Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on MiFID II / MiFIR (reference ESMA/2014/1570), published on the ESMA website.

Instructions

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

- use this form and send your responses in Word format (do not send pdf files except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_MIFID_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, and
- describe any alternatives that ESMA should consider.

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

Naming protocol:

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

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

Deadline

Responses must reach us by 2 March 2015.

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

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

**Data protection**

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

<table>
<thead>
<tr>
<th>Name of the company / organisation</th>
<th>Nasdaq</th>
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<tbody>
<tr>
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<td>Regulated markets/Exchanges/Trading Systems</td>
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Introduction

Please make your introductory comments below, if any:
<ESMACOMMENT_CP_MIFID_1>

Please find below a summary of the points which we believe are most important in Nasdaq’s reply to this consultation.

Transparency

We maintain our concern with the ambiguities in MiFIR with respect to the potential use of matched trades or riskless principal trading by systematic internalisers. As stated by ESMA in the consultation paper, we believe that the possibility of executing riskless or matched principal transactions by systematic internalisers may undermine the objective of establishing a level playing field between systematic internalisers and trading venues and possibly create arbitrage opportunities in respect of the limits to dark trading established by MiFIR. We urge ESMA to support a clarification.

Moreover, we are concerned with transparency regimes for SIs that we see too flexible when compared with the one applicable to which market-makers active on multilateral platforms. We believe the quantitative thresholds for the SMS, or at least the methodology should be aligned with that for the LIS. If the current SMS methodology is retained, the more liquid an instrument is, the less the average size of transaction is and therefore the lower the SMS threshold above which one can trade in the dark. This is actually counter-intuitive. There are no reasons why SIs should benefit from such a regime while multilateral platforms cannot, especially in an environment where, due to the OTC regulation, SIs will become increasingly used.

Fixed income

For fixed income, Nasdaq strongly supports the chosen use of the COFIA approach and the benefits it brings to market participants including operators of trading venues, investment firms, national competent authorities, etc. The model proposed by ESMA clearly benefits from being operational and at the same time offers an adequate level of accuracy in determining the liquidity for different types of bonds. It is important that the regime can support further transparency while at the same time not reducing transparency in already well developed fixed income markets.

1 The field will used for consistency checks. If its value is different from the value indicated during submission on the website form, the latest one will be taken into account.
Equity derivatives
Regarding the liquid market definition for equity derivatives, we also agree using the COFIA but we oppose using maturity as a proxy for liquidity and we support the idea to consider liquid equity derivative instruments available for trading on a trading venue. We nonetheless propose to introduce further granularity and proper calibration in the definition of pre- and post-trade large-in-scale thresholds, as to compensate the broad nature of ESMA’s proposal for determining liquid equity derivatives products.

We have serious concerns with the proposed large-in-scale thresholds. In many instances ESMA’s proposals will actually result in a reduction in the current levels of transparency. We have made a counterproposal. Our analysis indicates two very concerning outcomes of the ESMA proposal: (1) low thresholds proposed for very liquid contracts; and (2) high thresholds proposed for very illiquid contracts. We consider that ESMA’s proposal will result in liquid contracts moving out of central order books and illiquid contracts out of on-exchange trading altogether. This is counterintuitive and we therefore propose an alternative linked to the average daily turnover of the contracts.

Trading obligation for Equity derivatives
Nasdaq is concerned about the ability of MIFIR to fulfil the G20 2009 Pittsburgh summit’s mandate according to which all standardized OTC derivative contract should be traded on exchanges or electronic trading platforms, where appropriate and which reiterated in recital paragraph (5) of RTS 11.

There is a regulatory inconsistency in the combined EMIR-MiFIR framework because of the MiFIR trading obligation’s dependency to the EMIR clearing obligation and the current lack of an EMIR clearing obligation for standardized OTC equity derivatives classes, especially those mirroring exchange traded derivatives.

Microstructural issues
We generally question the appropriateness of market operators doing a due diligence of clients using sponsored access, which in principle resembles the one for members of the trading venue. The market operator is not better placed to do such controls than the member is. Rather the contrary, and it is an unnecessary duplication of a control which risks creating a false picture of safety in the first part of the control.

Further, on algorithms, conducting testing and due diligence of the members algorithms does not equate to a trading venue’s ability to "ensure” that such algorithms cannot create or contribute to disorderly trading in a live environment.

Market data
Nasdaq wants to stress that any forced unbundling of current market data packages will increase costs for venues. Moreover as there is no requirement for a vendor to do the same, vendors would most likely just re-bundle the data, at a cost. Greater disaggregation will not
only result in significantly higher costs in distributing market data, but it will also lead to confusion among investors who no longer can rely on receiving all the relevant market data. Moreover, disaggregation that separate large cap and SMEs, like the proposed requirement to disaggregate on the basis of membership in a major index, will result in a loss of visibility for SMEs in the market as data vendors are unlikely to want such data separately. This will create a barrier for SMEs to access market financing in total contradiction with the stated goals of the Capital Markets Union.

We also consider that some of the requirements imposed under the proposed consolidated tape provider regime are too strict. There should for instance be more flexibility around additional services that such providers are allowed to offer. Otherwise, regulatory requirements risk discouraging candidates to such a regime.

**Access rights to CCPs and trading venues**

We agree in general with ESMA’s approach to the level II specifications on grounds to deny access rights. Our main concern is to ensure that the framework governing access rights is as objective and exhaustive as possible. We want to avoid that subjectivity and open criteria provide CCP’s, trading venues and their competent authorities with an unreasonable opportunity to arbitrarily deny access, which will threaten the effectiveness of the provisions designed to facilitate the implementation of Level 1. We make a number of proposals towards clearer provisions that will hopefully also facilitate consistent implementation across the European Union.

<ESMA_COMMENT_CP_MIFID_1>
2. Investor protection

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

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

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

Q4. Do you agree with the approach proposed by ESMA on the topic of obstacles which may prevent effective exercise of the supervisory functions of the competent authority?

Q5. Do you consider that the format set out in the ITS allow for a correct transmission of the information requested from the applicant to the competent authority? If no, what modification do you propose?

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

Q7. Do you have any comment on the authorisation procedure proposed in the ITS included in Annex B?
Q8. Do you agree with the information required when an investment firm intends to provide investment services or activities within the territory of another Member State under the right of freedom to provide investment services or activities? Do you consider that additional information is required?

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

Q10. Do you consider useful to request additional information when an investment firm or market operator operating an MTF or an OTF intends to provide arrangements to another Member State as to facilitate access to and trading on the markets that it operates by remote users, members or participants established in their territory? If not which type of information do you consider useful to be notified?

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

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

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

Q14. Do you agree that any changes in the contact details of the investment firm that provides investment services under the right of establishment shall be notified as a change in the particulars of the branch passport notification or as a change of the tied agent passport notification under the right of establishment?
Q15. Do you agree that credit institutions needs to notify any changes in the particulars of the passport notifications already communicated?

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

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

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

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

Q20. Do you agree with proposed means of transmission?

Q21. Do you find it useful that the competent authority of the host Member State acknowledge receipt of the branch passport notification and the tied agent passport notification under the right of establishment both to the competent authority and the investment firm?
Q22. Do you agree with the proposal that a separate passport notification shall be submitted for each tied agent established in another Member State?

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

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

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

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

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

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

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

Overall we agree with the approach by ESMA.

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

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

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

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

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

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

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

<ESMA_QUESTION_CP_MIFID_37>
Yes, we agree. RFQ should be added as these are prevalent systems in Europe, especially in the context of ETFs.
<ESMA_QUESTION_CP_MIFID_37>

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

<ESMA_QUESTION_CP_MIFID_38>
Yes, we agree, but we repeat our concern on whether the double listed instruments traded in different currencies are considered. The approach should not be limited to a single market where the share is listed, but any of the dual listing markets.
<ESMA_QUESTION_CP_MIFID_38>

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

<ESMA_QUESTION_CP_MIFID_39>
Yes, we agree with the exhaustive list, provided that transactions contingent on technical characteristics include such transactions as automated trades related to an order-routing service offered by a trading venue (mirrored trade).

