract subject to the position limits.

ESMA should not impose an artificial restriction on the ability to net cash-settled and physically-settled non-derivative contracts if the contracts are economically equivalent. The level 1 text accurately sets that the economic equivalence is in the heart of the calculation of a position and not a legal equivalence. The purpose of level 1, clearly stated in article 57.1 (a), is to 'prevent market abuse' and 'support orderly pricing and settlement conditions'. These objectives go with a definition of netting that reflects the reality of these global markets.

The industry strongly supports a mechanism that is sufficiently broad and legally clear (i.e. measurable). In this respect we believe that the first approach is not sufficiently broad because the criteria are cumula-

tive. We also think that the implementation in the European Union of the second approach would need to be tailored to meet a much broad pool of contracts rather than the list of 28 contracts but potentially to all on-venue contracts. But we believe that the second approach offers a more practicable set of equivalence criteria by setting out the specific types of contracts which could be considered to be equivalent and that this type of approach would facilitate implementation. We suggest that ESMA considers defining qualitative criteria (which may be the same for certain commodities) per asset class, i.e. a) Oil, b) Gas and power, c) Metals, d) Agriculture.

We note with concern that ESMA's comments in the discussion paper indicate that it intends to interpret economically equivalent OTC contracts as meaning only MiFID financial instruments. In order to ensure a workable netting regime, market participants should be allowed to net against the underlying physical positions, including contracts that are not commodity derivatives (e.g., certain REMIT instruments and other physical contracts, e.g. coal and oil, or spot contracts). This greater pooling of positions and the provision of netting to allow bona fide hedges to be offset against physically settled transactions would therefore facilitate the accurate presentation of commodity risk levels.

In addition, a wider definition along the lines noted above is consistent with how the market hedges physical transactions which generally do not qualify as MiFID financial instruments (for example, (i) physically delivered metal forwards and options not traded on an MTF, not being for commercial purposes or having characteristics of other derivative financial instruments are hedged with LME futures; (ii) wholesale energy products subject to the REMIT carve out are hedged with power futures on European power exchanges; and (iii) OTC physically settled Loco London good delivery gold can be hedged with COMEX (non-EU venue) futures).

Also, we encourage ESMA to consider the need for "proxy hedging" when considering economically equivalent OTC contracts. Proxy hedging occurs when a risk related to a particular product is managed by hedging with a different product. For example, a participant may choose to hedge jet fuel exposure with ICE Europe Gas Oil Futures Contracts, since this ICE futures contract is both a key price determinant in European jet fuel markets and a highly liquid risk management tool. For the market to function as efficiently as possible and for all participants to have the ability to continue to offer, and benefit from, price risk management services, the position limit regime should allow for netting between proxy hedging contracts as economically equivalent contracts.

We recognise that there are challenges in defining proxy hedging contracts and in this regard refer ESMA to the CME Group rules and guidance on Exchange for Related Position (EFRP) transactions. EFRP's are used by market participants to establish, move or liquidate exchange positions by executing the exchange product versus an OTC. There are several types of EFRPs, including an Exchange of Futures for Physical (EFP), which is defined as, "the simultaneous execution of an Exchange futures contract and a corresponding physical transaction or a forward contract on a physical transaction." In determining what may qualify for the physical component of the EFP the CME Group provides the following in its guidance (see link provided):

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Where the risk characteristics and/or maturities of the related position differ from the instrument underlying the Exchange contract, the parties to the EFRP may be required to demonstrate the correlation between the products and the methodology used in equating the futures to the related position. In all cases, the related position transaction must be comparable with respect to quantity, value or risk exposure of the corresponding Exchange contract."

http://www.cmegroup.com/tools-information/lookups/advisories/market-regulation/files/RA1311-5.pdf

The CME group rules and guidance highlight both the need for proxy hedging capabilities and a general level of accepted market practice. ESMA requests suggested amendments to the second approach to determining economically equivalent OTC contracts (see Q497). We suggest that the CME Group rules and guidance on EFP transactions could be considered as the basis of an additional proxy hedging criterion for economically equivalent OTC contracts under the second approach.
<ESMA_QUESTION_497>

Q498: What arrangements could be put in place to support competent authorities identifying what OTC contracts are considered to be economically equivalent to listed contracts traded on a trading venue? ?

<ESMA_QUESTION_498>

Once the definition of economically equivalent OTC contracts is set with sufficient width and certainty, then the implementation and supervision will be much easier. We therefore believe that the response to this question largely depends upon the definition of economically equivalent OTC contracts. We also believe that CCPs and trading venues will be essential in conveying the necessary data for determining economically equivalent positions to listed contracts. Competent authorities may consider publishing examples of what they consider to be economically equivalent OTC contracts by commodity asset class as this would facilitate consistent interpretation and implementation (based on qualitative criteria par asset class). The lists would not be exhaustive but would aim to provide guidance
<ESMA_QUESTION_498>

Q499: Do you agree with ESMA's proposal that the "same" derivative contract occurs where an identical contract is listed independently on two or more different trading venues? What other alternative definitions of "same" could be applied to commodity derivatives?

<ESMA_QUESTION_499>
The intention of article 57(6) of MiFID II is to apply a single position limit across multiple trading venues where "the same" contract is traded. However, as a practical matter, we question if ESMA will be able to monitor and to resolve disputes with respect to position limits, in respect of trading venues located outside the EU. The example used in paragraph 35, page 412, of the discussion paper, is of the KOSPI 200 contract traded on Eurex and the Korea Exchange, is helpful however we do not see how the German regulator could impose its own position limits on the South Korean trading venue where there is no such regime.

We agree that the 'same' derivative contract is a subset of economically equivalent contract and that in addition to the criteria for recognising economically equivalent contracts, other elements have to be taken into account such as the settlement process.

We also strongly believe that the concept of 'same contract' is to be used only for the purpose of article 57(6) and shall not be used for the purpose of netting and calculation of net positions aggregated at a group level).
<ESMA_QUESTION_499>

Q500: Do you agree with ESMA's proposals on aggregation and netting? How should ESMA address the practical obstacles to including within the assessment positions entered into OTC or on third country venues? Should ESMA adopt a model for pooling related contracts and should this extend to closely correlated contracts? How should equivalent contracts be converted into a similar metric to the exchange traded contract they are deemed equivalent to?

<ESMA_QUESTION_500>

On aggregation of contracts (for aggregation at a group level, please see our response to question 493), we agree that same contracts and OTC economically equivalent contracts should be included within the calculation. When facilitating client trades where there is limited liquidity in the specific underlying contract, Investment Firms use hedging strategies across many geographies, markets, products and time horizons to manage their residual risk. The regime should allow for this approach.

On netting, we consider that the calculation of a market participant's position should be with respect to its net position on a portfolio basis for identical or correlated commodities (e.g. gasoil / oil, power / emissions) across different commodity markets and on third country venues (if considered significant for EU markets for example, COMEX or WTI) in order to accurately represent commodity risk levels.

Naturally, we would caution against any extra-territorial application of EU position limits to contracts on third country venues; this would not be supported by the level 1 text and, practically speaking, if implemented could lead to conflicting rules and requirements applying to the same position.

With respect to cross-commodity hedges, we recommend that ESMA reviews and takes into account the CFTC rules for cross-commodity hedges including quantitative (i.e. setting of correlation limits) and qualitative (i.e. commercial relationship between target commodity and commodity underlying the derivative contract) factors. We note, however, that ESMA should not impose a rigid quantitative test for determining what constitutes a permissible cross-commodity hedge e.g. a specific correlation requirement. While this may seem an attractive policy option it has major limitations due to the fact that many commodity markets do not have liquid exchange-traded derivatives that can be used as a hedge. In such cases, market participants must hedge their risk using related derivatives products even though these hedges are not perfect i.e. ICE’s Brent Contract is used to hedge a significant number of energy commodities. A qualitative test that is based on specific facts and circumstances and defers to the reasonable judgment of market participants is most appropriate.
<ESMA_QUESTION_500>

Q501: Do you agree with ESMA’s approach to defining market size for physically settled contracts? Is it appropriate for cash settled contracts to set position limits without taking into account the underlying physical market?

<ESMA_QUESTION_501>
Deliverable supply is the right metric for physically settled spot month contracts. For cash settled spot-month contracts, we believe that the metric should be the open interest.

We also believe that although they are expressed as percentage of open interest, limits on cash-settled spot month contracts should be as aligned as possible with limits applied to physically-settled spot month contracts.

In relation to the use of open interests for limits on physical and cash settled non-spot month contracts, as the MiFID II regime applies to a broader range of commodity derivatives than just futures and will include economically equivalent OTC contracts, it will be necessary to adjust the open interests (given is a futures related metric) to add the notional volumes of swaps relating to the relevant on-venue contract. It is also the case that certain commodities may not have a related futures contract and competent authorities will need to estimate the open interests based on notional amounts of swaps.

We also call ESMA to provide further detail on how they intend to determine the overall market size for securities contracts with a commodity underlying.

We highlight that there are significant implementation issues that need to be considered further. In particular: (i) the definition of deliverable supply/open interest and (ii) ensuring that the deliverable supply/open interest is based on reliable, accurate and current information. For example:

For ICE Europe Brent crude oil futures contract “...is a deliverable contract on EFP delivery with an option to cash settle against the ICE Brent Index price for the last trading day of the futures contract. The Ex-

change shall publish a cash settlement price (the ICE Brent Index price) on the next trading day following the last trading day for the contract month".

This ICE Europe futures example highlights the difficulty in determining deliverable supply for a particular contract as effectively any crude oil can form the basis of an EFP transaction for the purposes of settling the ICE Europe Brent crude oil futures contract. This example also highlights the difficulty in sourcing reliable, accurate and current data to determine deliverable supply.

Also the difference between commodities means that some are durable and can be stored indefinitely and some cannot; this means that for some commodities as well as production deliverable supply should also include stock levels (i.e. surplus production stored from a prior period).

We note, even though question 501 does not address this issue, that in this section the discussion paper addresses the notification and approval of exemptions (paragraph 43, page 413). It is very unclear how such mechanism should work in practice without being burdensome and potentially disruptive of markets and hedging conditions. For the sake of effective and smooth implementation and supervision, we strongly support a notification process that works on the basis of assumption that the exemption is approved until and unless is explicitly rejected. In other words: market participants shall notify the competent authority before breaching the position limit; the notification should be based on a web service; the exemptions shall be considered as accepted by until and unless is explicitly rejected. Upon rejection, the market participant is required to reduce its positions in a reasonable timeframe. This solution would allow markets to continue to hedge their commercial exposure whilst mitigating the burden and potentially adverse consequences of the approval procedure.
<ESMA_QUESTION_501>

Q502: Do you agree that it is preferable to set the position limit on a contract for a fixed (excluding exceptional circumstances) period rather than amending it on a real-time basis? What period do you believe is appropriate, considering in particular the factors of market evolution and operational efficiency?

<ESMA_QUESTION_502>
We agree that amending the position limit on a real-time basis is not only unnecessarily but unfeasible and that setting it for a fixed (excluding exceptional circumstances) period is preferable. With regard to the period itself, we propose that position limits on a contract are fixed for an initial period of two years and with annual reviews thereafter with amendments to the limits only where necessary.

We also believe that spot month limits generally should not be determined at the time a contract month becomes the spot month. Determining a position limit for the spot month contract on the first day that such contract is available for trade is impractical as it would require notice of a limit to be provided when that contract has already commenced trading (open interest calculations are usually published after trading has begun each day) and when parties may already be holding positions that are in breach of that new position limit. Requiring parties to trade out of positions to comply with the new position limits may lead to artificial volatility and a disorderly market.

For instance, the LME have daily Prompt date contracts and thus have daily settlements. The LME already impose a pseudo position limit when the contract is coming up to prompt (settlement) in that it has a rule that stipulates that if the accumulated net long positions of a particular participant or member, two days before settlement, exceeds 50% of LME warranted stock, the long position holder(s) has to reduce the positions to below 50% of LME stock at a pre-determined set premium (price). It is possible to have a forward position that adds up to more than 100% of LME warranted stock. It is then up to the position holder to manage his positions over the two day period before settlement to ensure it is holding less than 50% of LME stock. LME stock figures are published each day at 09:00 UK time. We believe this is the method enshrined in the LME Lending Guidance rules that LME has been operating since 1998 is an effective tool in ensuring orderly markets and in effect imposes a pseudo position limit on LME contracts that are physically settled on the exchange. An explanation of the Lending Guidance can be found here:

http://www.lme.com/~/media/Files/Notices/2011/2011_10/11_293_A286_R008_Explanation_of_Metal_Lending_Guidance.pdf

The implementation of a position limits regime will significantly affect the functioning of the commodity markets and for this reason an initial two year period is necessary to ensure that orderly trading conditions are maintained during the transition.

The measure of the deliverable supply for a period of time is challenging and ESMA and national regulators should rely on data gathered by exchanges and on existing database aiming to ensure transparency in physical markets. A one-size fits all approach such as the "three months expiry cycle" as proposed by ESMA may not fit the fundamentals of certain commodity markets.

We also highlight that data used for the purpose of defining the deliverable supply period per commodity type should span over a period of a minimum of three years and should have a granular view on a monthly basis. When calculating the deliverable supply period per commodity type, different factors must be included, among which, a basic taxonomy (i.e.: storable versus non-storable), weather, supply chain optimization level, demand and offer curve, geographical location-distance, seasonality, growth, and market concentration, as well as the trading cycles per each commodity market. As there would be differences across commodities and that some factors are outside of the control of either of the parties to the physically-settled contract, a +/- margin should be added to the averaged/estimated delivery supply period. This +/- margin could be set at no less than 15% of the overall delivery supply period.
<ESMA_QUESTION_502>

Q503: Once the position limits regime is implemented, what period do you feel is appropriate to give sufficient notice to persons of the subsequent adjustment of position limits?

<ESMA_QUESTION_503>
It may depend on the underlying commodity and on the liquidity of the affected physical and financial markets.

The period must be sufficient to ensure that the adjustment does not disrupt the market. Many commodity derivatives markets are by nature illiquid. If the period is too short, then the sudden adjustment that a major market participant might need to make could create stressed conditions in the concerned market.

We support that the notice/ adjustment period should be at least half the time of the fixed period however if grandfathering is allowed then a 3 to 6 month adjustment period should be manageable
<ESMA_QUESTION_503>

Q504: Should positions based on contracts entered into before the revision of position limits be grandfathered and if so how?

<ESMA_QUESTION_504>
Yes, we strongly support grandfathering of contracts entered into before the revision of position limits. The immediate application of new stringent rules can adversely impact illiquid markets. Many commodity derivatives markets are illiquid by nature and the immediate application of limits to existing contracts may increase the disruption of the markets and create the conditions for higher volatility and price spikes which is exactly what the position limits regime aims to prevent or mitigate

We also believe that staged compliance could be implemented following revision of position limits to ensure that market disruption is minimised.
<ESMA_QUESTION_504>

Q505: Do you agree with ESMA's proposals for the determination of a central or primary trading venue for the purpose of establishing position limits in the same derivative contracts? If you do not agree, what practical alternative method should be used?

<ESMA_QUESTION_505>
Yes. We agree that the application of the rule should be limited to the same commodity derivatives contract that is traded on two or more trading venues within the EU.

We agree with the method proposed by ESMA to assess whether the contract is traded in significant volumes in another jurisdiction. We also agree that the measure of the largest volume of trading shall be based on the largest volume of open interests measured in the number of lots of the relevant contracts.

Lastly, we reiterate that the concept of 'same contract' is to be used only for the purpose of article 57(6) and shall not be used for the purpose of netting and calculation of net positions aggregated at a group level.
<ESMA_QUESTION_505>

Q506: Should the level of "significant volume" be set at a different level to that proposed above? If yes, please explain what level should be applied, and how it may be determined on an ongoing basis?

<ESMA_QUESTION_506>
No. We agree with the approach proposed by ESMA. We obviously recognise that the revision of the measure of the 'significant volume' should be subject to the same principles as the revision of the position limits itself (see our response to question 502:

We agree that amending the position limit on a real-time basis is not only unnecessarily but unfeasible and that setting it for a fixed (excluding exceptional circumstances) period is preferable. With regard to the period itself, we propose that position limits on a contract are fixed for an initial period of two years and with annual reviews thereafter with amendments to the limits only where necessary.

We also believe that spot month limits generally should not be determined at the time a contract month becomes the spot month. Determining a position limit for the spot month contract on the first day that such contract is available for trade is impractical as it would require notice of a limit to be provided when that contract has already commenced trading (open interest calculations are usually published after trading has begun each day) and when parties may already be holding positions that are in breach of that new position limit. Requiring parties to trade out of positions to comply with the new position limits may lead to artificial volatility and a disorderly market.

For instance, the LME have daily Prompt date contracts and thus have daily settlements. The LME already impose a pseudo position limit when the contract is coming up to prompt (settlement) in that it has a rule that stipulates that if the accumulated net long positions of a particular participant or member, two days before settlement, exceeds 50% of LME warranted stock, the long position holder(s) has to reduce the positions to below 50% of LME stock at a pre-determined set premium (price). It is possible to have a forward position that adds up to more than 100% of LME warranted stock. It is then up to the position holder to manage his positions over the two day period before settlement to ensure it is holding less than 50% of LME stock. LME stock figures are published each day at 09:00 UK time. We believe this is the method enshrined in the LME Lending Guidance rules that LME has been operating since 1998 is an effective tool in ensuring orderly markets and in effect imposes a pseudo position limit on LME contracts that are physically settled on the exchange. An explanation of the Lending Guidance can be found here:

http://www.lme.com/~/media/Files/Notices/2011/2011_10/11_293_A286_R008_Explanation_of_Metal_Lending_Guidance.pdf

The implementation of a position limits regime will significantly affect the functioning of the commodity markets and for this reason an initial two year period is necessary to ensure that orderly trading conditions are maintained during the transition.

The measure of the deliverable supply for a period of time is challenging and ESMA and national regulators should rely on data gathered by exchanges and on existing database aiming to ensure transparency in

physical markets. A one-size fits all approach such as the "three months expiry cycle" as proposed by ESMA may not fit the fundamentals of certain commodity markets.

We also highlight that data used for the purpose of defining the deliverable supply period per commodity type should span over a period of a minimum of three years and should have a granular view on a monthly basis. When calculating the deliverable supply period per commodity type, different factors must be included, among which, a basic taxonomy (i.e.: storable versus non-storable), weather, supply chain optimization level, demand and offer curve, geographical location-distance, seasonality, growth, and market concentration, as well as the trading cycles per each commodity market. As there would be differences across commodities and that some factors are outside of the control of either of the parties to the physically-settled contract, a +/- margin should be added to the averaged/estimated delivery supply period. This +/- margin could be set at no less than 15% of the overall delivery supply period.)
<ESMA_QUESTION_506>

Q507: In using the maturity of commodity contracts as a factor, do you agree that competent authorities apply the methodology in a different way for the spot month and for the aggregate of all other months along the curve?

<ESMA_QUESTION_507>
We fully agree that competent authorities apply the methodology in a different way for the spot month and to all other months along the curve, considered in aggregate. We highlight that not all commodity markets follow the same vanilla date structure. For instance, the LME does not have a spot month, e.g. for the Primary Aluminium contract there exists daily prompt dates out to 3 months, weekly: 3 out to 6 months and then Monthly : 7 out to 123 months. (The 3rd Wednesday being the monthly prompt).

Therefore we believe that ESMA should clarify how to interpret the definition of spot month when taking into account markets with daily prompts.
<ESMA_QUESTION_507>

Q508: What factors do you believe should be applied to reflect the differences in the nature of trading activity between the spot month and the forward months?

<ESMA_QUESTION_508>
Financial markets are structured to achieve price convergence between physical and financial commodity markets, and for futures markets to act as effective risk hedging venues for physical commodities. Settlement prices typically converge with physical market prices at expiry.

'Spot' or 'delivery' month limits restrict how many contracts a participant can hold in the period during which delivery of the physical commodity is to be made. This is where dominant market positions can have the most acute effect.

For instance, LME key metal contracts have daily prompt dates and daily settlement. Copper and Aluminium contracts go out to 10 years. A squeeze can only happen near the time of settlement when LME warrants have to be sourced in order to prepare for delivery. Further out the curve for contracts that are for further forward prompt dates have little impact on settlement and position limits are less relevant.

Further down the curve however, position limits may be less effective given reduced liquidity for long-dated contracts. If a market participant holds a large position further 'down the curve' markets have sufficient time to react. Therefore , in our view the main focus of the position limit regime should be on the spot month and to the extent that limits needs to be applied to other months they should sufficient to allow the normal functioning of the market and not unnecessarily restrict liquidity.

We also believe that it is important to take account of contract design and related specifications in addition to deliverable supply. Market distortions do not simply arise due to the size of the position built by a market participant in a particular commodity but also can arise due to the manner in which a contract is designed.

In certain cases, using deliverable supply alone as the single determining factor when setting a position limit for a commodity is insufficient as it is also necessary to take into account specific characteristics of that commodity, for example, logistical constraints i.e. ease with which the commodity can be delivered or extracted given contract delivery points
<ESMA_QUESTION_508>

Q509: Do you agree with ESMA's proposal for trading venues to provide data on the deliverable supply underlying their contracts? If you do not agree, what considerations should be given to determining the deliverable supply for a contract?

<ESMA_QUESTION_509>
Yes, we fully agree that in the first instance the competent authority of the jurisdiction where a trading venue is located should obtain and use the data on deliverable supply that is maintained by that trading venue.

However, we consider that the competent authority should adjust the level of the deliverable supply as stated by the trading venue in order to reflect some other factors such as industry research or governmental statistics where it is difficult to get an accurate measure of the supply or for global markets. Also, for gas and power markets where system operators exist, the ENTSOs should be considered, either directly or through the intermediation of trading venues.

Further where a contract is a key benchmark and is used as a proxy hedge for other commodities e.g. ICE Gasoil contract is used to hedge jet derivatives, then the position limit regime should reflect this wider market.

This is because the exchange's view of deliverable supply will be focused on the specifics of its contract, whereas the MiFID position limit regime covers a wider universe.

We also fully support the G20 initiatives aiming to enhance the transparency in physical commodity markets (production and storage) though we highlight that on some commodities (precious metals and rare earths for instance) such a transparency does not yet exist, primarily because of the reluctance of some countries in a dominant position to publish relevant data on a regular basis.
<ESMA_QUESTION_509>

Q510: In the light of the fact that some commodity markets are truly global, do you consider that open interest in similar or identical contracts in non-EEA jurisdictions should be taken into account? If so, how do you propose doing this, given that data from some trading venues may not be available on the same basis or in the same timeframe as that from other trading venues?

<ESMA_QUESTION_510>
Yes, we believe that a harmonised regime globally for key economically-linked contracts both exchange traded and OTC is critically needed where the fundamentals of the underlying commodity markets are global. It would be a grave concern if a global commodity such as, for instance, gold, which is traded on different markets, to have different position limits depending on whether it falls within the CFTC regulation or the EU MiFID regime.

Coordination between relevant EU and non-EU competent authorities having access to regional or national trade repositories is essential to measure the overall size of the relevant commodity derivatives markets. In other words, open interest in similar or identical contracts in non-EU jurisdictions should be taken into account. Imposing limits that do not reflect the global nature of commodity markets would cause substantial fragmentation and would be detrimental to beneficial risk management activities.
<ESMA_QUESTION_510>

Q511: In the absence of published or easily obtained information on volatility in derivative and physical commodity markets, in what ways should ESMA reflect this factor in its methodology? Are there any alternative measures that may be obtained by ESMA for use in the methodology?

<ESMA_QUESTION_511>
We in general believe that volatility is not a relevant criterion for the purpose of the calculation methodology of limits and we do not clearly see at this time how ESMA proposes to incorporate volatility into position limit calculations.

Volatility is natural to markets and reflects the market adjusting to new information. If regulators believe that the effect is driven by some sort of abuse they have sufficient powers under MAR to take action. We do not believe that position limits prevent volatility. There is evidence that in some cases limits may even lead to increased volatility if they are inappropriately calibrated.

The presence of volatility in a market generally leads participants to seek risk management solutions and any restriction on participants' ability to do so through the use of position limits may prohibit participants from effectively managing their risks. Further, where limits are revised down at short notice in response to increasing volatility, this may further exacerbate volatility as participants are forced to close down positions to meet the new limits. Historically, regulated markets have used margin methodologies to manage volatility. Parties unable to maintain positions in volatile markets may have to reduce positions due to margin call, but there is no artificial constraint in their ability to participate.

We therefore request ESMA to undertake a further review of the impact of volatility before including any volatility based adjustment factor in the position limit methodology.

At the very least ESMA should clarify whether volatility in this particular context is intended to refer to price volatility or to the amount of the commodity available in the market.

We agree that the absence of accurate data on all physical markets makes it difficult to measure volatility of these markets. Given that volatility usually results from a lack of liquidity, we believe that position limits should be set high enough to take into account volatility of the physical markets and the consequences that volatility has on trading volumes e.g. fewer new market participants the higher the volatility
<ESMA_QUESTION_511>

Q512: Are there any other considerations related to the number and size of market participants that ESMA should consider in its methodology?

<ESMA_QUESTION_512>
We agree with ESMA's views on the size and number of market participants and do not see any other consideration. We also support ESMA's statement on page 419, paragraph 77 of the discussion paper: "*Concentration of positions in a market will particularly be a factor in national gas and power markets, which may need to set limits to reflect the existence of 'national champions', depending on the extent of fragmentation of former state-owned incumbents and the terms of any market maker schemes operated by venues as necessary for proper market operation. This is accommodated in the use of separate factors for different asset classes, which can reflect the individual market structures*".

We also believe that where a product is traded by a small number of participants, ESMA should seek to understand the composition of market participants before determining the position limit. For example, a market with ten active participants may have two sellers and eight buyers, or just one risk management provider amongst nine participants seeking risk management services. In such markets, a single position limit may have a disproportionate impact on some of the participants.
<ESMA_QUESTION_512>

Q513: Are there any other considerations related to the characteristics of the underlying commodity market that ESMA should consider in its methodology?

<ESMA_QUESTION_513>
We agree with ESMA's views that the seasonal supply outages in the physical market, the perishability of deliverable materials and the capacity constraints (with regard to transportation and delivery) should be taken into account. We reiterate that the absence of accurate data on production and storage of some commodities should be reflected in the consideration related to the characteristics of the underlying commodity market.
<ESMA_QUESTION_513>

Q514: For new contracts, what approach should ESMA take in establishing a regime that facilitates continued market evolution within the framework of Article 57?

<ESMA_QUESTION_514>
Firstly, we recognise there will be difficulty in determining position limits for new contracts. We therefore encourage ESMA to consider mechanisms to ensure that the limits do not damage developing liquidity in the new contracts. Low liquidity is not only a characteristic of new contracts, but also of many more regional or specialised commodity products. Where very few market participants exist with respect to a contract, liquidity will naturally be limited. Any consideration and/or methodology adopted for new contracts should therefore be extended to existing illiquid contracts.

We believe that the best approach would be to take each new or illiquid contract separately and consider a reasonable multiple of the current transaction size after a defined period of trading, so approach 1.

We also think that, instead of position limits, ESMA should consider relying on the position management powers available to national regulators and trading venues. New contracts often are illiquid/ immature initially and may be used by a small number of market participants. In order to accommodate the demand of hedgers and develop a robust, established market, it may be necessary to permit a small number of market participants to represent a relatively large share of the (small) market. Concerns regarding market abuse can be adequately addressed through enhanced reporting and surveillance, as necessary.
<ESMA_QUESTION_514>

Q515: The interpretation of the factors in the paragraphs above will be significant in applying ESMA's methodology; do you agree with ESMA's interpretation? If you do not agree with ESMA's interpretation, what aspects require amendment?

<ESMA_QUESTION_515>
We broadly agree with ESMA's views on the various factors that should be taken into account in the calculation methodology. We however reiterate that volatility is probably not a relevant tool for this purpose
<ESMA_QUESTION_515>

Q516: Are there any other factors which should be included in the methodology for determining position limits? If so, state in which way (with reference to the proposed methodology explained below) they should be incorporated.

<ESMA_QUESTION_516>
Where a liquid benchmark contract is used as a proxy or a generic hedge for a range of contracts, the position limits should be set at a level to allow this bona fide hedging activity to continue.
<ESMA_QUESTION_516>

Q517: What do you consider to be the risks and/or the advantages of applying a different methodology for determining position limits for prompt reference contracts compared to the methodology used for the position limit on forward maturities?

<ESMA_QUESTION_517>
We strongly believe that different methodologies should be applied for determining position limits for prompt reference contracts compared to position limits on forward maturities.

In terms of forward maturities an alternative methodology to imposing position limits is to instead require market participants to disclose their position upon coming within a certain range and then to explain the reason for having that position to the relevant NCA. This promotes greater transparency for the market and regulators while not artificially restricting liquidity in contracts that are not subject to logistical constraints associated with the delivery period (expiration).

We also note that the CFTC's proposed position limits regime differentiate spot and forward maturities as follows: Spot month limit levels are set at 25% of estimated deliverable supply (separately for physical-delivery and cash-settled Reference Contracts) determined by the exchange that lists the Core Referenced Futures Contract, unless CFTC chooses to rely on its own estimate – and may not be greater than 25% of such supply but not less than 1,000 lots for agricultural commodities and not less than 5,000 lots for energy / metal commodities. Each month (i.e. single month) and all-months-combined limits, which are set at the same level, are based on largest average annual open interest in Reference Contracts in the preceding two years (10% of open interest for first 25,000 contracts and 2.5% thereafter).
<ESMA_QUESTION_517>

Q518: How should the position limits regime reflect the specific risks present in the run up to contract expiry?

<ESMA_QUESTION_518>
The position limits regime could introduce "telescoping" limits to avoid market disruption. This would involve stating limits in the immediate period prior to contract expiry.
<ESMA_QUESTION_518>

Q519: If a different methodology is set for the prompt reference contract, would it be appropriate to make an exception where a contract other than the prompt is the key benchmark used by the market?

<ESMA_QUESTION_519>
We do not think that instances where a contract month other than prompt is primarily used as the "key benchmark contract" should cause particular problems. The key risk being addressed by limits is abusive squeezes occurring as the contract approaches expiry; spot month limits will ultimately apply to all contract maturities as they approach expiry, regardless of whether some months are more traded than others; ESMA is also anticipating applying back month limits, which would govern all contract maturities outside of the spot month, which could apply to the "key benchmark contract" when spot month limits are not currently in effect.
<ESMA_QUESTION_519>

Q520: Do you agree that the baseline for the methodology of setting a position limit should be the deliverable supply? What concrete examples of issues do you foresee in obtaining or using the measure?

<ESMA_QUESTION_520>
As stated in our response to question 501:

Deliverable supply is the right metric for physically settled spot month contracts. For cash settled spot-month contracts, we believe that the metric should be the open interest.

We also believe that although they are expressed as percentage of open interest, limits on cash-settled spot month contracts should be as aligned as possible with limits applied to physically-settled spot month contracts.

In relation to the use of open interests for limits on physical and cash settled non-spot month contracts, as the MiFID II regime applies to a broader range of commodity derivatives than just futures and will include economically equivalent OTC contracts, it will be necessary to adjust the open interests (given is a futures related metric) to add the notional volumes of swaps relating to the relevant on-venue contract. It is also

the case that certain commodities may not have a related futures contract and competent authorities will need to estimate the open interests based on notional amounts of swaps.

We also call ESMA to provide further detail on how they intend to determine the overall market size for securities contracts with a commodity underlying.
<ESMA_QUESTION_520>

Q521: If you consider that a more appropriate measure exists to form the baseline of the methodology, please explain the measure and why it is more appropriate. Consideration should be given to the reliability and availability of such a measure in order to provide certainty to market participants.

<ESMA_QUESTION_521>
In determining its methodology for the setting of position limits for physically delivered contracts ESMA should consider not only the defining of deliverable supply, but equally importantly the capacity for determination of deliverable supply.

Whether a trading venue or other related body is identified as the responsible calculation party, the ability for any one body to determine deliverable supply is limited by the scope of information available. For example, for medium to long term supply calculations, industry and government sponsored organisations (such as the International Energy Agency or, for oil, the OPEC reports) may have well established processes for determining structural supply and demand data, but for shorter term calculations it would most likely be the market participants that would be the key data providers for deliverable supply calculation.

In recommending a trading venue be responsible for determination of deliverable supply it is critical to provide a framework that enables the venue to access all relevant data and participants. In considering a more suitable calculation agent ESMA must consider the same availability and transparency of data. In support of the trading venue being the calculation agent, the availability of trading data across that particular venue may enable it to direct its focus to those participants most active in the relevant product most immediately and more effectively.