We support the inclusion of some sort of non-standard or special settlement trades in the list. This may be valuable in instances where the settlement deviates substantially from the standard settlement period. Non-standard settled trades that do not deviate substantially from the standard settlement period, such as t+1 or t+3, should, on the other hand, contribute to the price formation process.

For the list to be exhaustive, and for the sake of consistency, we also think it should include items listed in section 3.3 as not contributing to the price formation process, such as transaction resulting in the delivery of shares in the context of the exercise of convertible bonds, options, covered warrants or other similar derivatives.
<ESMA_QUESTION_CP_MIFID_39>

Q40. Do you agree with ESMA’s definition of the key characteristics of orders held on order management facilities? Do you agree with the proposed minimum sizes? Please provide reasons for your answers.
Yes, we agree on the definition of the key characteristics.

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

Yes, we agree.

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

We do not support the alternative approach with the proposed 1 MEUR threshold. We consider this to be too high for less liquid ETFs.

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

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

Yes, we support this approach.

Q45. Do you agree with the proposed conditions and standards that the publication arrangements used by systematic internalisers should comply with? Should systematic internalisers be required to publish with each quote the publication of the time the quote has been entered or updated? Please provide reasons for your answers.

Yes, we agree.

Q46. Do you agree with the proposed definition of when a price reflects prevailing conditions? Please provide reasons for your answers.
Yes, we agree, but we repeat our concern on riskless principal trading. We note that ESMA has acknowledged that this is an issue but that it cannot provide further clarity in the RTS as it has no relevant empowerment to do so; we therefore strongly urge ESMA to raise this further with the European Commission so that it can be addressed appropriately.

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

No, we do not agree, SMS is too low. In order to support price formation and transparency, SMS should be set at a level high enough. We believe it should be 15000 EUR at lowest level.

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

Yes, we agree with establishing an exhaustive list of the types of transactions which should be excluded from the trading mandate for equities, provided that mirrored trades are considered as negotiated transactions that do not contribute to the price formation process, i.e. contingent on technical characteristics, as referred to in our reply to Q39. We consider this to be the most effective way to ensure that the equities trading mandate is not illegitimately circumvented. In order to respond to market needs, any such definition should rely on an analysis and pragmatic typology of the types of transactions currently executed on an OTC basis. We believe that a definition solely based on general principles would not be appropriate, as it would open opportunities to circumvent the trading mandate.

ESMA states that Level 1 allows it to exempt “non-price forming” trades from post trade transparency if they are transacted OTC (para 16). However, these “non-price forming” trades must be made public when executed on a trading venue due to the obligations of the trading mandate for shares in MiFIR. This leads to a number of unintended consequences, namely:

1. Unequal treatment of OTC and on-exchange transactions, which is not desirable from a transparency perspective.
2. All OTC VWAP executions would be exempt from post-trade transparency obligations.
3. Trade flags ‘T’ and ‘G’ have almost the same definition with the execution venue being the only distinction. However, in case non-price forming OTC trades would be exempt from post-trade transparency obligations, we do not see in which case the trade flag ‘T’ might be used.
4. The potential exemption of post-trade transparency for non-price forming OTC transactions will make the sizing of the OTC trading activity impossible. This is an acknowledged weakness of MiFID I and will affect the calculation of the volume cap mechanism under MiFID II.
Therefore, we recommend that the final RTS do not discriminate between on-exchange and OTC “non-price forming” trade. The same post-trade transparency requirements for non-price forming transactions should apply, irrespective of whether they have been executed OTC or on-exchange.

Therefore, we consider that the definition of transaction types considered as “non-addressable” for the purpose of the equities trading mandate could rely on the work done by CESR (Committee of European Securities Regulators, now ESMA) in 2010\(^2\) and the standards developed by the “Market Model Typology” (MMT) initiative. This initiative, now governed by FIX Protocol Limited\(^3\), aims at supporting harmonised transaction reporting standards across the industry, including OTC transactions. Research undertaken by the Association for Financial Markets in Europe (AFME)\(^4\) and Aite Group\(^5\) also give a good overview of the type of transactions which are currently executed OTC. These standards and research were used as a basis to establish a detailed typology of OTC transactions, on which we suggest regulators could rely, to determine which OTC transactions can be considered as “non-addressable” for the purpose of the equities trading mandate.

We believe that standard transactions, which are currently in great proportion executed OTC, should be subject to the trading mandate to the extent that their characteristics do not justify execution outside regulated platforms. These include in particular:

(i) **Cross trades or agency trades**, which correspond to the matching of two client orders (otherwise BCNs will simply continue their activity OTC or under the SI category);

(ii) **Riskless principal or matched principal trades**, corresponding to the interposition of the intermediary’s own account between two client orders or between a client order and the market; and,

(iii) **Principal trades** where the intermediary matches a client order against its proprietary capital.

These transactions should all be executed on regulated platforms. This is because they are not technical in nature, should take part in the price formation process and be accessible to the market as a whole. In other terms, they should not remain in the OTC space. Therefore we welcome the exclusion of these trade types from the non-exhaustive list.

A tighter definition of benchmark, portfolio and delta neutral trades for the purpose of this article should be adopted in order to avoid creating loopholes. In fact these trades should only be allowed to be executed OTC in respect to the overall operation and not of its individual components, which should be executed on lit markets unless they meet the legibility criteria (in terms of order size for instance) to be executed in the dark. Otherwise, the risk is that more than half of total EU trading volumes would be allowed to remain dark.

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\(^2\) CESR, Technical Advice to the European Commission ahead of MiFID Review – Equity Markets, Post-trade Transparency Standards, Oct 2010
\(^4\) AFME, Market Analysis, The Nature and Scale of OTC Equity Trading in Europe, April 2011
\(^5\) Aite, European Dark Trading: Who’s Playing in Your Pool?, December 2010
(and without being constrained by the double volume caps) as most trades executed today in the EU correspond either to a VWAP operation or portfolio operation. In addition, and in any event, we would strongly recommend deleting the verb ‘meant to’ from part (b) and (c) of Article 2 in the draft RTS, as the use of such ‘unclear’ definitional criteria would enable many trades to fall under these definitions, which go against the spirit of MiFID 2.

The adoption of an exhaustive list to define the types of transactions considered as not contributing to the price discovery process is an important step to ensure that OTC trading is limited only to legitimate circumstances and does not open for loopholes to the trading mandate provided under Article 23 of Regulation 600/2014.

However, some of the definitions proposed should be further clarified in order to avoid creating significant loopholes, notably in respect to (i) benchmark trades – Article 2(a) RTS 8, (ii) portfolio trades – Article 2(b) RTS 8, and (iii) delta neutral trades – Article 2(c) RTS 8.

In order to ensure that the spirit of the text is respected, and therefore to close the above loophole, the definitions of these three types of trades should be further clarified. It should distinguish between (1) the portfolio and delta neutral overall operations and the individual components of these operations and (2) the benchmark trade and the trades which the benchmark price is derived from. Whilst in its entirety, a portfolio or delta neutral operation should be allowed to be effected OTC, the individual components (i.e. trades) of these operations (necessary to achieve a portfolio operation / a delta neutral operation) should fall within the trading mandate, i.e. should be considered as price-forming. Similarly, a benchmark trade executed OTC should be executed at a price that is derived over already published post-trade prices that have been executed under the trading mandate. This would ensure that the conduct of benchmark, portfolio and delta neutral operations are still possible (by enabling the operation to be considered, as a whole, as executable OTC) whilst protecting the price formation process by ensuring that the individual components (trades) necessary to execute the overall operation are executed on regulated market(s), MTF(s) or systematic internaliser(s).

In addition, and in order to close any loopholes, we suggest totally aligning the definition of transactions not subject to current market prices under the systematic internaliser regime with those retained for the purpose of the trading mandate exemptions. Otherwise, the risk is that we observe a growth of dark trading under the SI category, as the definition currently provided in 241 is much broader than that proposed for the purpose of the trading mandate.

Last, in order to avoid lack of clarity, we suggest encompassing all technical trades (which are non-price forming in their nature) within the non-price forming trade category in Table 2, which will facilitate flagging (as the distinction between technical vs. non-price forming trades may be difficult, precisely due to the non-price forming character of technical trades). We suggest retaining the ‘T’ technical trade flag and to delete the ‘G’ non-price forming trade flag, in order to fully align the definition and flagging of non-price-forming trades whether executed under the NDW or an OTC basis.

Amendment proposal
Recital 2-bis

Whilst in its entirety, a portfolio or delta neutral trade shall be allowed to be executed on an OTC basis or under the Negotiated Deal Waiver as non-price forming, the individual components (individual trades) necessary to the execution of those trades shall fall within the trading mandate and be executed on pre-trade transparent venues, as they are price-forming, unless meeting the eligibility criteria for other pre-trade transparency waivers due to their size or intrinsic characteristics. Similarly for benchmark trades, only the trade executed at the benchmark price should be considered as non-price forming, and should be based on already published post-trade prices. A portfolio or delta neutral trade is eligible to OTC trading and to the Negotiated Deal Waiver only if it is constituted by several non-dissociable and non-substitutable components which, when individually sent to execution venues, do not represent the initial interest in its entirety.

Table 2
List of flags for the purpose of post-trade transparency

<table>
<thead>
<tr>
<th>Flag</th>
<th>Name</th>
<th>Type of execution venue</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘B’</td>
<td>Benchmark trade</td>
<td>RM, MTF, OTC</td>
<td>Transactions executed in reference to a price that is calculated over multiple time instances</td>
</tr>
</tbody>
</table>
according to a given benchmark. In other words the price is derived over a period of time from post-trade prices of already executed trades. Examples include such as volume-weighted average price or time weighted-average price, and is constituted by several non-dissociable and non-substitutable components which, when individually sent to regulated market(s), MTF(s) or systematic internaliser(s) for execution, do not represent the initial interest in its entirety.

<table>
<thead>
<tr>
<th>'X'</th>
<th>Agency cross trade</th>
<th>RM, MTF, QTC</th>
<th>Transactions where an investment firm has brought together clients' orders with the purchase and sale conducted as one transaction and involving the same volume and price.</th>
</tr>
</thead>
<tbody>
<tr>
<td>'G'</td>
<td>Non-price forming trades</td>
<td>RM, MTF</td>
<td>All types of transactions listed under Article 2 of this Regulation and which do not contribute to the price formation.</td>
</tr>
</tbody>
</table>

Technical advice p.241

1. Execution in several securities shall be regarded as part of one transaction if that one transaction is a portfolio trade that involves an order for execution of 10 or more financial instruments from the same client and at the same time and the single components of the trade are meant to be executed only as a single lot and the trade is constituted by several non-dissociable and non-substitutable components which, when individually sent to a pre-trade transparent execution venue for execution, do not represent the initial interest in its entirety. An order for the execution of several securities in a portfolio trade shall also be considered as subject to conditions other than the current market price.
2. An order shall be considered subject to conditions other than the current market price when:

I. the price is calculated over multiple time instances according to a given benchmark. In other words the price is derived over a period of time from post-trade prices of already executed trades. Examples include, including volume-weighted average prices; and is constituted by several non-dissociable and non-substitutable components which, when individually sent to a pre-trade transparent execution venue for execution, do not represent the initial interest in its entirety;

II. it is contingent on the execution of a related derivative contract with the same client, and is constituted by several non-dissociable and non-substitutable components which, when individually sent to a pre-trade transparent execution venue for execution, do not represent the initial interest in its entirety; or

III. it is neither a market order nor a limit order but it is contingent on technical characteristics of the transaction which are unrelated to the current market valuation of that financial instrument.

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

Yes, we agree. However, we request clarity on whether the SI participant identity code is included rather than generic “SI” code. The actual identity code should be included.

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

We do not see a strong preference in this respect.

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

We largely agree with the proposed list of flags but question the need for the agency cross trade flag. Our view is that the value of adding such a flag should be assessed in relation to the potential burden it places upon trading participants. An agency cross trade flag is essentially a trading capacity flag and as such it provides limited information, since other trading capacity flags are not made public.

We also think that the algorithmic trade flag needs to be further clarified. Does it call for separate buyer/seller flags? If not, should all trades where an algorithmic trader is on either side be flagged as an algorithmic trade or should only trades initiated by an algorithm be flagged in such a way (and not trades where the algorithmic order is passive)? In our opinion
such a flag would first and foremost be of value if it included information about whether or not the buyer, seller or both were algorithmic.

Also, LIS flag should not be included as it would reveal the possible remaining part of LIS order. Moreover, we consider that the “L” flag can potentially harm the price formation process by shifting LIS orders away from lit order books towards either dark pool or negotiated trade executions. We therefore recommend removing the proposed “L” flag for trades originating from LIS orders.

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

Yes, we agree on all. Longer delays might be justified in certain cases for practical reasons.

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

No preferences.

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

Yes, we agree.

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

We believe that the table based on ADTs is not as appropriate in the context of ETFs. Large OTC market makes the analysis for single LIS threshold difficult.

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

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

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

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

In general Nasdaq strongly supports the chosen use of the COFIA approach and the benefits it brings to market participants including operators of trading venues, investment firms, national competent authorities etc.

(1) We support the proposed parameters, especially the use of issue size (and only that) as the variable determining liquidity in a particular bond. As ESMA’s analysis also indicate, it is obviously not perfect and this approach will lead to some bonds being categorized as liquid but in reality being illiquid and the other way around. But this will be the case for any model – and especially also for an IBIA model. No model will capture liquidity in a perfect way – given that every model will base its conclusions on historical trade activity as a proxy for future liquidity. In this case historical information is an estimate of future liquidity. And especially in the case of new issued bonds with no historical trade information, even an IBIA model will not be able to categorize bonds correctly.

Also, we do not believe that adding granularity to the preferred COFIA model will add significant more quality in the calibration which is needed in order to justify the added operational difficulties for market participants and trading venue operators in complying with the regime.

The model proposed by ESMA clearly benefits from being operational and at the same time offers an adequate level of accuracy in determining the liquidity for different types of bonds. As such we do not support including other parameters, the ones used currently are sufficient enough to estimate liquidity for bonds.
(2) We support the suggested parameters as an adequate proxy for assessing the liquidity in fixed income instruments.

(3) We note that table 5 that contains segment assessment has a very low accuracy for liquid covered bonds, i.e. only 26% of the bonds which are deemed liquid actually pass the liquidity test based on the underlying parameters. Also, for senior corporate bonds, for non-financials we note that a significant part of bonds are classified as illiquid but trades above the liquidity thresholds. This group adds up to approx. 8% of all illiquid corporate bonds but corresponds to more than 50% of the total number of LIQUID corporate bonds.

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

Yes, we agree with the proposed bond classes.

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

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

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

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

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

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

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

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

Yes, we support the proposed definition of liquid fixed income derivatives including the preference for option 1.

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

Yes, we support the proposed definitions.

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

Nasdaq supports the approach of using COFIA with sufficient level of granularity and agrees on reasons and issues of not adopting IBIA for equity derivatives.

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

   (1) your alternative proposal

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

   (3) which parameters and related threshold values would you use in order to define a sub-class as liquid.