It should be noted by ESMA that commodity markets can exhibit very rapid changes in supply and demand balances given the global nature of those markets (where product may move in and out of region frequently given supply/demand/pricing arbitrage, and production volumes in some commodities can change very rapidly). As a result the deliverable supply, particularly where a defined set of criteria is used to determine that supply, can change dramatically and very rapidly. Shorter term supply calculations could, and would likely, exhibit a level of volatility that can disrupt the efficient functioning of the market if this short term supply volatility is manifested in rapidly changing position limits based on deliverable supply.
<ESMA_QUESTION_521>

Q522: Do you agree with this approach for the proposed methodology? If you do not agree, what alternative methodology do you propose, considering the full scope of the requirements of Article 57 MiFID II?

<ESMA_QUESTION_522>
We support the expression of the limits as percentage of open interests (for cash-settled contracts and non-spot month physically-settled contracts,) or deliverable supply (for physically settled spot month contracts). We note that open interest will need to be adjusted to take into account the notional value of swaps given open interest for the relevant contract will be applied to OTC equivalents.
<ESMA_QUESTION_522>

Q523: Do you have any views on the level at which the baseline (if relevant, for each different asset class) should be set, and the size of the adjustment numbers for each separate factor that ESMA must consider in the methodology defined by Article 57 MiFID II?

<ESMA_QUESTION_523>

We think that position limits should be sufficiently high until the regulators are able to assess the data. Downwards adjustments may be made afterwards.

Also, we foresee significant issues with adjusting and absolute baseline figures on the basis of deliverable supply, volatility and number and size of market participants. In addition we do not understand the basis for ESMA's maximum adjustment calibration of 15% of the baseline figure nor is it clear how this will be applied i.e. if the total limit 25%=/-15% how will this be applied to the spot and other months?
<ESMA_QUESTION_523>

Q524: Does the approach to asset classes have the right level of granularity to take into account market characteristics? Are the key characteristics the right ones to take into account? Are the conclusions by asset class appropriate?

<ESMA_QUESTION_524>
The characteristics for each class outlined by ESMA relate to the relevant exchange contract not necessarily the OTC and physical markets and these differences will need to be recognised when applying a limit e.g. a monthly OTC metals contract to a daily LME regime. However, in general we think the granularity of the taxonomy is acceptable e.g. oil and oil products class should allow for the hedging of oil products without exchange contracts via ICE's Brent Contact.
<ESMA_QUESTION_524>

Q525: What trading venues or jurisdictions should ESMA take into consideration in defining its position limits methodology? What particular aspects of these experiences should be included within ESMA's work?

<ESMA_QUESTION_525>
We believe that all venues should be taken into account. We think that in addition to consulting with the relevant trading venues, ESMA should continue working closely with the CFTC on harmonising their approaches.

The key consideration in defining the EU position limits methodology is harmonisation. We also strongly believe that alignment of position limits regimes will improve results and provide a powerful data set for regulators to develop accurate and more useful tools to achieve their objectives. Inconsistencies across regimes will make systems harder to build and implement across global trading businesses.
<ESMA_QUESTION_525>

Q526: Do you agree that the RTS should accommodate the flexibility to express position limits in the units appropriate to the individual market? Are there any other alternative measures or mechanisms by which position limits could be expressed?

<ESMA_QUESTION_526>
Expression of limits as percentage of open interest or deliverable supply is the most appropriate way. But as long as the measure of the physical underlying market is taken into consideration, flexibility may make sense in some limited cases

See our response to question 502:

We agree that amending the position limit on a real-time basis is not only unnecessarily but unfeasible and that setting it for a fixed (excluding exceptional circumstances) period is preferable. With regard to the period itself, we propose that position limits on a contract are fixed for an initial period of two years and with annual reviews thereafter with amendments to the limits only where necessary.

We also believe that spot month limits generally should not be determined at the time a contract month becomes the spot month. Determining a position limit for the spot month contract on the first day that such contract is available for trade is impractical as it would require notice of a limit to be provided when that contract has already commenced trading (open interest calculations are usually published after trading has begun each day) and when parties may already be holding positions that are in breach of that new

position limit. Requiring parties to trade out of positions to comply with the new position limits may lead to artificial volatility and a disorderly market.

For instance, the LME have daily Prompt date contracts and thus have daily settlements. The LME already impose a pseudo position limit when the contract is coming up to prompt (settlement) in that it has a rule that stipulates that if the accumulated net long positions of a particular participant or member, two days before settlement, exceeds 50% of LME warranted stock, the long position holder(s) has to reduce the positions to below 50% of LME stock at a pre-determined set premium (price). It is possible to have a forward position that adds up to more than 100% of LME warranted stock. It is then up to the position holder to manage his positions over the two day period before settlement to ensure it is holding less than 50% of LME stock. LME stock figures are published each day at 09:00 UK time. We believe this is the method enshrined in the LME Lending Guidance rules that LME has been operating since 1998 is an effective tool in ensuring orderly markets and in effect imposes a pseudo position limit on LME contracts that are physically settled on the exchange. An explanation of the Lending Guidance can be found here: http://www.lme.com/~/media/Files/Notices/2011/2011_10/11_293_A286_R008_Explanation_of_Metal_Lending_Guidance.pdf

The implementation of a position limits regime will significantly affect the functioning of the commodity markets and for this reason an initial two year period is necessary to ensure that orderly trading conditions are maintained during the transition.

The measure of the deliverable supply for a period of time is challenging and ESMA and national regulators should rely on data gathered by exchanges and on existing database aiming to ensure transparency in physical markets. A one-size fits all approach such as the "three months expiry cycle" as proposed by ESMA may not fit the fundamentals of certain commodity markets.

We also highlight that data used for the purpose of defining the deliverable supply period per commodity type should span over a period of a minimum of three years and should have a granular view on a monthly basis. When calculating the deliverable supply period per commodity type, different factors must be included, among which, a basic taxonomy (i.e.: storable versus non-storable), weather, supply chain optimization level, demand and offer curve, geographical location-distance, seasonality, growth, and market concentration, as well as the trading cycles per each commodity market. As there would be differences across commodities and that some factors are outside of the control of either of the parties to the physically-settled contract, a +/- margin should be added to the averaged/estimated delivery supply period. This +/- margin could be set at no less than 15% of the overall delivery supply period.
<ESMA_QUESTION_526>

Q527: How should the methodology for setting limits take account of a daily contract structure, where this exists?

<ESMA_QUESTION_527>
We believe that ESMA should defer to the relevant markets here. However, care needs to be taken not to ‘jam’ OTC/physical trades into inappropriate daily limits.
<ESMA_QUESTION_527>

Q528: Do you agree that limits for option positions should be set on the basis of delta equivalent values? What processes should be put in place to avoid manipulation of the process?

<ESMA_QUESTION_528>
Yes. During the lifetime of the option, in order to minimise risk, the hedge for the option will replicate the change in delta (as opposed to the absolute value of the option). Therefore, in setting limits for options position limits should track the option delta. Regarding anti-manipulation, calculation methodology can be subject to retrospective audit from the relevant national regulator, upon request. Also, in the event options are used to hedge futures it is critical that option deltas are able to be netted with futures positions delta in order to accurately reflect commodity risk levels.
<ESMA_QUESTION_528>

Q529: Do you agree that the preferred methodology for the calculation of delta-equivalent futures positions is the use of the delta value that is published by trading venues? If you do not, please explain what methodology you prefer, and the reasons in favour of it?

<ESMA_QUESTION_529>
As market participants will have different internal calculation methodology for calculating delta futures equivalent values, to ensure consistency with internal risk systems they should be allowed the flexibility to use their own calculations rather than those delta value published by trading venues (subject to being able to justify the calculation).
<ESMA_QUESTION_529>

Q530: Do you agree that the description of the approach outlined above, combined with the publication of limits under Article 57(9), would fulfil the requirement to be transparent and non-discriminatory?

<ESMA_QUESTION_530>
Yes, we fully agree with this approach.
<ESMA_QUESTION_530>

Q531: What challenges are posed by transition and what areas of guidance should be provided on implementation? What transitional arrangements would be considered to be appropriate?

<ESMA_QUESTION_531>
Unfortunately, the level 1 MiFID II text does not allow a phased-in approach. However, at a minimum, the grandfathering of existing positions at the time of implementation of the new regime, along with setting of "high limits" which can be calibrated over time, is required in order to avoid market disruption and mismatched hedging.
<ESMA_QUESTION_531>

7.3. Position Reporting

Q532: Do you agree that, in the interest of efficient reporting, the data requirements for position reporting required by Article 58 should contain elements to enable competent authorities and ESMA to monitor effectively position limits? If you do not agree, what alternative approach do you propose for the collection of information in order to efficiently and with the minimum of duplication meet the requirements of Article 57?

<ESMA_QUESTION_532>
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We question the appropriateness of setting up a Position Reporting for commodities. We don't understand why this specific position reporting is to be put in parallel to EMIR reporting, where the same information is supposed to end up anyway. They consequently do not see the additional value of this specific reporting.

We believe that ESMA could simply filter the information collected by Trade Repositories for purposes of monitoring their position limits regime.

Setting up a separate reporting regime for MiFID not only adds complexity, it is also prone to error if the relevant data and fields are not taken over from EMIR. Market participants would like to avoid a separate reporting chain, as this is just costly duplicity.

We agree with ESMA's approach on the purpose of the position reporting requirements.

We particularly support the expressed will to standardise the data definitions and the format of the reporting information required by MiFID with other existing legislative texts to the greatest extent possible in order to reduce the quantity of duplicative reporting. In our view, wherever possible, we also think that ESMA should establish reporting requirements and data standards that are equivalent to, or at least compatible with, analogous requirements imposed (or proposed) by other jurisdictions. For instance, we believe that an appropriate comparison for regulators would be CFTC form 102 and 204, and the data required to be reported pursuant to Parts 15 through 20 of the CFTC's rules. In case the US and EU standards were not compatible, this would result in significant additional costs on the industry, and increase the risk of market disruption and fragmentation.

Lastly, we agree that the data fields included within position reports should include an indicator of whether a position is risk reducing for commercial purpose or not (and therefore eligible to the hedging exemption to position limits). However, we call for clarifications on the following points: a) do the requirements for members of trading venues to provide their clients' positions in on-venue contracts pertains only to that which the member holds on behalf of their client (rather than their counterparty's positions under principal transactions)?; b) if a market participant has to report positions all the way down to the "end client", how can this market participant establish whether or not the end client's position is a hedging position? c) Would the market participant be liable if the end client misinformed it (which would not be acceptable)?
<ESMA_QUESTION_532>

Q533: Do you agree with ESMA's definition of a "position" for the purpose of Article 58? Do you agree that the same definition of position should be used for the purpose of Article 57? If you do not agree with either proposition, please provide details of a viable alternative definition.

<ESMA_QUESTION_533>
Yes, we agree that the definition of 'position' under article 58 should be aligned with the definition under article 57 since the position reporting requirements aim to support the position limit regime. The position reporting requirements should therefore apply to contracts traded on a trading venue and economically equivalent OTC contracts. We also agree that the definition of position, alternatively called 'open interest', should embrace the net accumulation of buy and sell transactions in a particular commodity derivative, emission allowance or derivative on an emission allowance at a specific point in time.
<ESMA_QUESTION_533>

Q534: Do you agree with ESMA's approach to the reporting of spread and other strategy trades? If you do not agree, what approach can be practically implemented for the definition and reporting of these trades?

<ESMA_QUESTION_534>
Article 58 only requires that positions that are risk reducing transactions (i.e. netting applies to the calculation of the overall position of the market participant for the calculation of the limits but not to reporting) should be reported gross.

Any additional reporting is duplicative and unnecessary given that Investment Firms will already be reporting transactions. Looking at a gross position does not provide any regulatory useful information nor is it the way that exchanges current receive position reports. Those positions that are not used for the purposes of 'risk reducing' should be reported net.

Any requirement to report spread and other complex trades on a disaggregated basis should be consistent with the reporting requirements imposed by other jurisdictions. For example, in certain circumstances, market participants should be permitted to report positions based on a diversified commodity index on a consolidated basis (e.g., where the index is commonly known and the weightings of individual components are publically available).
<ESMA_QUESTION_534>

Q535: Do you agree with ESMA's proposed approach to use reporting protocols used by other market and regulatory initiatives, in particular, those being considered for transaction reporting under MiFID II?

<ESMA_QUESTION_535>
Yes, we agree with ESMA's approach to use reporting protocols used for other transactions reporting under MiFID II but not as stated above; position reporting should be on a net position basis.
<ESMA_QUESTION_535>

Q536: Do you have any specific comments on the proposed identification of legal persons and/or natural persons? Do you consider there are any practical challenges to ESMA's proposals? If yes, please explain them and propose solutions to resolve them.

<ESMA_QUESTION_536>
ESMA's proposal to use LEI, BIC, National code waterfall logic will mean existing EMIR reporting methodology can be leveraged minimising new builds and facilitating implementation.
<ESMA_QUESTION_536>

Q537: What are your views on these three alternative approaches for reporting the positions of an end client where there are multiple parties involved in the transaction chain? Do you have a preferred solution from the three alternatives that are described?

<ESMA_QUESTION_537>
Our members have two major concerns regarding the reporting of the positions of an end-client:

- The protection of client confidentiality, i.e. the end-client's identity is not disclosed to the intermediaries involved in the transaction chain;

- The simplicity and cost-neutrality of the reporting system, i.e. the approach should not involve complex data fields setting that would imply onerous implementation for market participants.

With these two concerns in mind, we feel that none of the three approaches are entirely satisfactory.

We strongly believe that option 1 is definitely not suitable because of aforementioned reasons of client confidentiality. In particular, it would not be appropriate to require reporting parties to obtain potentially commercially sensitive information from their counterparties. For example, counterparties may not be willing to provide reporting parties with details of their other OTC swap positions with third parties because providing this information could place them at a competitive disadvantage.

Between options 2 and 3, we have tried to assess the advantages and disadvantages of each and may have different views.

Some members, mostly representing they sell-side, support option 3 whereby the position report provided by the investment firm to the trading venue or to the relevant competent authority may include the identification of its own immediate client and an indicator on whether that client is itself an investment firm. In this scenario the reporting firm would also be required to provide a position report to the trading venue or competent authority, giving the positions that it holds and on whose behalf. This process would have to be repeated until the investment firm that holds the ultimate end-client account is reached. They also feel that Option 2 adds complexity.

Some other members, believe that option 2 is the only one that truly protects client confidentiality and that while this option would imply additional set-up costs, ongoing maintenance costs would not be material.

The general feeling is that:

- If ESMA opts for option 2, they have to limit the set-up costs and therefore limit the additional data fields in the report;

- If ESMA opts for option 3, they have to ensure end-client confidentiality.

In addition, ESMA should ensure that any information published by ESMA, the competent authorities, or individual trading venues does not reveal the positions of individual market participants. This is a particular concern in physical commodity markets where contracts based on specific delivery points may be used by a small number of market participants. Even though position information for such contracts may be nominally anonymous, the identity of individual traders may still be discernible in markets with low volume or liquidity. Without adequate safeguards, reporting parties will be forced to share position information in a way that could reduce competition and frustrate beneficial risk management activities
<ESMA_QUESTION_537>

Q538: What alternative structures or solutions are possible to meet the obligations under Article 58 to identify the positions of end clients? What are the advantages or disadvantages of these structures?

<ESMA_QUESTION_538>
One possible solution would be to adopt the CFTC approach where an investment firm will identify its client, and the relevant competent authority will require that client (or its underlying client) to provide the relevant report. This would allow competent authorities to receive the information they require without the intermediation of the investment firm, although there may be cases in which the client or its underlying client is unable to provide the necessary information.

However, regardless of the way in which ESMA seeks to obtain information on clients and their underlying clients, investment firms should not be prohibited from dealing with clients who are unable to provide the required information (either in relation to themselves or in relation to their underlying clients), as this is likely to result in significant barriers to market access for end clients.
<ESMA_QUESTION_538>

Q539: Do you agree with ESMA's proposal that only volumes traded on-exchange should be used to determine the central competent authority to which reports are made? If you do not agree, what alternative structure may be used to determine the destination of position reports?

<ESMA_QUESTION_539>
We agree with ESMA's proposal that the determination of the central competent authority to which position reports are made should be decided solely by the volume of activity undertaken on exchanges but note that it does not take into account that the level of activity is likely to change from time to time, meaning that the relevant competent authority will also change. Firms may want some assurances that they will not be sanctioned for reporting to the wrong competent authority if there is a change.

ESMA may consider publishing a list of the relevant competent authorities, which firms could rely on for a period of time (e.g. one or two years) and which would be updated by ESMA. ESMA will also need to consider situations where a significant portion of the market is off exchange, i.e. OTC swap market.
<ESMA_QUESTION_539>

Q540: Do you agree that position reporting requirements should seek to use reporting formats from other market or regulatory initiatives? If not mentioned above, what formats and initiatives should ESMA consider?

<ESMA_QUESTION_540>
Yes, we agree that position reporting should seek to use reporting formats for other regulations and in particular those that are in place or being considered for EMIR trade reporting or for transaction reporting under MiFID.

We further recommend that any reporting requirements and data standards that are adopted be compatible with analogous requirements imposed by other jurisdictions. Differing data standards will require market participants to develop duplicative systems. This would be costly and inefficient. Moreover, inconsistent data standards increase the risk that regulators will receive and make policy decisions based on inconsistent market information. We therefore call, amongst other things, for consideration of the formats used for position reporting in other jurisdictions in order to facilitate both implementation and accuracy of reporting.
<ESMA_QUESTION_540>

Q541: Do you agree that ESMA should require reference data from trading venues and investment firms on commodity derivatives, emission allowances, and derivatives thereof in order to increase the efficiency of trade reporting?

<ESMA_QUESTION_541>
Yes, we agree that to support the position reporting of investment firms, trading venues should be required to provide reference data on on-venue and economically equivalent OTC contracts. We recognise the product identification under EMIR may not be granular enough in the specific context of position reporting of commodity derivatives for the purpose of position limits under MiFID II. We also recognise that product identification under EMIR does not incorporate the concept of linking position in on-venue contracts with 'economically equivalent OTC contracts'.
<ESMA_QUESTION_541>

Q542: What is your view on the use of existing elements of the market infrastructure for position reporting of both on-venue and economically equivalent OTC contracts? If you have any comments on how firms and trading venues may efficiently create a reporting infrastructure, please give details in your explanation.

<ESMA_QUESTION_542>
We believed that CCPs are best placed to report position data on OTC cleared trades however currently some data fields such as the client identifier will be missing. Trading venues should be able to report positions either to NCAs or Trade Repositories for on-exchange contracts.
<ESMA_QUESTION_542>

Q543: For what reasons may it be appropriate to require the reporting of option positions on a delta-equivalent basis? If an additional requirement to report delta-equivalent positions is established, how should the relevant delta value be determined?

<ESMA_QUESTION_543>
Reporting of delta equivalent positions is established, and then consistent with question 529, the conversion to delta would need to be based on market participants' models and not be restricted by pre-defined numbers published by trading venues.

We do not think that the preferred methodology for calculation of delta-equivalent futures position should require use of the delta value published by trading venues. Instead we think participants should be able to use their own internal models / delta calculations to ensure consistency with internal records and risk systems (subject to being able to justify the calculation).
<ESMA_QUESTION_543>

Q544: Does the proposed set of data fields capture all necessary information to meet the requirements of Article 58(1)(b) MiFID II? If not, do you have any proposals for amendments, deletions or additional data fields to add the list above?

<ESMA_QUESTION_544>
Gap analysis should be conducted against existing reporting formats applicable to market participants. In particular, we recommend consideration of EMIR reporting formats and the CFTC's position reports, and new ownership and control reporting rules. This will ensure consistency and therefore reduction in differences in further formats.

<ESMA_QUESTION_544>

Q545: Are there any other fields that should be included in the Commitment of Traders Report published each week by trading venues other than those shown above?

<ESMA_QUESTION_545>
While recognising the need for the reporting fields to be specifically applicable to, and take account of, the idiosyncrasies of the European market framework and regulatory regime, both market participants and market infrastructures strongly support alignment with CFTC standards (including Commitment of Trader reports) wherever possible so as to promote consistency of reporting for all market participants with operations outside the EU (and, in particular, those active in the US).
<ESMA_QUESTION_545>

8. Market data reporting

8.1. Obligation to report transactions

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.

<ESMA_QUESTION_546>
No. We disagree with ESMA's proposal for what constitutes 'execution of a transaction'. In the context of ETD markets, we consider ESMA's definition of 'execution' to be much too broad. In an ETD context, ESMA's definition of 'execution of a transaction' would encompass post-trade events that occur automatically and/or require no intervention by a decision maker. Bearing in mind the primary purpose of reporting (i.e. combating market abuse) we consider that the transaction execution definition should only include events requiring positive intervention in relation to which a decision maker has a choice. Accordingly, we think that in the context of ETD, post-trade events which occur without the need for intervention, including assignments, novations, compressions (or netting or aggregating of positions into single end of day positions), and the exercise of options – all of which occur 'naturally' as part of the trade lifecycle and which pose little risk of market abuse – should not be covered by the execution definition or reporting obligation. In ETD markets, different market participants are involved at different stages of the trade, such as the executing broker and the clearing broker. However, based on the proposed definition of 'execution' and 'execution of a transaction', both the executing broker and clearing broker in ETD markets will each have a reporting obligation. Consequently it is important that the definitions provide clarity for both the executing broker and the clearing broker regarding which reportable events are reportable and by whom.
<ESMA_QUESTION_546>

Q547: Do you anticipate any difficulties in identifying when your investment firm has executed a transaction in accordance with the above principles?

<ESMA_QUESTION_547>
Yes. We anticipate difficulties. In the context of ETD markets, ESMA's expansive definition of 'execution of a transaction' includes post-trade events which occur, for example, after clearing, and of which an executing broker would have no visibility. Once an ETD transaction is cleared, the executing broker is no longer party to the trade and has no knowledge of events relating to the trade that occur outside of the trading venue. The executing broker only has visibility of the sale or purchase (paragraph 11(i)(a) of the Discussion Paper).
<ESMA_QUESTION_547>

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

<ESMA_QUESTION_548>
Yes. In the context of ETD markets, all post-trade events that do not require positive intervention by a decision maker (including assignments, novations, compressions (or netting or aggregating of multiple ETD positions into single end of day positions), and the exercise of options at expiry) should not be reportable under Article 26. For the avoidance of doubt, any position resulting from contract expiry should also not be reportable. In paragraph 15(iv) of the Discussion Paper ESMA correctly identifies give-ups for clearing and settlement as not being reportable. As outlined above, other post-trade events which occur without the need for intervention by a decision maker should not be reportable for the same reason that give-ups are excluded – the event occurs automatically, without intervention by decision makers and the event is not susceptible to market abuse. For example, "netting" in the ETD markets refers to the process by which transactions executed over the course of the day are aggregated or netted into positions at the end of the trading day.
<ESMA_QUESTION_548>

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

<ESMA_QUESTION_549>
Yes. We think that for exchange traded derivative (ETD) markets, because the proposal is that both the executing broker and the clearing broker will have an obligation to report, additional clarity is required to ensure these market participants fully understand their reporting obligations. At the point of execution, the executing broker will not have access to some of the information that is to be reported by the executing broker under the current proposal, particularly (i) information as to the beneficiary which, per footnote 188 on page 443 of the Discussion Paper, will be required under "client information (designation + additional details)" (paragraph 21(d) on page 443), and (ii) the allocation information required under paragraph 21(i)(f) on page 443.

We would like to emphasise the point that it is a fundamental feature of the ETD market that where executing broker and clearing broker are different firms, that they are not privy to the same level of post-trade clearing broker account information and in some cases will never receive the information required to fulfil ESMA's requirement of transmission of an order. For example, an asset manager (acting as the manager for a number of different funds) will place an order on behalf of the funds with an executing broker for execution on an ETD market, but the asset manager currently never discloses to the executing broker at point of order submission the details of how the distribution of the executed order is to be made to the individual fund accounts held at the clearing broker. As noted, ESMA's proposals in the DP for what constitutes a transaction and execution of a transaction, it is apparent that both the executing broker and clearing broker will have an obligation to report, so we would appreciate further clarity on these definitions to make clearer what each market participant should report. In addition to ESMA providing further clarity on these definitions it will also need to be determined when a "transmission of order" has been communicated to an executing broker and/or a clearing broker.

ESMA should clarify that it does not intend to apply these requirements at the point of execution. If, for example, the beneficiary and client allocation information noted above were required to be provided at the point of execution, it would mean that an investment firm dealing with an order received from an EU client would not have to apply similar constraints in respect of non EU clients, and as a result, ESMA's proposals could interfere to a greater extent with investment firms' ability to provide best execution to EU clients as opposed to non EU clients
<ESMA_QUESTION_549>

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.

<ESMA_QUESTION_550>
FIA Europe has the following comments in this context:

1. Field 57 of Annex 8.1.1 (*Instrument identification code type*): FIA Europe requests that for EU markets ESMA give due consideration to mandating a harmonised approach to product identifiers. FIA Europe considers that ISIN should be the required identifier in respect of EU ETD markets.

2. Field 60 of Annex 8.1.1 (*Ultimate underlying instrument identification code type*): Contract specifications for ETD products are provided by EU trading venues, so for EU markets we propose that these specifications should incorporate the identification of the ultimate underlying by the relevant ISIN.

3. Field 91 of Annex 8.1.1 (*Report Matching Number*): Significant transformation of the trade can take place in between initial execution and final allocation to a client. Trades are subject to multiple points of change by multiple parties through the execution and clearing process. Providing linkage from execution to clearing and post-trade events should not be required as give-ups (and give-ins) are not reportable. FIA Europe would like to note to ESMA that the industry is likely to find it practically difficult to link execution and lifecycle events with a common identifier across

firms, based on the experience under EMIR. This problem is exacerbated where the executing broker and the clearing broker are different investment firms.

4. FIA Europe notes that, unlike under EMIR, there is no field that can be used to identify which type of lifecycle event is being recorded in a particular transaction report. FIA Europe would propose that this could be a possible use for Field 93 of Annex 8.1.1 (*Report Status*).

5. FIA Europe requests that ESMA is consistent, explicit and sufficiently granular in its requirements so that firms have absolute clarity over the details to be reported. For example, if a MIC is required the standards should specify which type of MIC is reportable, i.e., whether the MIC to be reported should be the operating MIC or the segment MIC. Further, to the extent the same fields are required under other EU reporting regimes (e.g., EMIR, REMIT), the detailed guidance provided under MiFIR should be consistent with the information required under such other European reporting regimes.

Finally, FIA Europe would like to note that while it is supportive of fields being harmonised across jurisdictions, the list suggested by ESMA in Annex 8.1.1. includes a list of 93 fields, which is a substantial increase from 27 fields which were previously required by the FCA. Accordingly, FIA Europe believes that investment firms will need sufficient lead-in times to implement the reporting requirements proposed in the Discussion Paper.
<ESMA_QUESTION_550>

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?

<ESMA_QUESTION_551>
FIA Europe has the following comments in connection with the use of LEI:

1. *Obligation to obtain / maintain an LEI*: FIA Europe requests that ESMA place the onus of obtaining an LEI firmly on the individual market participants with no obligation on the investment firms already using LEI to ensure compliance with this requirement or to check the status of annual recertification of their clients' LEI.

2. *Investment firm obligations*: the approach proposed by ESMA that investment firms are to stop trading with the client if they are eligible for an LEI but have not obtained one (paragraph 49 of the Discussion Paper) appears to place additional obligations on investment firms to determine if a client is eligible for an LEI or not. FIA Europe proposes that investment firms should be able to rely on a representation from the client on this issue, for example, in the event that the client is eligible for an LEI but is under no obligation to apply for an LEI under the laws of the jurisdiction to which it is subject.

3. *LEI eligibility*: FIA Europe would welcome further guidance on the circumstances in which investment firms would need to use BIC because a client is not eligible for an LEI.

4. *National code*: FIA Europe does not support the use of national code in circumstances where a LEI or BIC is not available, as it is not clear what types of codes could be used for such purpose. Further, FIA Europe would welcome guidance on what approach should be used in circumstances where a client does not have a head office which is located in the EEA.

In addition, FIA Europe has strong concerns over the possibility of identity theft when storing significant personal details about individuals or firms. Our concern does not relate to data security at ESMA but to potential risks to personal data when it is transmitted amongst and stored by multiple intermediaries in a chain.
<ESMA_QUESTION_551>

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

<ESMA_QUESTION_552>
We agree with the general approach.
<ESMA_QUESTION_552>

Q553: In particular, do you agree with ESMA's proposed approach to assigning a trader ID designation for committee decisions? If not, what do you think is the best way for NCAs to obtain accurate information about committee decisions?

<ESMA_QUESTION_553>
This is a question best addressed by the investment management community.
<ESMA_QUESTION_553>

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

<ESMA_QUESTION_554>
Provided that investment firms which provide Direct Market Access do not provide generic log-on IDs from which multiple users from a given client can execute trades, the relevant trader can be identified by means of such electronic log-on id, and investment firms should be able to rely on such electronic information. Accordingly, we advocate against the use of generic log-on IDs in the context of Direct Market Access.
<ESMA_QUESTION_554>

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?

<ESMA_QUESTION_555>
FIA Europe has the following comments:

1. *Chains of algorithms*: Where a chain of algorithms is used for either the decision to execute a transaction or in order to effect the execution, FIA Europe believes that the algorithm which is nearest to the market, being, in our consideration, the last algorithm in the chain, should be the only algorithm which should be reported.

2. *Distinguishing different algorithms*: We would also propose that separate algorithms would be defined by different logic. i.e. changes to parameters within an algorithm would not constitute a new algorithm which requires a separate Algo ID as long as the logic does not change.
<ESMA_QUESTION_555>

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.

<ESMA_QUESTION_556>
FIA Europe does not foresee any problems, in the context of ETDs, with an executing broker identifying the specific waivers under which the trade took place prior to the relevant trade having been given up to clearing. However, to the extent any post-trade events are subject to the reporting obligation, and particularly where the executing broker and the clearing broker are different investment firms, the clearing broker may lack information relating to the specific waiver(s). Furthermore, waivers are identified at a transaction level, whereas post-trade events will be reported post-netting, which is the aggregation of a transaction, and the waiver is unlikely to be populated at this level.
<ESMA_QUESTION_556>

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?

<ESMA_QUESTION_557>
We broadly support the comments made by BBA and AFME.
<ESMA_QUESTION_557>

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?

<ESMA_QUESTION_558>
We broadly support the comments made by BBA and AFME.
<ESMA_QUESTION_558>

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

<ESMA_QUESTION_559>
We broadly support the comments made by BBA and AFME.
<ESMA_QUESTION_559>

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?

<ESMA_QUESTION_560>
We broadly support the comments made by BBA and AFME.
<ESMA_QUESTION_560>

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

<ESMA_QUESTION_561>
We broadly support the comments made by BBA and AFME.
<ESMA_QUESTION_561>

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?

<ESMA_QUESTION_562>
No. We believe that since contract specifications for ETD products are provided by EU trading venues, these specifications should incorporate the identification of the ultimate underlying by the relevant ISIN.
<ESMA_QUESTION_562>

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?

<ESMA_QUESTION_563>
As noted in our response to Q.562, since contract specifications for ETD products are provided by EU trading venues, these specifications should incorporate the identification of the ultimate underlying by the relevant ISIN.
<ESMA_QUESTION_563>

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

<ESMA_QUESTION_564>
We believe that the current regime should be retained, which provides flexibility enabling either the branch to report to the host NCA, or the head office to report to its home NCA. However, if ESMA does decide to change the current regime, we would support ESMA's proposal in paragraph 131 on page 463.
<ESMA_QUESTION_564>

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

<ESMA_QUESTION_565>
We do not anticipate any difficulties with maintaining the current MiFID approach to branch reporting, nor with implementing ESMA's proposal in paragraph 131 on page 463.
<ESMA_QUESTION_565>

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

<ESMA_QUESTION_566>
Yes, the list is sufficient.
<ESMA_QUESTION_566>

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.

<ESMA_QUESTION_567>
FIA Europe believes that specifying a single format is not desirable given the range of market participants, existing set-ups with national competent authorities and the fact that the re-submission of reports is sometimes required. FIA Europe also believes that it is preferable not to codify reporting formats into law, given that any future modification to mandated reporting formats will require legislative intervention, which may cause practical difficulties in the interim.
<ESMA_QUESTION_567>

8.2. Obligation to supply financial instrument reference data

Q568: Do you anticipate any difficulties in providing, at least daily, a delta file which only includes updates?

<ESMA_QUESTION_568>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_568>

Q569: Do you anticipate any difficulties in providing, at least daily, a full file containing all the financial instruments?

<ESMA_QUESTION_569>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_569>

Q570: Do you anticipate any difficulties in providing a combination of delta files and full files?