Nasdaq supports ESMA proposal for the definition and application of the criteria for liquid markets for financial instruments.

Looking at the analysis that ESMA has done on the distribution of traded volumes, Nasdaq wants to stress that it is not a reflection of distribution of available liquidity but rather a
distribution of traded volumes. The fact that longer maturities trade less frequently is not a reflection of less liquidity but an intrinsic characteristic of how such products are used.

Coming to the proposed options:

Option #1 – constitutes a strongly limiting approach that is based on considerations not aligned with the intrinsic nature of equity derivatives products and how these are traded. As pointed out by ESMA such approach would result in less transparency than currently available rather than promoting it. Some products, such as dividend futures, that due to their intrinsic nature have yearly expirations, would not have any maturity being considered liquid at the start of the year for no reason.

Option #2 – Nasdaq, as a starting point, supports such proposal as it sets the grounds to preserve current levels of transparency. However, it should be noted that it may result in some product classes being considered liquid irrespective of actually fulfilling any of the criteria defined on level I text.

In Nasdaq’s view, the proposal should be improved in 2 alternative ways:

- Introduce further granularity and proper calibration in the definition of pre- and post-trade LIS thresholds as to compensate for any negative impact from the ESMA broad proposal for liquid equity derivatives products (see Q80).

Or,

- Introducing further granularity for both stock and index derivatives (i.e. on individual single name equity derivatives product classes) for the liquidity classification, and introducing a floor on ADT, for the classification of a product class or sub-class as liquid.

Nasdaq has a preference for the first alternative.

Q65. Do you agree with the definitions of the equity derivatives classes provided in ESMA’s proposal (please refer to Annex III of draft RTS 9)? Please provide reasons for your answer.

Nasdaq supports the proposal from ESMA as it captures most products that are currently available for trading on trading venues and centrally cleared.

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

1) Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criterion to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?
(2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?

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

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

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

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

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

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

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

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

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

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

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

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

(3) Would you qualify as liquid certain sub-classes qualified as illiquid (or vice versa)? Please provide reasons for your answer.
Q70. Do you agree with ESMA's proposal with regard to the content of pre-trade transparency? Please provide reasons for your answer.

OTFs
Nasdaq wishes to stress that principles and rules for discretionary matching in OTFs should be made public so as to provide all trading venues with the necessary information to compete on a level playing field.

Trading venue type 6 and transparency
In general, Nasdaq believes that transparency should favour price formation and protect end clients and liquidity providers in their risk taking activity. Therefore, there should be general principles that apply to any trading venue and hence the level of pre-trade transparency and its calibration should not differ in any significant way between types of venue for the same types of trade (e.g. size of trade). It would avoid the risk of distorting the playing field among venues and, more importantly, non-harmonized levels of transparency for market participants.

Based on the above concerns, Nasdaq is worried that for the Type 6 Trading Venue:
Trading system not covered by first 5 rows

A hybrid system falling into two or more of the first five rows or a system where the price determination process is of a different nature than that applicable to the types of system covered by first five rows.

Adequate information as to the level of orders or quotes and of trading interest; in particular, the five best bid and offer price levels and/or two-way quotes of each market maker in the instrument, if the characteristics of the price discovery mechanism so permit.

There is not enough clarity in the level and nature of the information to be made public compared to what is required from the first 5 trading venue types. Specifically the wording “if the characteristics of the price discovery mechanism so permit” leaves too many uncertainties on the outcome. It leaves room for defining trading venue types that do not immediately fall in the first categories and that could benefit from a less certain and clear pre-trade transparency regime and potentially leading to less transparency and distort the playing field with other type of venues.

Nasdaq suggests that the text “if the characteristics of the price discovery mechanism so permit” is removed from the text for hybrid trading systems and therefore ensure that a pre-trade transparency regime is not bended to the specifics of a trading system but rather the opposite.

<ESMA_QUESTION_CP_MIFID_70>

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

<ESMA_QUESTION_CP_MIFID_71>

For the same reasons that there is a need for different LIS and SSTI thresholds between different asset classes (i.e. between index and interest rate futures but also between index futures and options), it would make sense to define different minimum reserve order sizes for different asset classes.

Reserve orders are used when the broker/trader believes that displaying the total size of the order can impact the price formation in the lit order book. This assessment will be made considering the order’s size in relation to the instrument and asset class in question, not in relation to all non-equity instruments. As such it is inappropriate to define a general threshold for all non-equity instruments.

Furthermore, Nasdaq disagrees with the proposed level and considers it extremely low compared to how equity derivatives products are currently traded. Considering the underlying purpose of using reserve/iceberg orders, we fail in finding the logic for such a low threshold. It would potentially lead to the extreme case where the vast majority of orders traded today with full pre-trade transparency could be submitted with a non-displayed reserve volume.
Q72. ESMA seeks further input on how to frame the obligation to make indicative prices public for the purpose of the Technical Standards. Which methodology do you prefer? Do you have other proposals?

It would be inappropriate to leave to the trading venue’s discretion to define the calculation methodology as it could lead to a multitude of different methodologies being implemented by the various trading venues for the purpose of complying with the exact same pre-trade transparency requirement. This could result in confusion for the market participants rather than providing certainty on how to interpret market data.

Instead, we suggest a general rule being defined in the RTS for request-for-quote and voice trading systems to publish, as a reference price for an instrument, the volume weighted average spread of the best bid and offer coming from actionable indications of interest, above a size specific to the instrument but below the large in scale size. Such reference price is suggested to be calculated accordingly:

\[
\frac{\text{Best Bid Price} \times \text{Best Bid Volume} + \text{Best Ask Price} \times \text{Best Ask Volume}}{\text{Best Bid Volume} + \text{Best Ask Volume}}
\]

It is equally important that an indicative price is shown when only a bid or offer is available, a formula must be adopted for this also.

Q73. Do you consider it necessary to include the date and time of publication among the fields included in Annex II, Table 1 of RTS 9? Do you consider that other relevant fields should be added to such a list? Please provide reasons for your answer.

In most publications of venues, every transaction would already today have a time-stamp of when this transaction is published. In case there is doubt as to whether this actually is the case for all APAs and trading venues, it would make sense to require this information to be part of the published information.

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

In general we support the proposed flags in Annex II, table 2 of RTS 9.

However, for bond transactions there would also be a need for a flag for trades with non-standard settlement or long settlement. This flag is already being widely used in bond markets today and should as such also be part of the public information on trades in the future.

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

1. a 3-year initial implementation period
a maximum delay of 15 minutes during this period

(3) a maximum delay of 5 minutes thereafter. Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_75>

The approach to have one proposal for all derivatives is very limiting and does not consider
the large diversity of market dynamics among different asset classes. Therefore we provide
separate comments for commodities, equity derivatives and fixed income below:

Commodities:

- Agree on a maximum delay of 15 min, but not 5 min. For trades that are manually
  booked (most of our trade reports) 5 minutes seems too short.
- Also, after 3 year we would have stricter rules than the US requirements (15 min)

Equity derivatives:

Equity derivatives markets are highly automated in the execution with near-to real-time
publication from the trading systems. A fundamental point is to at least preserve the current
levels of transparency, as suggested by ESMA in 3.5 – 90 Liquid Markets (pp 132, CP). For
Nordic equity derivatives, electronically executed trades are published in real-time and
negotiated deals traded on-exchange are to be published within 5 min. The proposed delays
are de-facto a step back and would allow trading activity to be conducted at worse conditions
than today’s when it comes to post-trade publication. This can only be detrimental for the
price discovery process and reduce overall transparency, thus negatively impacting end
investors.

Fixed income:

In general we support the use of an implementation period for transparency requirements as
these are entirely new procedures for most OTC traded markets. For trading venues, this
would not be necessary as all trades are usually published real-time, except if a waiver is
applied. But since most fixed income products are traded OTC and are today not subject to
transparency requirements, we support the use of an implementation period.