<ESMA_QUESTION_570>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_570>

Q571: Do you anticipate any difficulties in providing details of financial instruments twice per day?

<ESMA_QUESTION_571>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_571>

Q572: What other aspects should ESMA consider when determining a suitable solution for the timeframes of the notifications? Please include in your response any foreseen technical limitations.

<ESMA_QUESTION_572>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_572>

Q573: Do you agree with the proposed fields? Do trading venues and investment firms have access to the specified reference data elements in order to populate the proposed fields?

<ESMA_QUESTION_573>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_573>

Q574: Are you aware of any available industry classification standards you would consider appropriate?

<ESMA_QUESTION_574>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_574>

Q575: For both MiFID and MAR (OTC) derivatives based on indexes are in scope. Therefore it could be helpful to publish a list of relevant indexes. Do you foresee any difficulties in providing reference data for indexes listed on your trading venue? Furthermore, what reference data could you provide on indexes?

<ESMA_QUESTION_575>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_575>

Q576: Do you agree with ESMA's intention to maintain the current RCA determination rules?

<ESMA_QUESTION_576>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_576>

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

<ESMA_QUESTION_577>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_577>

<ESMA_QUESTION_1>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_1>

8.3. Obligation to maintain records of orders

Q578: In your view, which option (and, where relevant, methodology) is more appropriate for implementation? Please elaborate.

<ESMA_QUESTION_578>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_578>

Q579: In your view, what are the data elements that cannot be harmonised? Please elaborate.

<ESMA_QUESTION_579>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_579>

Q580: For those elements that would have to be harmonised under Option 2 or under Option 3, do you think industry standards/protocols could be utilised? Please elaborate.

<ESMA_QUESTION_580>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_580>

Q581: Do you foresee any difficulties with the proposed approach for the use of LEI?

<ESMA_QUESTION_581>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_581>

Q582: Do you foresee any difficulties maintaining records of the Client IDs related with the orders submitted by their members/participants? If so, please elaborate.

<ESMA_QUESTION_582>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_582>

Q583: Are there any other solutions you would consider as appropriate to track clients' order flows through member firms/participants of trading venues and to link orders and transactions coming from the same member firm/participant?

<ESMA_QUESTION_583>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_583>

Q584: Do you believe that this approach allows the order to be uniquely identified If not, please elaborate

<ESMA_QUESTION_584>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_584>

Q585: Do you foresee any difficulties with the implementation of this approach? Please elaborate

<ESMA_QUESTION_585>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_585>

Q586: Do you foresee any difficulties with the proposed approach? Please elaborate

<ESMA_QUESTION_586>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_586>

Q587: Do you foresee any difficulties with the proposed approach? Please elaborate.

<ESMA_QUESTION_587>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_587>

Q588: Would the breakdown in the two categories of order types create major issues in terms of mapping of the orders by the Trading Venues and IT developments? Please elaborate

<ESMA_QUESTION_588>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_588>

Q589: Do you foresee any problems with the proposed approach?

<ESMA_QUESTION_589>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_589>

Q590: Are the proposed validity periods relevant and complete? Should additional validity period(s) be provided? Please elaborate.

<ESMA_QUESTION_590>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_590>

Q591: Do you agree that standardised default time stamps regarding the date and time at which the order shall automatically and ultimately be removed from the order book relevantly supplements the validity period flags?

<ESMA_QUESTION_591>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_591>

Q592: Do venues use a priority number to determine execution priority or a combination of priority time stamp and sequence number?

<ESMA_QUESTION_592>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_592>

Q593: Do you foresee any difficulties with the three options described above? Please elaborate.

<ESMA_QUESTION_593>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_593>

Q594: Is the list of specific order instructions provided above relevant? Should this list be supplemented? Please elaborate.

<ESMA_QUESTION_594>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_594>

Q595: Are there any other type of events that should be considered?

<ESMA_QUESTION_595>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_595>

Q596: Do you foresee any difficulties with the proposed approach? Please elaborate.

<ESMA_QUESTION_596>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_596>

Q597: Do you foresee any problems with the proposed approach? Do you consider any other alternative in order to inform about orders placed by market makers and other liquidity providers?

<ESMA_QUESTION_597>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_597>

Q598: Do you foresee any difficulties in generating a transaction ID code that links the order with the executed transaction that stems from that order in the information that has to be kept at the disposal of the CAs? Please elaborate.

<ESMA_QUESTION_598>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_598>

Q599: Do you foresee any difficulties with maintaining this information? Please elaborate.

<ESMA_QUESTION_599>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_599>

8.4. Requirement to maintain records of orders for firms engaging in high-frequency algorithmic trading techniques (Art. 17(7) of MIFID II)[3]

[3] 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.

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

<ESMA_QUESTION_600>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_600>

Q601: Do you foresee any difficulties in complying with the proposed timeframe?

<ESMA_QUESTION_601>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_601>

8.5. Synchronisation of business clocks

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.

<ESMA_QUESTION_602>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_602>

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

<ESMA_QUESTION_603>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_603>

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

<ESMA_QUESTION_604>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_604>

9. Post-trading issues

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

Q605: What are your views generally on (1) the systems, procedures, arrangements supporting the flow of information to the CCP, (2) the operational process that should be in place to perform the transfer of margins, (3) the relevant parties involved these processes and the time required for each of the steps?

<ESMA_QUESTION_605>
For the avoidance of doubt, our responses relate to ETD markets only. By way of general comments, we would note the following:

1. In contrast to the OTC market, clearing in the ETD markets is **well established and highly automated** using anonymous electronic central order book platforms, resulting in immediate (and automatic) submission of all trades to CCPs and **immediate certainty of clearing**.

2. The growth in transaction volumes over the past 20 years has necessitated significant investment by Exchanges, CCPs and their members in systems infrastructure to support an **efficient automated clearing process**. In our view, the existing infrastructure ensures that ETD transactions 'are submitted and accepted for clearing as quickly as technologically practicable using automated systems'. Notwithstanding that ETD markets already have a high degree of automation around post trade processes, the industry continues to invest and innovate in global solutions, in co-operation with Exchanges, CCPs and ISVs to (i) identify further efficiencies, (ii) achieve the economies of scale required to accommodate the various individual segregation solutions being introduced by CCPs and (iii) provide further STP opportunities to streamline all associated post trade processes such as give-ups/claims, average pricing and collateral lodgement/withdrawal.

3. Any amendments to the existing ETD structure should preferably be agreed by the industry on a **global basis** and it is important that significant inconsistencies across regional markets are avoided. The ETD market is a global one, in that clients can contract with a single entity and obtain access to global markets. There is a risk that material differences could create the incentive for regulatory arbitrage and drive business outside the EU. Any ETD structural changes should be implemented with care so as to avoid the introduction of new types of risk to executing and clearing brokers, both reputational (i.e. failure to clear a client's trades) and financial (broker or third party error leads to a failure to clear and the client suffers a loss), and avoid restricting or inhibiting order submission and trade execution.

4. Many of the issues raised in ISDA's responses in respect of OTC derivatives are not as relevant to the ETD market, specifically:

    (a) whilst the **certainty of clearing at execution** is a key concern in the OTC context, the requisite certainty for ETD is already achieved. Validation in respect of trading requirements occurs when an order is submitted to an Exchange for execution. Currently, both executing brokers ("**EBs**")and Exchanges implement "obvious error/fat finger" and price level checks to prevent orders from being entered in error; similarly, for risk mitigation purposes, many platforms have pre-trade risk limits, relating to order/position size, in place between the clearing broker ("**CB**") and their direct clients and their Exchange members that act as EBs, including "kill" buttons, which can be used to suspend the trading activity of a client or EB. All information required for execution and clearing is provid-

ed at this stage and any invalid orders are rejected by the Exchange's trading platform. In respect of clearing itself, there is always a clearing member that is responsible for the clearing of the trade immediately upon the trade having been executed, through the operation of the Exchange/CCP Rules whereby the EB is required to have a clearing agreement in place with a CB.

(b) **certainty of product** – the standardisation of products on the ETD market and the publication by Exchanges and CCPs of the necessary product standing data means that trades do not fail for lack of certainty regarding the product. Each Exchange and CCP is already set-up to execute and clear the types of transactions that will be presented to it.

(c) **rejected transactions/failures to clear** – due to the standardised, developed and automated nature of ETD clearing, rejected transactions in the manner possible in the OTC market (i.e. a trade that will not be subject to clearing) do not occur.

(d) **margin transfer** – in the ETD context, the margin calculation and calling process between CCP and CB, both in relation to end of day and intra-day margin, is well established and has been recently subject to extensive review through the introduction of EMIR and the CCP authorisation process. Were any changes to be made to these processes, they should be driven by the aim of achieving greater consistency across CCPs.

<ESMA_QUESTION_605>

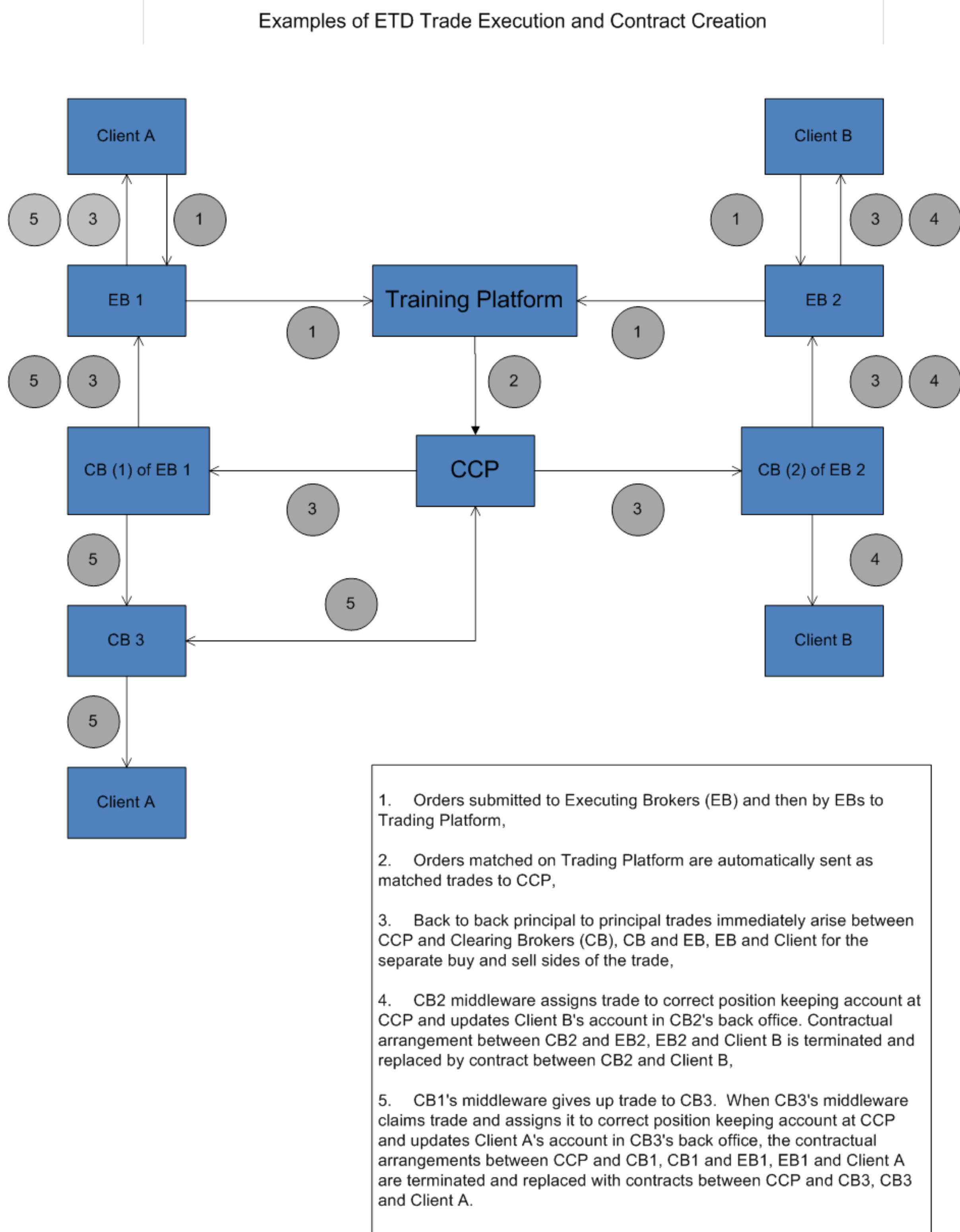
Q606: In particular, who are currently responsible, in the ETD and OTC context, for obtaining the information required for clearing and for submitting the transaction to a CCP for clearing? Do you consider that anything should be changed in this respect? What are the current timeframes, in the ETD and 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?

<ESMA_QUESTION_606>
We have limited our response to address the ETD context only.

Clearing process

In the interests of clarity we have represented the standard ETD clearing flow diagrammatically in Figure A, "ETD STP Model", below.

Figure A – ETD STP Model



As reflected in Figure A, the key features of the clearing process for ETD are as follows:

1. Orders are matched at the Exchange and the resultant trades are automatically submitted to CCP immediately upon execution. No unmatched trades can arise.

2. All orders submitted to the Exchange are subject to validation. Both executing brokers and Exchanges implement "obvious error/fat finger" and price level checks to prevent orders from being entered in error; similarly, for risk mitigation purposes, many platforms have pre-trade risk limits, relating to order/position size, in place between CB and their direct clients and their Exchange members that act as EBs, including "kill" buttons, which can be used to suspend the trading activity of a client or EB. Importantly and in contrast to the OTC model, invalid orders are rejected at this stage and no manual intervention is required.

3. As the ETD markets have matured so have the contractual relationships supporting those markets. At every stage of the post trade process chain the contractual relationships are clear, supported by CCP and Exchange Rules governing contractual relationships arising on trade execution, industry standard clearing agreements, FIA industry standard give up agreements and FIA standardised CB / client agreements. Upon trade execution a chain of linked back-to-back principal to principal contracts are immediately created between the client and EB, the relevant EB and its CB (if the EB is a non-clearing member of the relevant CCP), and the CBs and the CCP for both the buyer and seller of the contract. This means that there is immediate certainty of clearing and an obligation on the relevant CB to meet whatever margin requirements the CCP may deem necessary to manage the risks of that position. Given that each order also either implicitly or explicitly contains the minimum necessary clearing information, the trade/contract details will be immediately reflected in the applicable clearing system and, provided the trade has the applicable client details attached, middle office systems will ensure that the trade/contract will immediately flow through to the client's account at the clearing member without any manual intervention, subject to the capacity and throughput performance of the CCP and members' systems.

4. The CB is responsible for meeting any margin calls made by the CCP. Where the trade has to be given-up to another CB (where the client's account is held), the CB of the EB is responsible for entering the necessary allocation instructions into the clearing system. It is possible for the EB and CB to be the same entity as well the trade being given up from an EB to a different CB. Each EB must have a clearing agreement in place with a CB, such that in the event that a trade fails to be allocated correctly to a third party CB, it will still be cleared by the CB on behalf of the EB.

5. By virtue of an EB having to appoint a CB, there is always a clearing member that is responsible for the clearing of the trade as soon as the trade has been executed. This CB would continue to be responsible for the clearing of the trade in place of the 'receiving' CB if, for example, the trade is not allocated correctly.

Give-ups

A significant percentage of client business is executed via EBs, with clients such as fund managers choosing to spread the execution of their business in a market across a number of different EBs and to hold their positions across a number of CBs (this is the scenario described in figure A). Therefore, in a liquid market, a single 100 lot order could give rise to 100 one lot trade executions.

The markets have developed sophisticated middleware solutions to undertake the processing of many thousands of trades per day for each CB which, amongst other things, includes ensuring that such 'give-ups' are reflected at the CCP level and reconciled with the CB's own internal accounts. There are situations where trades executed by an EB are not promptly given up to the client's CB, for example, a client may instruct EB to execute a large lot order across the course of a trading day with the intention to allocate an average price trade in different proportions to a number of CBs (volume-weighted average price and time-weighted average price orders) and then to split such trades across a number of different fund accounts held at each CB.

Given that the average price and the number of lots to be allocated cannot be determined until the aggregate order is executed in full, some trade executions remain with the EB's guarantor CB for a period of time post execution. However, by the end of the clearing day the vast majority of trades (figures supplied by three major CB members of European CCPs indicate that this is, on average, in excess of 99.96% of trades) are held and margined in the intended accounts of the CBs with the CCP. In order to deal with the very low percentage of trades that are held and margined overnight by the CCP in the EB's guarantor CB account, CCPs have developed automated processes for the transfer of the small number of trades from one clearing member account to another on a T+1 basis.