(1) The period should definitely not be longer than three years, and could potentially
   even be shortened to 2 years.
(2) We accept the use of 15 minutes delay
(3) For some fixed income derivatives, it can be argued that trades have more data to be
   entered and to be ensured that the data are correct, warranting a longer delay. But for
   normal bond instruments, there is no more complexity to handle than for equity trades
   traded OTC. As such, we feel the delay should over time be shortened so it equals
   the delay accepted for OTC equity trades.

<ESMA_QUESTION_CP_MIFID_75>

Q76. Do you agree that securities financing transactions and other types of
transactions subject to conditions other than the current market valuation of the
financial instrument should be exempt from the reporting requirement under article
21? Do you think other types of transactions should be included? Please provide
reasons for your answers.
Nasdaq supports ESMA’s proposal with the exception of securities financing transactions, which we feel should be included in the transparency obligation.

We do not see the rationale behind including all transactions that are not considered price forming (e.g. Give Ups, Exercise of Options etc.) in the post-trade transparency regime. We question what the market will benefit from including these transaction types in the post-trade transparency regime?

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

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

1. We do not support a 48 delay, as that would mean we would see trades delayed and published continuously during a trading day, which could in turn disturb the price formation. Delayed trades published continuously during normal trading hours could - even if these trades would be flagged as delayed - potentially still confuse some market participants, especially in fast markets.

We would rather see a daily fixed time for publication, i.e. EoD or beginning of T+2 trading day. We do realize that some markets operate more hours than morning to afternoon, but most markets do still operate inside normal hours and as such there would be no need for the 48 hour deferral for these markets. They could instead use a fixed time for publication of deferred information.

The fixed time approach is also used for the possibility to grant further deferrals by the NCA, where they instead ask for aggregated data prior to 9:00 CET every day, or on a specific day every week. So we propose that a LIS deferral should instead be deferred until 9:00 on T+2 instead of 48 hours – or shorter.
We also note the in some markets, EoD or early next morning deferrals are already the market standard today. It would be contradictory to the intent with this regulation if it leads to “less” transparency by introducing longer delays.

Nasdaq would also like to ask for a clarification of the use of deferrals by the NCA. It is not entirely clear if the NCA can grant a deferral of precisely 48 hours or grant a deferral for “no longer than 48 hours”, i.e. also a shorter delay, possibly even a fixed time for publication inside the 48 hours as Nasdaq has also suggested above. Nasdaq has a significant preference for letting the NCA decide the needed deferral, as that would also allow the NCA to set deferrals to those currently used in some markets, rather than choosing between on the one hand no deferrals at all, or on the other hand a longer (than current) deferral, which would in fact create less transparency than currently is the case.

(2) We support SSTI equal to 50% of LIS thresholds.

(3) We support the volume measure proposed.

(4) We are OK with pre- and post-trade thresholds at the same sizes, but also accept that in some markets there would be a need to have smaller thresholds for pre-trade in order for liquidity providers not to be subject to too much risk.

(5) We support annual recalibration of thresholds, as that would be the only fair way to change thresholds according to changing market conditions and changes in market structure.

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

(1) deferral period set to 48 hours

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

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

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

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1), provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2), provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on
which the recalculations will be performed (c) irrespective of your preference for
option 1 or 2 and, with particular reference to OTC traded interest rates
derivatives, provide feedback on the granularity of the tenor buckets defined. In
other words, would you use a different level of granularity for maturities shorter
than 1 year with respect to those set which are: 1 day- 1.5 months, 1.5-3 months,
3-6 months, 6 months – 1 year? Would you group maturities longer than 1 year
into buckets (e.g. 1-2 years, 2-5 years, 5-10 years, 10-30 years and above 30
years)?

<ESMA_QUESTION_CP_MIFID_78>

(1) We do not support a 48 delay implemented, as that would mean we would see trades
delayed and published continuously during a trading day, which could in turn disturb
the price formation. Delayed trades published continuously during normal trading
hours could - even if these trades would be flagged as delayed - potentially still
confuse some market participants, especially in fast markets.

We would rather see a daily fixed time for publication, i.e. EoD or beginning of T+2
trading day. We do realize that some markets operate more hours than morning to
afternoon, but most markets do still operate inside normal hours, and as such there
would be no need for the 48 hour deferral for these markets. They could instead use
a fixed time for publication of deferred information.

The fixed time approach is also used for the possibility to grant further deferrals by
the NCA, where they instead ask for aggregated data prior to 9:00 CET every day, or
on a specific day every week. So we propose that a LIS deferral should instead be
defered until 9:00 on T+2 instead of 48 hours – or shorter.

We also note the in some markets, EoD or early next morning deferrals are already
the market standard today. It would be contradictory to the intent with this regulation if
it leads to “less” transparency by introducing longer delays.

Nasdaq would also like to ask for a clarification of the use of deferrals by the NCA. It
is not entirely clear if the NCA can grant a deferral of precisely 48 hours or grant a
deferral for “no longer than 48 hours”, i.e. also a shorter delay, possibly even a fixed
time for publication inside the 48 hours as Nasdaq has also suggested above.
Nasdaq has a significant preference for letting the NCA decide the needed deferral,
as that would also allow the NCA to set deferrals to those currently used in some
markets, rather than choosing between on the one hand no deferrals at all, or on the
other hand a longer (than current) deferral, which would in fact create less
transparency than currently is the case.

- We support SSTI equal to 50% of LIS thresholds.
- We support the volume measure proposed.
• We are OK with pre- and post-trade thresholds at the same sizes but also accept that in some markets there would be a need to have smaller thresholds for pre-trade in order for liquidity providers not to be subject to too much risk.

• We support annual recalibration of thresholds as that would be the only fair way to change thresholds according to changing market conditions and changes in market structure.

<ESMA_QUESTION_CP_MIFID_78>

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

(1) deferral period set to 48 hours

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

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

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

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

<ESMA_QUESTION_CP_MIFID_79>

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

(1) deferral period set to 48 hours

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

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

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

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

<ESMA_QUESTION_CP_MIFID_80>

(1) deferral period set to 48 hours
Nasdaq does not agree with the suggested deferral period of 48 hours for liquid standardised index, stock and stock dividend derivatives. A maximum deferral period longer than end-of-the regular trading session is inappropriate as a liquidity provider is expected to have hedged its immediate risks associated with a trade during the same day and in the regular (most liquid) trading session.

Deferred publication is already today offered by all the main exchanges for equity derivatives in Europe. Given that no one offers a longer maximum deferral time than end-of-day, it is evident that giving NCAs the possibility to grant longer deferrals would only impact transparency negatively.

As to not contradict the principle of supporting current levels of transparency, as expressed by ESMA in 3.5 – 90 (pp 132, CP) for defining liquid markets, Nasdaq encourages ESMA to have a deferral period of end-of-day for all equity derivatives products.

(2) size specific to the instrument threshold set as 50% of the large in scale threshold
The LIS threshold will for regulated equity derivatives markets in practice correspond to the minimum block size threshold, i.e. the minimum size eligible for negotiated transactions (“block trades”) to be formalised by the trading venue and benefitting from a pre-trade transparency waiver.

Since smaller sizes on negotiated transactions cannot be accepted by the regulated market (as they are not able to benefit from a waiver for pre-trade transparency), the LIS threshold will also correspond to the minimum size required for deferred publication on regulated markets.

Since the SSTI threshold however will decide whether a transaction concluded by an SI and its client outside of a trading venue is eligible for deferred publication, OTC transactions in standardised look-a-like derivatives between dealers and their clients will in general benefit from deferred publication at a 50% lower size than the corresponding transaction in an ETD on a regulated market.

This could actually incentivise dealers to trade sizes between the SSTI and the LIS thresholds OTC in order to avoid publishing the transaction to the public immediately. It appears to be an undesirable inconsistency which would counteract the general objectives of increased transparency in the MiFID II/MiFIR framework.

The alternative approach suggested by Nasdaq is to set the threshold for SSTI equal to the LIS.
(3) Volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

The notional amount traded (contracts x size x strike/futures price) as volume measure makes sense and appears reasonable when comparing volumes across different strikes, maturities and underlying instruments.

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

By setting the pre- and post-trade thresholds at the same size, ESMA implicitly states that all negotiated trades on trading venues would be eligible for deferral in asset classes where the NCA has approved deferred publication.

Learning from how current equity derivatives exchanges in Europe operate, it is evident that such an approach would actually counteract the general objectives of increased transparency. In fact, currently, the publication of block trades is deferred only on a small minority of volume, and for the largest transactions in size. The reason is of course that most block trades are already properly hedged at the time of reporting to the exchange, so that a liquidity provider does not need to worry about moving the market if it needs to continue hedging the derivatives trade. E.g. an option’s delta has been hedged immediately following, or simultaneously with, the conclusion of the derivatives trade. This is typically also the criteria exchanges use when deciding on thresholds for deferrals, i.e. at what size is it reasonable to expect that the liquidity provider reporting the transaction would need to continue hedging after reporting it to the exchange, and that the hedging process could be disrupted if the derivatives trade is published to the public immediately? This argument is strengthened by the fact that this is how the levels are currently implemented on the main derivatives exchanges in Europe, i.e. the threshold for deferred publication is set higher than the minimum block size. Typically, the average daily volume in underlying is considered when concluding reasonable thresholds for deferrals.

Therefore:
- **Pre-trade waiver for large in scale orders**: protects investor for unfavourable market price impact of posting large orders in the lit book (i.e. minimum block trade size threshold). Thresholds should be based on pre-trade and post-trade data (e.g. available liquidity, avg. size of on-book vs. off-book trades, etc.).
- **Post-trade waiver for large in scale trades**: protects the liquidity providers from the risk related to securing the proper hedging based on the liquidity of the underlying market. Thresholds should be based on the liquidity available on the underlying market.

Considering the different purposes of this waiver when it comes to pre- and post-trade, it is strongly recommended that the post-trade thresholds should be set significantly higher than the pre-trade.

Therefore Nasdaq is proposing that:
- LIS = SSTI, both for pre- & post-trade transparency (or as close as possible); but
  - LIS/SSTI_{pre-trade} < LIS/SSTI_{post-trade}; which would correspond to current practice of having
    - A minimum block trade size threshold < min size for deferrals.
    - This would result in ETD and SI regime OTC having the same thresholds for pre- & post-trade transparency.

(5) large in scale thresholds
Nasdaq prefers the system with annual re-calculation of the thresholds. Nasdaq is concerned by three major problems in the ESMA proposal for the determination of LIS thresholds for pre- and post-trade transparency waivers:
  1) ESMA proposes only one single methodology and level for both pre- and post-trade LIS thresholds
  2) The level of granularity for the LIS threshold is on instrument type (i.e. index futures, index options, etc.)
  3) The proposed methodology is affected by major flaws
This results in the concrete risk of reduced transparency and incorrect calibration that could actually disrupt price formation. The methodology completely ignores how transactions are concluded in the lit order book on a regulated market, that is – transactions are concluded by matching orders in full or in part.

Also the complete order to either buy or sell an instrument is not necessarily entered in full into the book at once. Instead the frequent usage of execution algorithms in futures markets naturally leads to many smaller transactions. The level of HFT trading activity (typically many trades in small sizes) would also completely bias the outcome in terms of LIS thresholds calculation.

The result of this is that for derivatives such as index futures which are primarily traded in the lit order book, by only looking at transaction by transaction data, the methodology completely underestimates the size of the complete underlying orders resulting in the total volume traded. Everything else equal, a class containing one or several derivatives where lit order book trading is widely adopted, will typically see lower LIS levels than classes where most or all volume is negotiated outside of the lit order book.

Furthermore, a big problem is ESMA’s approach to use the same LIS level for both pre- and post-trade waivers as already expressed in the answer to Q80(4). Using the same methodology for calculating both LIS thresholds per class of derivatives will never be able to suggest realistic levels. It will either need to suggest a reduction in post-trade transparency compared to current levels if prioritizing realistic levels for minimum block trade sizes. Or it might keep current levels for deferred publication, but then risk disrupting price discovery processes by forcing too big orders in to the lit order book.

Adding to all this is the result of ESMA’s proposal to apply one LIS threshold to all derivatives within a class. As seen below in Table 1, this will result in sometimes abnormally large differences between derivatives of the same class, since not all derivatives within that class are equally liquid. If not calibrating for these differences with the appropriate level of granularity, the least liquid derivatives of a class will typically see LIS thresholds which are by far more than large in scale compared to normal market size in that specific derivative.

<table>
<thead>
<tr>
<th>Sub-class ADT ($)</th>
<th>ESMA LIS/ADT</th>
</tr>
</thead>
</table>

36
Impact analysis of ESMA proposal on OMXS30 index future:
The majority of index futures volumes typically trade in lit order books and the suggested LIS threshold is therefore extremely low because of the proposed methodology. Applying the ESMA proposal to OMXS30 futures contracts shows several problems. The proposed LIS threshold of EUR 2 million corresponds to approx. 11 bps of the daily avg. notional traded in 2014 (translating into 130 contracts end of that year), which by no means is large in scale “compared with normal market size”. The current level eligible for deferral at Nasdaq is approx. EUR 87 million (i.e. 5 000 contracts!). It is evident that this proposal would not increase transparency, only risk reducing current levels.

Furthermore, as an exercise, Nasdaq has applied the ESMA proposed criteria #1 and #2 to trade data for the OMXS30 index future to evaluate the LIS threshold for its own index, the outcome of the simulation gave:

| Criterion 1 | 177 241 |
| Criterion 2 | 6 986 338 |

The outcome of 7 M EUR (although very low compared to current 87 M EUR) is much larger than the 2 M EUR proposed for all index futures which highlights the need for enforcing a methodology that would allow for more granular approach when defining the thresholds for index futures. A one-size fits all approach is sub optimal.

Impact analysis of ESMA proposal on OMXS30 index options:
Also index options trade frequently in the lit order book and the impact on LIS levels is the same. OMXS30 options currently are eligible for deferral at the same level as futures – i.e. 5,000 contracts corresponding to approx. EUR 87 million (!) for ATM options as opposed to the proposed 1,5 M EUR level. Interesting to note that in the Nasdaq market during 2014,
only 0.08% of the total notional value traded was deferred by the market participants. Looking at off-book volume, still only 0.21% was deferred.

Last, **looking at all transactions eligible for deferred publication, only 1.43% was actually deferred.**

Deferred publication is obviously **very rarely used** in listed options market, and typically only **needed on exceptionally large sizes.** As such, the suggested levels would only risk reducing transparency – not improve it.

Furthermore, the simulation run by Nasdaq based on ESMA proposed methodology applied to the OMXS30 index options results in:

<table>
<thead>
<tr>
<th>OMXS30 index options</th>
<th>Thresholds EUR</th>
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</thead>
<tbody>
<tr>
<td>Criterion 1</td>
<td>961 169</td>
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<tr>
<td>Criterion 2</td>
<td>13 031 370</td>
</tr>
<tr>
<td><strong>LIS (€)</strong></td>
<td><strong>15 000 000</strong></td>
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</tbody>
</table>

The outcome of 15 M EUR (although **very low** compared to current 87 M EUR) is much larger than the 1.5 M EUR proposed for all index options which highlights again the need for enforcing a methodology that would allow for more granular approach when defining the thresholds for index options.