Amendments

In our view the existing processes for STP in the ETD context are well developed, well-understood, and efficient and provide market participants with the requisite certainty. Notwithstanding that ETD markets already have a high degree of automation around post trade processes, the industry continues to invest and innovate in global solutions, in co-operation with Exchanges, CCPs and ISVs to (i) identify further efficiencies, (ii) achieve the economies of scale required to accommodate the various individual segregation solutions being introduced by CCPs and (iii) provide further STP opportunities to streamline all associated post trade processes such as give-ups/claims, average pricing and collateral lodgement/withdrawal.
<ESMA_QUESTION_606>

Q607: What are your views on the balance of these risks against the benefits of STP for the derivatives market and on the manner to mitigate such risks at the different levels of the clearing chain?

<ESMA_QUESTION_607>
The growth in transaction volumes in ETD markets over the past 20 years has necessitated significant investment by Exchanges, CCPs and their members in systems infrastructure to support an efficient clearing process. In our view, the existing infrastructure ensures that ETD transactions 'are submitted and accepted for clearing as quickly as technologically practicable using automated systems'. Notwithstanding that ETD markets already have a high degree of automation around post trade processes, the industry continues to invest and innovate in global solutions, in co-operation with Exchanges, CCPs and ISVs to (i) identify further efficiencies, (ii) achieve the economies of scale required to accommodate the various individual segregation solutions being introduced by CCPs and (iii) provide further STP opportunities to streamline all associated post trade processes such as give-ups/claims, average pricing and collateral lodgement/withdrawal.
<ESMA_QUESTION_607>

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?

<ESMA_QUESTION_608>
As the ETD markets have matured so have the contractual relationships supporting those markets. At every stage of the post trade process chain the contractual relationships are clear, supported by CCP and Exchange rules governing contractual relationships arising on trade execution, industry standard clearing agreements, FIA industry standard give up agreements and FIA standardised CB / client agreements. Upon trade execution a chain of linked back-to-back principal to principal contracts are immediately created between the client and EB, the relevant EB and its CB (if the EB is a non-clearing member of the relevant CCP), and the CBs and the CCP for both the buyer and seller of the contract. This means that there is immediate certainty of clearing and an obligation on the relevant CB to meet whatever margin requirements the CCP may deem necessary to manage the risks of that position.
<ESMA_QUESTION_608>

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?

<ESMA_QUESTION_609>
In the ETD context, orders are already validated prior to submission to the Exchange for execution. Both executing brokers and Exchanges implement "obvious error/fat finger" and price level checks to prevent orders from being entered in error; similarly, for risk mitigation purposes, many platforms have pre-trade risk limits, relating to order/position size, in place between CB and their direct clients and their Exchange members that act as EBs, including "kill" buttons, which can be used to suspend the trading activity of a client or EB. Importantly and in contrast to the OTC model, invalid orders are rejected at this stage and no manual intervention is required.

As the ETD markets have matured so have the contractual relationships supporting those markets. At every stage of the post trade process chain the contractual relationships are clear, supported by CCP and Exchange rules governing contractual relationships arising on trade execution, industry standard clearing agreements, FIA industry standard give up agreements and FIA standardised CB / client agreements. Upon trade execution a chain of linked back-to-back principal to principal contracts are immediately created between the client and EB, the relevant EB and its CB (if the EB is a non-clearing member of the relevant CCP), and the CBs and the CCP for both the buyer and seller of the contract. This means that there is immediate certainty of clearing and an obligation on the relevant CB to meet whatever margin requirements the CCP may deem necessary to manage the risks of that position. Given that each order also either implicitly or explicitly contains the minimum necessary clearing information, the trade/contract details will be immediately reflected in the applicable clearing system and, provided the trade has the applicable client details attached, middle office systems will ensure that the trade/contract will immediately flow through to the client's account at the clearing member without any manual intervention, subject to the capacity and throughput performance of the CCP and members' systems.
<ESMA_QUESTION_609>

Q610: What are your views on the manner to determine the timeframe for (1) the exchange of information required for clearing, (2) the submission of a transaction to the CCP, and the constraints and requirements to consider for parties involved in both the ETD and OTC contexts?

<ESMA_QUESTION_610>
In the ETD context, all requisite information is exchanged in advance of execution and the trades are submitted for clearing immediately upon execution.
<ESMA_QUESTION_610>

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?

<ESMA_QUESTION_611>
In the ETD context, orders are validated prior to execution and the CCP accepts the trade immediately upon execution. Each Exchange and CCP is set-up to execute and clear the types of transactions that will be presented to it and therefore we do not believe it is necessary to propose any amendments to the current processes and timelines or impose any additional requirements for product validation.
<ESMA_QUESTION_611>

Q612: What should be the degree of flexibility for CM, its timeframe, and the characteristics of the systems, procedures and arrangements required to supporting that flexibility? How should it compare to the current practices and timeframe?

<ESMA_QUESTION_612>
In the ETD context, the automatic submission of trades to the CCP from the Exchange gives rise under Exchange and CCP Rules to the immediate creation of the contractual relationships between the CCP and the buying and selling CBs and the inclusion of the trades into the CB's positions. The CCP monitors the impact of the new trades on the CB positions, regularly re-calculating margin requirements and assessing

any concentration risks etc., such that where there is a material impact on the risk position of the CB, the CCP has the ability to call intra-day margin from CB if necessary. The margin calculation and calling process between CCP and CB, both in relation to end of day and intra-day margin, is well established and has been recently subject to extensive review through the introduction of EMIR and the CCP authorisation process.
<ESMA_QUESTION_612>

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?

<ESMA_QUESTION_613>
Given the standardised, developed, automated and immediate nature of ETD clearing, such concerns are not relevant in the ETD context as rejected transactions in the manner possible in the OTC market (i.e. a trade that will not be subject to clearing) do not occur.
<ESMA_QUESTION_613>

9.2. Indirect Clearing Arrangements

Q614: Is there any reason for ESMA to adopt a different approach (1) from the one under EMIR, (2) for OTC and ETD? If so, please explain your reasons.

<ESMA_QUESTION_614>
Yes, we are of the view, for the reasons discussed below, that ESMA should adopt a different approach in relation to indirect clearing arrangements from the one taken under EMIR and as between OTC derivatives ("**OTCD**") and exchange-traded derivatives ("**ETD**").

I Executive Summary

1. This response proposes that, in respect of the regulation of indirect clearing arrangements in relation to ETD:

   (a) ESMA should adopt a different approach from the one under EMIR in light of fundamental problems associated with the EMIR indirect clearing rules, which have effectively precluded the use of indirect clearing arrangements in relation to OTCD; and
   (b) ESMA should adopt a different approach as between OTCD and ETD in light of the fundamental differences between the OTCD and ETD markets.

2. There are fundamental legal and practical problems associated with the indirect clearing rules relating to OTCD set out in EMIR and Commission Delegated Regulation (EU) No 149/2013 (the "**EMIR RTS**" and together with EMIR, the "**EMIR Requirements**"). In particular:

   (a) Clearing members are unable to satisfy the requirement to (i) establish a "credible mechanism" for transferring indirect clients' positions and assets to an alternative client or clearing member (i.e. porting) as required by Article 4(4) of the EMIR RTS or (ii) ensure the return of the proceeds of liquidation of assets and positions to the indirect client as required by Article 4(5) of the EMIR RTS. Absent a harmonised global (or even pan-European) insolvency regime that recognises indirect clearing arrangements, porting of indirect client assets and positions and/or return of the liquidated proceeds directly to the indirect clients would be highly susceptible to legal challenge. On this basis, reputable legal counsel has advised that it would not be prepared to issue a legal opinion to support the existence of the required "credible mechanism" for porting and it is not possible to put in place procedures which ensure with the requisite certainty that liquidated proceeds can be returned directly to the indirect client. Therefore, clearing members are not able to

ensure compliance with Article 4(4) or Article 4(5) of the EMIR RTS and, as a result, cannot offer to facilitate indirect clearing of OTCD.

(b) Clearing members subject to the laws of certain non-EU jurisdictions, including the United States, cannot satisfy the requirement imposed by Article 4(2) of the EMIR RTS to provide EMIR equivalent account segregation due to conflicting local law requirements. This issue has recently been acknowledged by ESMA in the context of client clearing in CCP Response 8(i) of the EMIR Questions and Answers on the Implementation of EMIR (ESMA/682) (the "**EMIR Q&A**"), but it remains unaddressed in the context of indirect clearing under the EMIR Requirements. Clearing members in this position therefore cannot satisfy Article 4(2) of the EMIR RTS and, as a result, cannot offer to facilitate or provide indirect clearing of OTCD.

3. As a result of these issues and others described below, indirect clearing arrangements are not expected to be widely available in the OTCD market. In contrast, more than 50% of existing global ETD activity involves clearing where the ultimate client is not in a direct relationship with the ultimate clearing member (see paragraph 0 below). Such ETD indirect clearing arrangements enable clients to access global markets and provide protections that are clearly understood by clients and have proven to be legally and operationally effective. Participation in such existing ETD indirect clearing arrangements does not always involve a choice for either the client or their primary broker because:

(a) many local markets prevent foreign entities from becoming participants in the relevant markets; and
(b) most ETD products are exclusive to, and available to be traded or cleared on, one venue only (in the world).

The application of the EMIR Requirements to ETD would necessitate the cessation of a substantial proportion of existing ETD indirect clearing. The immediate consequences for indirect clients would be a widespread reduction in ETD market access, a significant reduction in market liquidity and the prevention of effective hedging strategies.

4. As described in Section V below, in addition to the structural and factual differences between the OTCD and ETD markets, we are of the view that there are a number of regulatory and legal reasons which necessitate a different approach to indirect clearing arrangements under MiFIR to the approach taken under EMIR. In particular, in our view Article 30 of MiFIR does not prohibit the maintenance of indirect clearing arrangements other than those meeting the requirements set out in the RTS developed under Article 30 of MiFIR (the "**MiFIR RTS**") and that the MiFIR RTS can and should impose sensible limits on the applicability of the MiFIR RTS. Accordingly, we propose that the definition of “indirect clearing arrangement” in the MiFIR RTS should make it clear that the MiFIR RTS only applies (i) to arrangements in respect of clearing through an EU CCP authorised under EMIR and (ii) if those arrangements are entered into (x) where the service provider holds itself out as offering indirect clearing arrangements which meet the MiFIR RTS requirements and (y) with the intention that the client will benefit from the client asset protections included in the MiFIR RTS. In our view, this approach is consistent with Article 30 of MiFIR and ESMA's approach in respect of EMIR, as clarified by CCP Response 8(j) of the EMIR Q&A.

5. Notwithstanding paragraph 4 above, the industry is fully supportive of the objectives of increased client asset protection and reduced counterparty risk throughout the clearing chain. Nevertheless, it is clear that these objectives would not be achieved by applying the EMIR Requirements to ETD without amendment. It is possible however that those objectives could be addressed by introducing requirements that are based on the EMIR Requirements, with certain modifications in light of the problems with the EMIR Requirements and the differences between the OTCD and ETD markets.

6. We would, therefore, propose that, to the extent that the EMIR RTS are applied to ETD, the MiFIR RTS should differ from the EMIR RTS in the following primary respects (for the avoidance of doubt, these are the principal differences but are not intended to be exhaustive):

(a) Porting and close out and return

In our view the MiFIR RTS should not require a clearing member to (i) provide a mechanism for porting or (ii) ensure that liquidation proceeds are paid directly to the indirect clients following the default of the client, where it is not practicable or possible to do so. In the absence of a harmonised global (or even pan-European) insolvency regime that recognises indirect clearing arrangements, clearing members are constrained in the level of protection they can provide to their indirect clients and are not able to ensure compliance with Article 4(4) or 4(5) of the EMIR RTS when offering indirect clearing arrangements.

In our view sufficient client asset protection can be preserved even where it is not possible or practicable to (i) provide for a mechanism for porting or (ii) ensure that liquidation proceeds are paid directly to the indirect clients because:

(i) many EU and non-EU markets have client asset protection regimes in place and end-clients in such markets often elect to receive such protections;

(ii) whilst it is unlikely to be possible to return liquidation proceeds directly to the indirect clients, provided the relevant client has correctly informed the clearing member of the assets and positions that relate to its indirect clients, the clearing member should be able to return any liquidation proceeds to the insolvency practitioner of the relevant client for the account of the indirect clients; and

(iii) while porting mechanisms are important in the OTCD market due to constraints on liquidity with respect to certain products, it is generally accepted that there is less necessity for porting mechanisms in relation to ETD markets, the majority of which are by their nature, highly liquid involving relatively standardised products and in which it is much easier for clients to close out and put back on any relevant positions without the need for a porting mechanism.

(b) Segregation

As discussed above and elaborated below, conflicting local law requirements often prevent clearing members and clients from offering EMIR compliant segregation arrangements to indirect clients.

In our view, the MiFIR RTS should not require clearing members and/or clients to provide for segregation in accordance with Article 4(2) and Article 5(1) respectively of the EMIR RTS, where it is not practicable or possible to do so provided that the clearing member and/or client (as applicable) has disclosed to the indirect client (i) the nature of the relevant segregation arrangements and (ii) the relevant risks related to such segregation arrangements.

This clarification would help to overcome some of the well-documented difficulties with EMIR account segregation in a global market and would be consistent with ESMA's approach in respect of EMIR, as clarified by CCP Response 8(i) of the EMIR Q&A. In our view provided the risks of alternative segregation arrangements have been disclosed to indirect clients there is no reason to prevent such arrangements.

7. In our view a MiFIR RTS incorporating the provisions we highlight above would still provide indirect clients with sufficient protection and reduced counterparty risk throughout the clearing chain, while simultaneously dealing with the difficulties experienced in the OTCD market which have effectively precluded the development of indirect clearing arrangements for OTCD. However, in light of the problems encountered in respect of the EMIR RTS and the potentially disruptive

impact of imposing inappropriate rules on the ETD markets, we would urge ESMA to engage with the industry on these issues. In this respect:

(a) we are eager to offer any assistance in respect of the drafting of the MiFIR RTS. To this end, we are considering the specific drafting amendments which would be required to effect the modifications to the EMIR RTS described above and to resolve other issues. We will share these proposals with ESMA in due course;
(b) we encourage ESMA to include a long phase-in period for the application of the MiFIR RTS to ensure that they can be implemented effectively by the industry; and
(c) the eventual MiFIR RTS should also build in the potential for review and should take into account information provided and lessons learnt as part of the Commission's review of EMIR (under Article 85 of EMIR).

II Overview of response

8. We have structured our response as follows to include:

(a) A description of the existing ETD market, focusing on (i) the structures used currently in the ETD market that could be categorised as indirect clearing arrangements and (ii) data demonstrating the scale of such ETD indirect clearing arrangements.

(b) A description of the significant challenges presented by the EMIR Requirements.

(c) A detailed explanation of why a different approach is required in relation to the ETD indirect clearing under MiFIR from the one under EMIR in relation to OTCD indirect clearing. In summary, these reasons can be grouped into the following four categories: (i) significant challenges posed by the EMIR Requirements; (ii) frustration of MiFIR regulatory objectives; (iii) legal and credit risk concerns; and (iv) cross-border concerns.

(d) Our proposed approach in respect of ESMA's response to its mandate under Article 30 MiFIR.

III The Existing ETD Market

9. The ETD market is an established, well functioning and generally highly liquid market involving standardised products which are already centrally cleared.

10. The global ETD market is predicated on the idea that a client can contract with a single entity and obtain access to markets worldwide. While there is no definition of "indirect clearing" under MiFIR, the current ETD market makes widespread use of structures that enable a client to (i) obtain access to a contracting entity's global network (generally consisting of its global affiliates and other associates worldwide) and (ii) to offer clearing services to its clients where it is not a member of the relevant CCP and which could therefore be characterised as indirect clearing arrangements (the "**ETD Model**"). These structures provide protections that are clearly understood by clients and have proven to be legally and operationally effective.

11. Indirect clearing arrangements in relation to ETD currently take one of a number of forms. For assistance we have included in the Appendix a number of illustrations reflecting various structures by which ETD indirect clearing may currently operate.

12. Much ETD indirect clearing is conducted on a multijurisdictional basis. The ETD indirect clearing structures can be used where the relevant CCP is within the EU or outside the EU. Indirect clearing arrangements in relation to ETD allow EU clients to access non-EU markets as well as non-EU clients access to EU markets. Commonly, those indirect clearing arrangements for ETD permit end users to obtain access to products needed to risk manage their portfolios effectively.

13. As illustrated in the Appendix, the ETD Model is complex and has developed over time to provide clients with global market access on reasonable commercial terms. This does not always involve a choice for either the client or their primary broker because many local markets prevent foreign entities from becoming participants in the relevant markets. In addition most ETD products are exclusive to, and available to be traded or cleared on, one venue only (in the world). In the absence of the ETD Model, clients would effectively be unable to transact in such jurisdictions. Furthermore, the ETD Model is widely used and understood by clients and other market participants and developed prior to the creation of the EMIR Requirements. As such, clients entering into indirect clearing arrangements in relation to ETD do not do so with the expectation that the EMIR Requirements will be met.

14. Generally, the client assets are held in a client omnibus account at the direct clearing member and separate from house assets. EU ETD markets are also subject to existing client asset protection regimes imposed by MiFID and implemented in Member States (through the CASS Rules in the UK for example) and many non-EU markets also have client asset protection regimes. Clients can and often do elect to receive such protections. Furthermore, clients often have the option to enter into margin arrangements in relation to ETD using security arrangements rather than on a title transfer basis should they so choose.

15. We provide an illustration of the significant proportion of ETD clearing which is currently done "indirectly", with the exception of client to client clearing for which we do not have available data, in the table below. The data was collated by FIA Europe from responses received from member firms. The figures shown are an average of the data provided by 5 member firms in relation to them and their group companies. The data gathered has been ordered to focus on whether the main EU group entity is a member of the relevant CCP.

	Exchange memberships	Total number	Voumes cleared
1.	Exchange memberships of group (direct or indirect) globally	38	100%
2.	Exchange memberships where an EU group entity is the member	13	48%
3.	Relationships for which the main EU group entity is not a member in the relevant market and therefore a third party clearing member is used to provide access to the relevant market	13	2%
4.	Relationships for which the main EU group entity is not a member in the relevant market and therefore affiliates are used to provide access to the relevant market	17	50%

16. It is clear from the figures above that the ETD Model is commonplace and that a substantial volume of clearing in relation to ETD is done indirectly. Any clearing done through an affiliate or non-affiliate, as shown in rows 3 and 4 above, would be directly affected by the imposition of the EMIR Requirements in relation to ETD indirect clearing arrangements. It is also worth noting that the five firms represented in the sample are major clearing brokers. Smaller brokers may have even less direct access to clearing venues and, therefore, data for that group of industry participants (if it were included in the sample) would likely show a much greater percentage in row 3 of the table.

IV Indirect Clearing under EMIR

17. It has become clear that the EMIR Requirements present significant difficulties in practice. Despite the continued efforts of the industry there are real challenges and it has not been possible, as yet, to design any fully compliant structure which is scalable either from a legal or operational perspective.

18. By way of example, Article 4(4) of the EMIR Regulatory Technical Standards on indirect clearing (Regulation 149/2013) (the "**EMIR RTS**") requires the establishment of credible mechanisms for the porting of client positions and assets and Article 4(5) requires procedures that allow for the prompt liquidation of the assets and positions of a client and payment by the clearing member directly to the indirect client following the default of the client. Given that these requirements involve the transfer of positions and/or assets of an insolvent party for the benefit of the end client or the return of liquidation proceeds directly to the end client, there is a high risk that the relevant actions could be subject to insolvency-based challenges. CCPs often benefit from legislation, at a national and EU level and, in future, via mutual cross-border recognition, which protect their actions taken on a clearing member default from the risk of insolvency challenge. However, similar protections are not available to clearing members when acting to port or return assets and positions in the event of a failure of their immediate client, the indirect clearer. Even where such protections are proposed at a national level they fail to provide protection in a cross-border scenario. Without such protections, there is a risk that the insolvency practitioner of an insolvent client could seek to reclaim the value of its assets and positions from the clearing member if the clearing member has (i) ported the assets or position of the client or (ii) returned liquidation proceeds directly to an indirect client rather than to the client. Such an outcome exposes the clearing member to undue risk.

19. To establish a model which meets the Article 4(4) and/or Article 4(5) requirements necessitates a detailed analysis on a case by case basis, including of the insolvency regime in the jurisdiction of each party and for each entity type. Consider, for instance, an affiliate clearing structure (explained in the Appendix) in which each party is a UK entity. In these circumstances the analysis would involve an examination of the effect of the structure under English law (including insolvency law) only and for each entity type (e.g. corporate or bank). However, if, for example, the client facing clearing member is replaced by a Chinese bank, the effectiveness of the whole structure would need to be reassessed in light of the Chinese legislation relevant to the Chinese bank and how any conflicts with the relevant UK legislation might be resolved. As such, a structure which works on a particular fact pattern will not necessarily be effective in other circumstances, for example where the participants are in different jurisdictions or are different entity types (which might be subject to different and conflicting requirements, in particular in relation to insolvency). Accordingly, even if a structure can be designed to work for one particular fact pattern, it cannot be assumed to (and may not) work for any other fact pattern.

20. Another problematic requirement is the segregation requirement set out at Article 5 of the EMIR RTS which requires omnibus and individual client segregation to be offered to clients and which may be inconsistent with the rules applicable in other jurisdictions for example those applicable to a U.S. Futures Commission Merchant ("**FCM**"), which is permitted only to offer CFTC compliant structures. This issue is already known to and acknowledged by ESMA and has been the subject of the 10 July 2014 EMIR Q&A update (CCP Question 8(i)). As noted above, a large majority of ETD transactions involve multiple jurisdictions meaning this is of even greater concern in relation to ETD.

21. Whilst certain CCPs have made some attempts to put in place mechanisms to assist clearing members to comply with the EMIR Requirements, (i) the cost associated with such structures is likely to be prohibitively high and would ultimately increase costs for clients and (ii) no EMIR authorised CCPs have live indirect clearing arrangements designed to assist with compliance with the EMIR Requirements. Furthermore, the proposed operational offerings are only part of what is needed to deliver indirect clearing in compliance with the EMIR Requirements and do not address

all of the legal risks and other operational complexities of providing indirect clearing in accordance with the EMIR Requirements (see paragraphs 0 to 0 above).

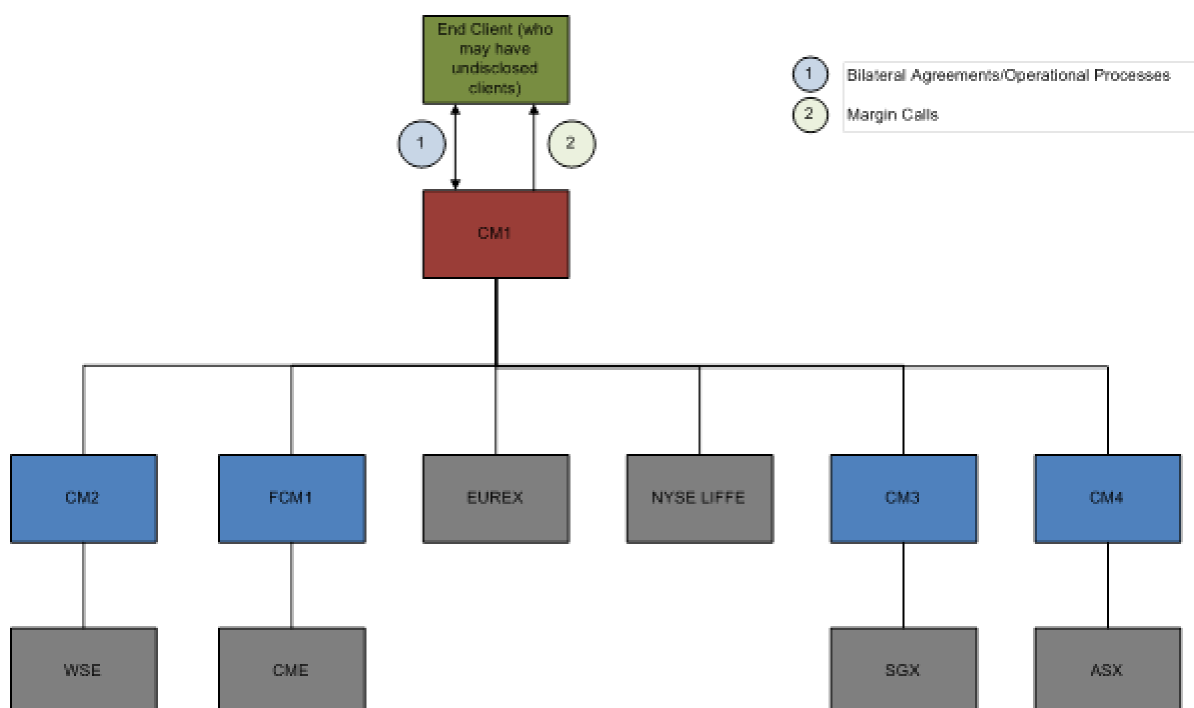
V Reasons to support different approaches to OTC and ETD indirect clearing

(a) Differences between the OTC and ETD markets

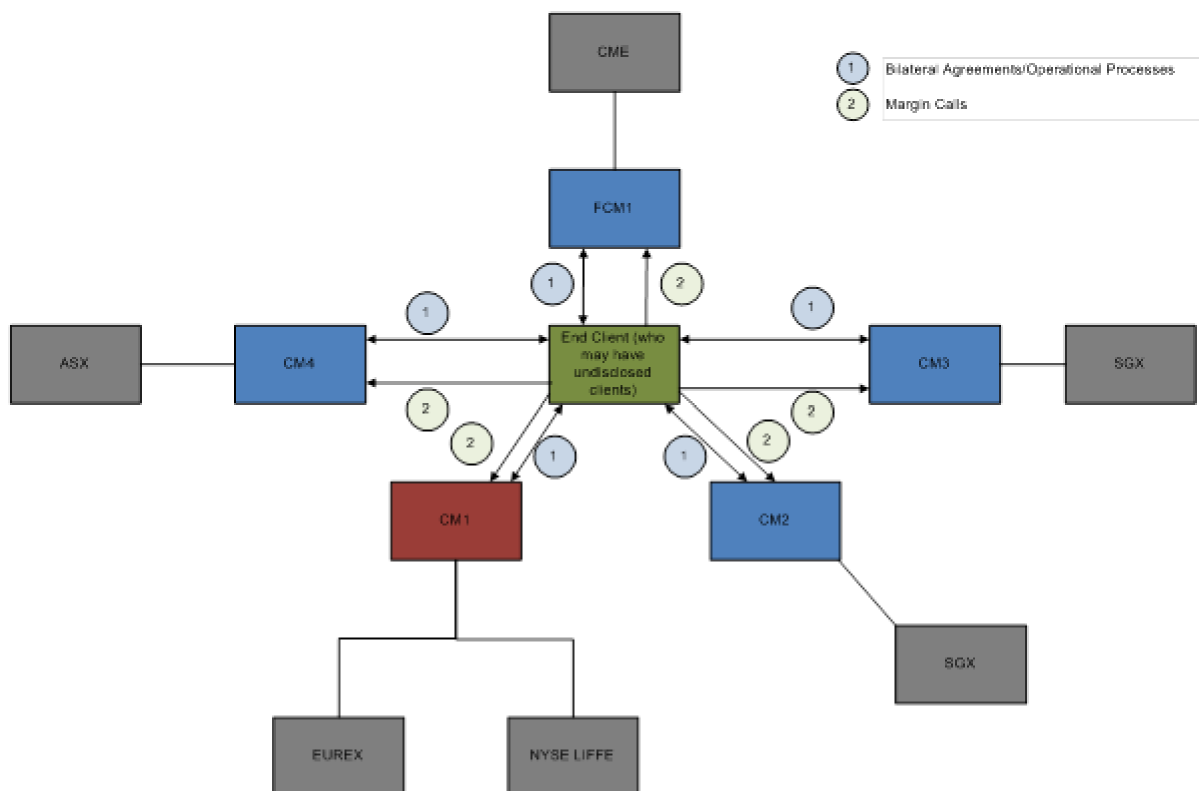
22. As discussed at Section IV above, the application of the EMIR Requirements have effectively precluded the use of indirect clearing arrangements in relation to OTC derivatives. OTC and ETD markets are fundamentally different markets involving fundamentally different products and structures. Such differences are acknowledged in EMIR itself. By way of example, Article 26 EMIR provides for different minimum liquidation periods for OTC derivatives as compared to ETD because ETD markets are generally much more liquid. It therefore does not necessarily follow that the same requirements should be applied to each market.

23. The EMIR Requirements apply where a firm is prepared to facilitate indirect clearing (although, as discussed above, none has yet been able to do so). By contrast, if requirements comparable to the EMIR Requirements are applied to all ETD transactions, since ETD indirect clearing arrangements are already in place in ETD markets, they would be effectively mandatory. Given the complexity and variety of the ETD Model, the EMIR Requirements would be far more problematic if applied to ETD markets: disrupt those existing markets; and the issues in designing solutions in relation to indirect clearing under EMIR, discussed at IV above, are likely to be more pronounced. It is commonly the case that the indirect client is not known to the ultimate clearing member. If the end client is not known to the clearing member or client facing clearing member these issues will be further exacerbated. It will therefore not be possible to design a scalable "one size fits all" solution in relation to ETD.

24. Today, a client can access for example the CME, Eurex, ASX, SGX, NYSE LIFFE and WSE via a single relationship (CM1) resulting in lower costs and increased efficiency for the end client. The structures are transparent (via disclosure by CM1) and are well understood and accepted by end clients.



If ETD indirect clearing is not permitted under its current form, the client would potentially need to put in place up to five separate legal relationships (i.e. one clearing member for each jurisdiction where the relevant CCP is located, as necessary), comply with five distinct separate operational processes and meet multiple margin calls, which will likely be significantly more expensive for the client, in addition to being more complex both legally and operationally (as demonstrated in the diagram below).



This will not necessarily result in increased protection for the client as foreign markets may not provide the porting and account segregation functionality required by EMIR. It may also result in the client being unable to trade in the relevant markets as the relevant clearing member (FCM 1, CM 1, CM2, CM3 or CM4) may not be permitted to provide clearing services into the jurisdiction of the client. Whilst OTC clearing has evolved to mitigate the potential access issues by dual listing contracts with different CCPs, most ETD products are exclusive to, and available to be traded or cleared on, one venue only (in the world). An inability to access the relevant market will therefore also prevent clients from accessing the relevant products.

25. The effect of applying the EMIR Requirements to all ETD is almost certainly to shut down elements of an established and well functioning market potentially causing market distortion. This will have significant impacts on market access and may make regulated markets and non-EU markets effectively inaccessible to many end users. The EMIR RTS were drafted in a fundamentally different context and are yet to be successfully implemented. In practice, they seek to regulate a market which does not yet exist, whereas if applied to ETD they would regulate a vast range of existing activity. In our view, such untested and problematic rules should not be applied to widely used, well-established and settled market activity.

26. The imposition of the EMIR Requirements on all ETD would have a particularly significant impact on smaller brokers, not themselves members of relevant CCPs as well as smaller market participants, who are not able to access markets directly and would therefore be shut out of the relevant markets. The impact on these smaller brokers and participants would result in a distortion of the market and a consequent reduction in competition, in direct conflict with the

fundamental aims of the European Union. It may also create an unlevel playing field, contrary to an expressly stated aim of MiFID II.

27. As described in paragraph 0 above, clients entering into ETD transactions often elect to make use of existing client asset protection regimes and/or have security interests which provide recourse to their assets on a default of a party in the clearing chain. Whilst the existing client asset protections and/or security arrangements cannot be said to reduce all counterparty risks to nil, they are well understood by end clients and operate effectively within the bounds of legal and operational constraints. Risk is always an inherent feature of doing business and risk remains even where EMIR segregation and porting are effected (as ESMA acknowledges in paragraph 14 of Discussion Paper on the calculation of counterparty risk by UCITS for OTC financial derivative transactions subject to clearing obligations (ESMA/2014/876)). We do not believe it is possible given the legal and operational issues highlighted above and below to implement a system which removes counterparty risk completely. The fact that ETD business involves derivatives should be of no impact: many other non-derivatives markets and means of doing business, give rise to an element of risk in the clearing and settlement chain.

28. ESMA has recently shown its willingness to take a pragmatic and flexible approach where significant issues have been raised in relation to the EMIR RTS, as noted above at paragraph 0. In light of the serious issues raised above we encourage ESMA to take a similarly pragmatic and flexible approach in the development of the relevant regulatory technical standards under Article 30 of MiFIR.