**Impact analysis of ESMA proposal on Swedish Stock options:**
Looking instead at the Swedish options market where there are significant differences in liquidity between different underlying shares, there are many contracts that would see levels suggesting unreasonably large orders having to be executed in full transparency. For options on Lundin Mining as an example, the suggested LIS threshold would correspond to approx. 388% of the avg. daily notional traded in 2014. Expressed in number of contracts (market convention for listed derivatives) end of that year, this illiquid contract relative to the whole Swedish listed options market, would see the highest minimum block trade threshold of approx. 2,300 contracts.

Nasdaq urges ESMA to request similar data from other main EU venues to validate these observation before finalizing the draft RTS and proposes a number of alternatives to be considered by ESMA that in Nasdaq view could be more effective in defining the pre-trade (1 proposal) and post-trade thresholds for LIS transparency waiver (2 proposals).

**Alternative methods for deciding LIS thresholds**
Nasdaq would like to stress that in light of the ESMA proposed broad classification of liquid products for equity derivatives, sufficiently granular and well calibrated LIS thresholds for pre- and post-trade thresholds are of utmost importance.

A dynamic approach is required to achieve the goal to attract products to regulated multilateral venues and in this sense a high pre-trade transparency threshold often is unhelpful, because the order book cannot absorb such large sizes. Market participants will as
a consequence execute such sizes OTC, without any control related to current prices, whereas regulated multilateral venues would exercise such control.

To the extent compatible with the level I text, the below proposed methodologies for pre- and post-trade LIS thresholds should also leave to a trading venue, under the supervision of its competent authority, the possibility to further calibrate the LIS thresholds for different classes of derivatives. Trading venues shall have the possibility to apply one limit (calculated based on the proposed methodologies) for the whole class, a group of derivatives within such class or calibrating it differently depending on criteria including but not limited to underlying when defining sub-classes. If ESMA decides this sub-classification of derivatives classes cannot be left to trading venues and their competent authority when calibrating LIS thresholds, it is extremely important that ESMA adds at least the underlying index/shares/basket to the set of criteria for the equity derivatives classes in Annex III of RTS 9.

The final methodologies should also leave to the trading venue to express LIS levels in number of contracts/lots in line with current market practices. This makes the thresholds easier to work with, and market participants do not have to consider different thresholds for different options strikes or futures levels for the same derivative.\(^6\)

Trading venues must also be able to consider and treat strategy trades including several sub-classes separately from outright trades. Nasdaq believes it would make sense to let trading venues set the LIS threshold for multi-leg strategy trades equal to the smallest outright LIS threshold of the individual components.

**Alternative method for pre-trade LIS threshold definition for equity derivatives:**
Nasdaq would like to suggest an alternative methodology for concluding LIS thresholds for pre-trade transparency where the LIS level for a derivative sub-class should correspond to a given % of the daily average notional traded in the preceding year for the relevant derivative.

A ceiling level for the LIS should be considered as it gives room for identifying a level where it is no longer possible to use average daily turnover in the derivative itself as an indication of liquidity available in the lit order book, and where execution will be dependent on other factors such as possibility to hedge or combine instrument in a multi-leg trade.

Furthermore, it is suggested that for products falling below a minimum ADT level (e.g. for low liquidity single stock derivatives, newly launched product classes or sub-classes, etc.), the pre-trade LIS threshold is set at fixed minimum level.

Such minimum LIS size could be set equal to the minimum size that market makers must quote or more simply equal to a fixed value of 10 contracts.

This is due to the characteristic of equity options and the various degrees of liquidity formation demand. The purpose is to ensure that for individual product classes with very low levels of liquidity, the impact of enforcing a pre-trade transparency regime is mitigated by a sufficiently low pre-trade LIS threshold.

\(^6\) A proposal on the conversion to number of contracts is provided in Appendix C.
For equity derivatives, the sub-classes are created by adding the underlying to the set of criteria.

Nasdaq is at this time not suggesting firm input parameters and levels as it will require further quantitate analysis and input from market participants. Nasdaq has as an example performed simulations on its own market using a 5% multiplier with a ceiling set at €10,000,000 and a minimum ADT level set to 2 000 000 EUR.

This resulted in a more realistic outcome based on current screen liquidity compared to the ESMA suggested thresholds. For the complete result, please see Appendix A – Pre-trade LIS thresholds.

<table>
<thead>
<tr>
<th>Sub-class</th>
<th>Spot level (SEK)</th>
<th>ADT (€)</th>
<th>ESMA Proposal LIS (€)</th>
<th>in contracts</th>
<th>NDAQ Proposal LIS (€)</th>
<th>in contracts</th>
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</tr>
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<td>VOLVB</td>
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<td>10 contract</td>
</tr>
</tbody>
</table>

Table 2: Nasdaq calibration of pre-trade LIS thresholds for Swedish index & equity derivatives.

Alternative methods for post-trade LIS thresholds for equity derivatives:
Option #1:
Nasdaq would like to suggest an alternative methodology for concluding LIS thresholds for post-trade transparency, where the LIS level for a derivative sub-class should correspond to a given % of the daily average notional traded in the preceding year for the relevant derivative, and with floor and ceiling values.

The floor value represents a common minimum level for the class of derivatives where it is expected that the immediate publication of the trade will not impact any continued hedging.

The ceiling gives room for identifying a common level for the class of derivatives where it is expected that the immediate publication of the trade is always likely to impact or disturb any continued hedging, including but not limited to the price formation in other hedge instruments.
For equity derivatives, the sub-classes are created by adding the underlying to the set of criteria.

Nasdaq is at this time not suggesting firm input parameters and levels as it will require further quantitate analysis and input from market participants. Nasdaq has as an example performed simulations on its own market, using a 50% multiplier with a floor set at €1,000,000 and a ceiling set at €100,000,000. This resulted in a more realistic outcome and closer to current levels compared to the ESMA suggested thresholds. For the complete result, please see Appendix B – Post-trade LIS thresholds.

<table>
<thead>
<tr>
<th>Sub-class</th>
<th>Spot level (SEK)</th>
<th>ADT ($)</th>
<th>ESMA Proposal LIS ($)</th>
<th>in contracts</th>
<th>NDAQ Proposal LIS ($)</th>
<th>in contracts</th>
<th>Current deferral (contr)</th>
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<td>Stock options</td>
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</tr>
</tbody>
</table>

Table 3: Nasdaq calibration of post-trade LIS thresholds for Swedish index & equity derivatives.

Option #2:
An alternative mechanism to define the post-trade LIS thresholds could be based on the ADV of the underlying instrument as adopted by Nasdaq and described in Appendix 12 of its rules and regulation:

Appendix A – Pre-trade LIS thresholds
Nasdaq calibrated pre-trade LIS thresholds compared with ESMA draft proposal for Swedish index and equity derivatives with MM commitments and full trading year 2014.

<table>
<thead>
<tr>
<th>Sub-class</th>
<th>Spot level (SEK)</th>
<th>ADT ($)</th>
<th>ESMA Proposal LIS ($)</th>
<th>in contracts</th>
<th>NDAQ Proposal LIS ($)</th>
<th>in contracts</th>
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<tr>
<td>Index futures</td>
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41
Appendix B – Post-trade LIS thresholds

Nasdaq calibrated post-trade LIS thresholds compared with ESMA draft proposal for Swedish index and equity derivatives with MM commitments and full trading year 2014.

<table>
<thead>
<tr>
<th>Sub-class</th>
<th>Spot level (SEK)</th>
<th>ADT (€)</th>
<th>ESMA Proposal LIS (€)</th>
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<td><strong>Index futures</strong></td>
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</tbody>
</table>
Appendix C – Conversion of LIS Thresholds to Number of Contracts

When converting the LIS levels in notional value to number of contracts, the thresholds are determined using the underlying closing level and FX conversion rate on the last trading day of the year as well as the standard contract size for the sub-class (e.g. 100 shares). The thresholds determined are rounded up to the next:

a. 25 if the threshold value is smaller than 100;
b. 100 if the threshold value is equal to or greater than 100, but smaller than 1,000;
c. 250 if the threshold value is equal to or greater than 1,000, but smaller than 5,000;
d. 500 if the threshold value is equal to or greater 5,000.