(b) Different regulatory objectives of EMIR and MiFIR

29. Indirect clearing under EMIR was a means to further the regulatory objective of satisfying the obligation to clear. This is specifically acknowledged in Recital 33 to EMIR which reads "*[a]s not all market participants that are subject to the clearing obligation are able to become clearing members of the CCP, they should have the possibility to access CCPs as clients or indirect clients subject to certain conditions*" and further in ESMA EMIR Q&A, OTC Question 18, which reads "*[t]he fact that the provisions are lodged within Article 4 of EMIR and are said to be for the purpose of meeting the clearing obligation means that that they only apply to OTC derivatives*". Indirect clearing under EMIR is therefore a way of enabling a category of client (that might not otherwise be able to) to comply with the clearing obligation.

By contrast, as noted above, indirect clearing arrangements in relation to ETD transactions are well established and function well. The ETD Model is not an "indirect clearing" model in the same way as under EMIR. Rather it is a series of structures and networks which provide market access. To prohibit these structures is to effectively prohibit access. This is contrary to an expressly stated aim of MiFID II/MiFIR. Recital 107 to MiFID II makes clear that investment firms should all have the same opportunities of having access to regulated markets and that technical and legal restrictions on access to regulated markets should be abolished. Recital 108 further reiterates this in relation to cross-border transactions.

We are strongly of the view that application of the EMIR Requirements to ETD would jeopardise the regulatory objective of access to markets, in practice having the opposite effect, through limiting access for ETD end users to global ETD markets and thereby reducing liquidity and increasing market risk.

(c) Legal considerations / limitations

30. As discussed above, the application of the EMIR Requirements to ETD without properly accounting for the differences between the ETD and OTC markets would effectively impose a mandatory regime on a mature and well functioning market, which is at odds with MiFIR Article 30 for the reasons stated below.

31. The application of the EMIR Requirements to all ETD would result in an ETD regime with a significantly farther reaching scope than that for OTC derivatives. There are no direct, positive obligations on counterparties to ETD transactions in relation to the clearing of such transactions, given that the clearing obligation for derivatives traded on regulated markets set out in Article 29 is not placed on the counterparties to the transaction, but rather on the operator of the regulated market. By contrast, under EMIR, the clearing obligation and associated EMIR Requirements apply directly to specified counterparties to a transaction and as such, they are not applicable to all OTC derivatives transactions. The ESMA EMIR Q&A (at OTC Question 18) expressly confirms that the EMIR Requirements apply solely to "products which are subject to the EMIR clearing obligation". As such, to apply the EMIR Requirements to all ETD transactions would go much further than the equivalent requirements under EMIR on the basis that it would:

(i) impose obligations in relation to clearing arrangements on persons not even directly subject to any clearing obligation; and

(ii) apply to all ETD transactions, by contrast to the relevant requirements under EMIR which are applicable only to transactions in specified OTC derivatives and entered into between specified counterparties.

In our view, this outcome is not supported by the wording of Article 29. If Article 29 was intended to impose a clearing obligation on market participants and an obligation to clear in a particular manner and only in that manner the obligation would have been stated explicitly.

32. In developing the MiFIR RTS in relation to indirect clearing arrangements, ESMA's mandate is to "specify the types of indirect clearing service arrangements" which meet the conditions of Article 30. It is not evident from the wording of Article 30 that it mandates the imposition of any obligations or new structures in the relevant RTS. As a result, we believe that Article 30 does not mandate the application of the EMIR RTS, as written, to either ETD or MiFIR indirect clearing arrangements. To impose such obligations would in effect impose an obligation to clear in accordance with a specified structure and prohibit well established ETD indirect clearing arrangements. We believe such an approach would fall outside Article 30.

33. Further, Article 30 MiFIR does not require that the MiFIR RTS to be drafted under that article, in relation to indirect clearing arrangements are the same as the EMIR RTS. ESMA is required only to ensure "consistency" with those rules. Given the differences between the EMIR rules for OTC derivatives and the MiFIR rules for ETD discussed above, ESMA therefore has the flexibility it needs to draft the MiFIR RTS in a different way. The use of the words "where established" clearly means the EMIR Requirements are not mandatorily applicable.

34. The legal issues discussed above necessitate and permit sensible limits to be placed on the application of the MiFIR rules on indirect clearing in relation to ETD, in particular to avoid the imposition of an effectively mandatory, global regime, would not be supported by the provisions of MiFIR.

(d) Cross-border Considerations

35. Application of the EMIR Requirements to ETD would also create significant difficulties given the cross-border nature of much ETD indirect clearing activity, resulting in a far greater extra-territorial reach than was perhaps intended.

36. Article 30 MiFIR is potentially extremely broad in territorial scope given that the definition of ETD is a derivative traded on a regulated market or on a third country venue considered to be equivalent to a regulated market. As discussed above, at paragraph 0 the EMIR Requirements are even more problematic in cross-border scenarios. Applying requirements comparable to the EMIR Requirements outside of the European Union would be, at best, difficult and likely impossible in

most cases; it will not be possible to force non-EU CCPs or intermediate brokers, who may face different requirements locally to comply with such requirements.

37. In addition, if MiFIR is applied in this way, non-EU markets will be incentivised not to become recognised as they would not then be subject to requirements comparable to the EMIR Requirements; a seemingly perverse outcome. In practice, given that the relevant rules in the US permit indirect clearing through omnibus accounts and the Asian markets do not have any equivalent requirements in relation to indirect clearing for ETD, this may drive business offshore.

VI Proposals for ESMA's response to its mandate under Article 30 MiFIR

38. Based on the above, it cannot be the intention that Article 30 is applicable to all ETD transactions and it must therefore only apply in relation to certain specified types of ETD indirect clearing arrangement.

39. Current ETD market practice provides appropriate service standards and required access benefits for clients. Indirect clearing in relation to ETD transactions is a known and understood process. Therefore, any approach adopted by ESMA should also allow for the maintenance of current practice provided on reasonable commercial terms. The current ETD Model is well understood by end-clients and provides end-clients with operational efficiency, market access and simplicity. Under the ETD Model, clients need only enter into one bilateral agreement with one clearing member rather than entering into numerous agreements with different clearing members. As discussed above at paragraphs 0, **Error! Reference source not found.** and 0, the ETD Model also enables end clients to obtain access to products needed to risk manage their portfolios effectively. Further, clients are subject to one margin call across all business lines, as opposed to many separate calls and costs are therefore reduced.

40. The imposition of the EMIR Requirements on all ETD would increase costs significantly for clients (both in terms of the legal costs involved in entering into multiple relationships and increased margin and operational costs) have significant impact on market access and may make regulated markets and non-EU markets effectively inaccessible to many end users

41. While already implicit in Article 30 of MiFIR, in our view it should be expressly stated that not all indirect clearing arrangements (including existing arrangements) should be required to comply with the MiFIR RTS. Clients should continue to be able to choose to access markets directly or to use their primary broker and access markets indirectly. For the reasons set out in paragraphs 0 to 0 above, we are proposing that this client choice is retained and that clients should have the choice of differing levels of client asset protections provided appropriate disclosures are made and the relevant risks are understood. In addition, in light of the issues raised at paragraphs 0 to 0 and in Section V(d) (paragraphs 0 to 0) above, in our view the MiFIR RTS should only apply to arrangements in respect to clearing through an EU CCP authorised under EMIR. Such an approach is consistent with Article 30 of MiFIR and ESMA's approach in respect of EMIR, as clarified by CCP Response 8(j) of the EMIR Q&A.

    Therefore we propose that the definition of 'indirect clearing arrangements' in the MiFIR RTS should make clear that the MiFIR RTS applies only in relation to arrangements:

    (a) in respect of clearing through an EU CCP authorised under EMIR; and

    (b) entered into (i) where the service provider holds itself out as offering indirect clearing arrangements which meet the MiFIR RTS requirements and (ii) with the intention that the client will benefit from the client asset protections expected to be included in the MiFIR RTS.

42 Notwithstanding the foregoing, the industry is fully supportive of increased client asset protection throughout the clearing chain and additional measures to reduce counterparty risk. Nevertheless,

as has become apparent in the context of the EMIR RTS, the industry is constrained by the current legal environment. Without the introduction of significant new legislation in the form of a pan-European client asset regime coupled with a pan-European insolvency regime and equivalent efforts in relation to third countries, it will not be possible for the industry to provide a legally workable, commercially viable, scalable and/or cost effective solution which can support the super equivalent (as compared to the protections provided by client asset regimes) client protections contained in the EMIR Requirements. We believe that such reforms are desirable and the industry would support efforts by ESMA and the Commission to introduce such reforms.

43. The MiFIR RTS should recognise that absent such reforms the industry is constrained by the current legal environment. Without prejudice to the views expressed at paragraphs 0 and 0 above we believe, to the extent that the EMIR RTS are applied to ETD, that the MiFIR RTS should differ from the EMIR RTS in the following principal respects (for the avoidance of doubt, these are the principal differences but are not intended to be exhaustive):

(a) *Porting and close out and return*

As described at paragraphs 0 and 0 above putting in place legal mechanisms which allow for the porting of client assets and positions of and/or the return of liquidated assets directly to an indirect client is impossible to provide on a mandatory basis. Therefore, the MiFIR RTS should not require a clearing member to (i) provide a mechanism for porting or (ii) ensure that liquidation proceeds are paid directly to the indirect clients following the default of the client, where it is not practicable or possible to do so.

In our view sufficient client asset protection can be preserved even where it is not possible or practicable to (i) provide for a mechanism for porting or (ii) ensure that liquidation proceeds are paid directly to the indirect clients because:

(i) many EU and non-EU markets have client asset protection regimes in place and end-clients in such markets often elect to receive such protections (as discussed in paragraph 0 above);

(ii) whilst it is unlikely to be possible to return liquidation proceeds directly to the indirect clients, provided the relevant client has correctly informed the clearing member of the assets and positions that relate to its indirect clients, the clearing member should be able to return any liquidation proceeds to the insolvency practitioner of the relevant client for the account of the indirect clients; and

(iii) while porting mechanisms are important in the OTCD market due to constraints on liquidity with respect to certain products, it is generally accepted that there is less necessity for porting mechanisms in relation to ETD markets, the majority of which are by their nature, highly liquid involving relatively standardised products and in which it is much easier for clients to close out and put back on any relevant positions without the need for a porting mechanism.

(b) *Segregation*

As described in paragraph 0 above, conflicting local law requirements often prevent clearing members and clients from offering EMIR compliant segregation arrangements to indirect clients.

In our view, the MiFIR RTS should not require clearing members and/or clients to provide for segregation in accordance with Article 4(2) and Article 5(1) respectively of the EMIR RTS, where it is not practicable or possible to do so provided that the clearing member and/or client (as applicable) has disclosed to the indirect client (i) the nature of the

relevant segregation arrangements and (ii) the relevant risks related to such segregation arrangements.

This clarification would help to overcome some of the acknowledged difficulties with EMIR account segregation in a global market and is consistent with ESMA's approach in respect of EMIR, as clarified by CCP Response 8(i) of the EMIR Q&A. In our view provided the risks of alternative segregation arrangements have been disclosed to indirect clients there is no justification for preventing such arrangements. In this respect the existing ETD indirect clearing structures are already transparent as clients have visibility as to (i) those CCPs at which the clearing member is clearing directly, (ii) those CCPs for which their direct clearing member uses an affiliate; and (iii) those CCPs where a third party broker is used.

44. In light of the issues raised above, we believe that it is vital that ESMA collaborates with the industry in the development the MiFIR RTS and FIA Europe would offer any assistance in this regard which ESMA seeks. In particular:

(a) we would welcome the opportunity to provide further data on the significance of current ETD indirect clearing arrangements (particularly from the smaller broker community);

(b) we are eager to offer any assistance in respect of the drafting of the MiFIR RTS. To this end, we are considering the specific drafting amendments which would be required to effect the modifications to the EMIR RTS described above and to resolve other issues. We will share these proposals with ESMA in due course;

(c) we encourage ESMA to include a long phase-in period for the application of the MiFIR RTS to ensure that they can be implemented effectively by the industry; and

(d) the eventual MiFIR RTS should also build in the potential for review and should take into account information provided and lessons learnt as part of the Commission's review of EMIR (under Article 85 of EMIR).

Appendix – Illustrations of ETD clearing arrangements

Affiliated and non-affiliated client clearing

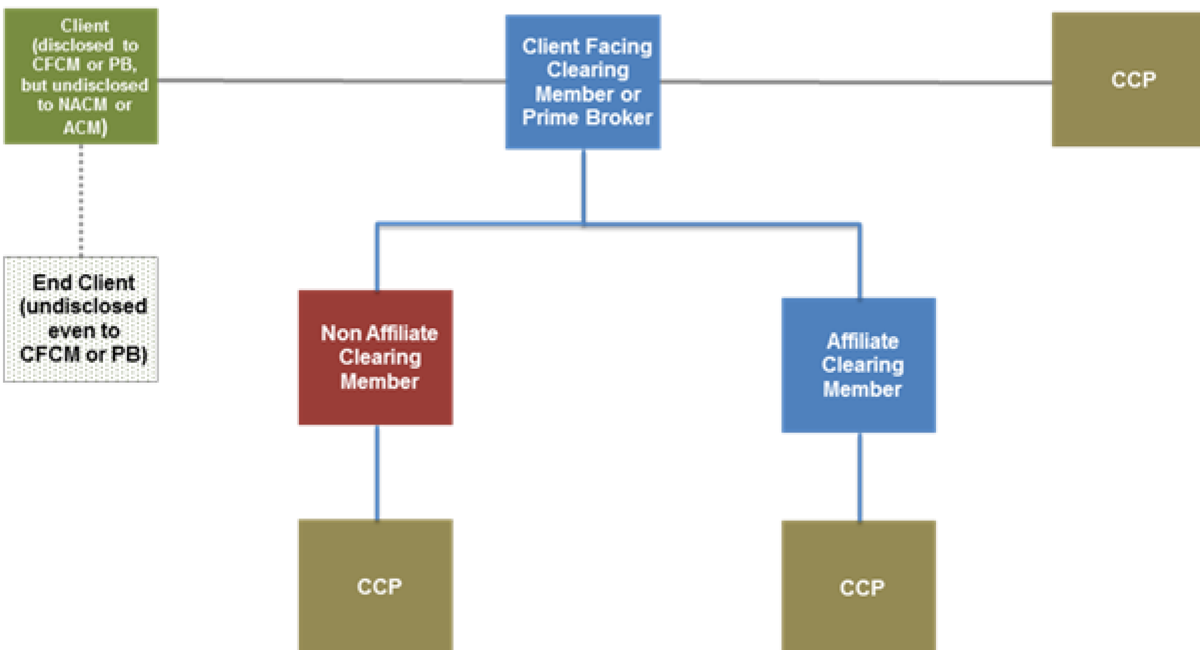
An EU client wishing to trade on a US or Asian market (where, for example, there is no comparable product to trade on an EU market) will approach their EU broker. Where their EU broker is not a member of the relevant US or Asian market (typically because the client facing clearing member does not meet the requirements to become a member of the relevant CCP) their broker will access the relevant US or Asian Market via a FCM or a participant in the relevant Asian market (as applicable) who will execute the trade on such market. The FCM or Asian market participant utilised by the EU broker may either be an affiliate of theirs (an "**Affiliated Clearing Member**" or "**ACM**") or a non-affiliate third party (a "**Non-Affiliated Clearing Member**" or "**NACM**"). The trade will then be cleared on the relevant US or Asian CCP, via a chain from FCM or Asian participant as clearing member to EU broker to EU client.

Client of client clearing
A direct client of a clearing member (while not itself a clearing member in a relevant CCP) may offer clearing services to its clients as part of its business. In such circumstances the direct client acts as a

clearing intermediary for its own clients. It is unlikely that the client facing clearing member would know who the end client is.

Prime-broker clearing
Similarly to the client of client clearing model, a prime broker (while not itself a clearing member in a relevant CCP) may offer clearing services to its clients as part of its business. In such circumstances the prime broker acts as a clearing intermediary for its own clients. It is unlikely that the client facing clearing member would know who the end client is. In relation to both client of client clearing and prime broker clearing, the direct client or prime broker (as relevant) which is offering the clearing services may not be affiliated with the clearing member and, as such, there may be commercial sensitivities on their part to introducing their client directly to the clearing member; this would effectively take away their business.

Combinations
In practice, clients will use a combination of the above indirect clearing arrangements to gain required access to markets, as illustrated below. Generally, the client assets are held in a client omnibus account at the direct clearing member and separate from house assets.



<ESMA_QUESTION_614>

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

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Please see our response to question 614 above.
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