To simplify the mechanism further, ESMA could also consider rounding in larger steps the LIS thresholds calculated based on the % of ADT and by that effectively defining a limited number of bands for the pre- and post-trade LIS.
Q81. Do you agree with ESMA’s proposal for securitised derivatives? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

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

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

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

Q83. Do you agree with ESMA’s proposal in relation to the supplementary deferral regime at the discretion of the NCA? Please provide reasons for your answer.
We strongly support the delegated competence to NCAs to allow for supplementary deferral regimes for fixed income instruments traded only at one market and where liquidity changes over time. This would allow local FSAs to take special consideration to local markets with few market participants, smaller currency areas, or very unique trading structures.

However, we are also concerned about the possible “regulatory arbitrage” this could lead to for products traded in several jurisdictions, and would encourage ESMA to monitor the use of this closely.

There is a general concern that for highly liquid and transparent markets, such as equity derivatives, different supplementary deferral regimes could be granted in different countries by the NCAs on the same product classes (e.g. German single stock options) offered for trading by different venues.

In a fragmented landscape of equity derivative products, an NCA could allow real-time transparency (i.e. does not allow deferred publication at all) and another one could even grant an extended deferral period.

Not requiring each NCA to adopt the same level of transparency for the same product, could result in un-harmonized levels of post-trade transparency for end investors, inefficient price discovery and potentially an unlevelled playing field among trading venues. The risk is further exacerbated when combining this with the extremely low LIS thresholds and the long deferral period (i.e. 48 hours) that are being proposed.

Supplementary deferral regimes (except for instruments traded only in local markets as stated above) would go against any harmonization among the current EU regimes and combined with the other proposals (LIS, time of publication and deferral periods) would allow for an even more relaxed regime.

Some of the negative aspects highlighted above could actually materialize even today, but Nasdaq believes that the intention of the transparency regime introduced with this regulation should be to improve the situation and eliminate such risks on equity derivatives. Nasdaq urges ESMA to consider and address these concerns by providing guidance to the NCAs on the application of supplementary regimes on highly liquid instruments.

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

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

Open access rights in EU will make it more common that a derivative product class is traded in several venues across the EU. The market and therefore the liquidity assessment for a product class should be expected to be done by considering all the venues where it is traded.
The liquidity assessment and the temporary suspension of transparency regimes should avoid a situation where one NCA grants a transparency suspension in one trading venue, while the same product class continues to be traded under another transparency regime in place in other venues subject to other NCAs’ decisions. This scenario would be detrimental to the overall transparency of the market for a product class and negatively affect the end investors.

Nasdaq recommends that ESMA considers this aspects when it issues an opinion to the requesting competent authority so as to avoid the above scenario.

As for the rationale for the provision allowing temporarily removing transparency requirements in markets suffering from a temporary lack of liquidity with a view to restoring liquidity, it must be noted that this assumption may not be applicable to all derivative products. Specifically for standardized equity derivatives products (e.g. ETDs), the lack or reduction of transparency typically results in less liquidity. Temporarily suspending transparency could therefore lead to the opposite effects. For these products, suspending transparency should be an exceptional measure that needs to be very carefully considered.

A significant drop in terms of ADT, frequency of trading and average size of trades might well be driven by many other external factors which may have no impact on the availability of liquidity from the market makers (i.e. no impact on availability of spreads and sizes). Any reduction in transparency could instead result in the instrument being traded as an OTC product.

**Thresholds:**

It is proposed that:

Class of derivative: The total volume (notional amount) traded during the last 30 days represents less than 40% of the average monthly volume (notional amount) for the preceding 12 full calendar months.

In quote driven markets (e.g. equity derivatives), the main liquidity criteria is availability of quotes and spreads from market makers, which guarantees the end investor’s ability to trade at fair and publicly available prices as needed. Even if ADT has dropped significantly, this function of the market is still preserved by the presence of market makers and there is no reason to release the transparency regime as this may result in less publicly available liquidity.

Nasdaq agrees with (1). As for (3), the % should be considered as a minimum, given that it uses 12 month lookback period and this could have captured exceptional peaks of volumes and volatility and thus could be biased.

Nasdaq believes that the proposal could be improved by providing further guidance to NCAs when assessing other quality criteria to consider (specifically for equity derivatives):

Presence of MM fulfilling their obligation in liquidity provisions under the market making scheme in place (-> this is a key element in assessing the liquidity and availability of it)
Consider also a longer look-back period than 12 months when evaluating the drop in ADT as to reduce the impact of exceptional peaks in volatility occurred during that time frame which could bias the calculation of the average ADT as opposed to the normal long term history of the product class (e.g. 2-3- and up to 5 years).

NCA shall also consult with the trading venues/s before requesting a temporary suspension.

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

Q86. Do you agree with the articles on the double volume cap mechanism in the proposed draft RTS 10? Please provide reasons to support your answer.

Yes, we agree. However we would like to have further clarity on practical implications of calculating the data during 2016 and are concerned whether the data collected prior to implementation of the Regulation will be accurate and consistent enough across trading venues. We would also ask ESMA to clarify the conversion rate used for transactions executed in a currency other than euro: the ESMA consultation paper proposal defines the rate to be “ECB monthly average rate”, whereas the draft RTS 10 Article 6(4) it is defined as “using the End of Day conversion rate published by the European Central Bank on its website.” Either way, it’s important that the conversion rates to be used can be automatically downloaded from source.

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

Yes, we agree, however we support longer minimum period (5 years) for storage of data than the proposed 2 years.

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

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

General comment on TO and lack of EMIR Clearing Obligation
Nasdaq supports the overall approach considered by ESMA in the application of the criteria and in addition recommends that ESMA includes also volumes from equivalent contracts traded OTC in order to assess whether a product is sufficiently liquid to trade only on venues.

Nevertheless, with regards to the recital RTS 11 – paragraph (5), Nasdaq reiterates the concern about the ability of this regulation to fulfil the 2009 G20 Pittsburgh summit mandate that all standardized OTC derivative contract should be traded on exchanges or electronic trading platforms, where appropriate.

There is a regulatory inconsistency in the combined EMIR-MiFIR framework because of the MiFIR trading obligation’s dependency on the EMIR clearing obligation and the current lack of an EMIR clearing obligation for standardized OTC equity derivatives classes.

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

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

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

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

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

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

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

We do not agree with this proposal. The implementation of such a market impact assessment would cause firms to intercept their orders, snap shot the order book situation and evaluate the impact. At the time when the decision on whether to send the order or not is taken, the snap is outdated and not of relevance anymore. The result would just lead to inappropriate delays in the order flow. We believe that maximum order value and volume are sufficient to prevent potential “fat finger” errors.

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

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

Q99. Do you have any additional comments or questions that need to be raised with regards to the Consultation Paper?
Q100. Do you have any comments on Organisational Requirements for trading venues as set out above? Is there any element that should be clarified? Please provide reasons for your answer.

We generally believe that the requirements for trading venues to operate pre- and post-trade controls should be clarified. The scope of trading activities that will fall under the scope of this regulation is very broad and the conditions for trading will differ significantly. This is acknowledged in parts of the regulation, whereas there are possibilities to make assessments with regards to relevance and proportionality in certain contexts. We believe that it would be relevant to allow such assessments also in this context, given the very different types of products and trading models that will be subject to the regulation.

Definition of disorderly trading (article 2(3b))
We are concerned with and would like clarity on the statement “…cases where orders are not resting for sufficient time to be executed”. Sufficient seems very arbitrary.

Due Diligence (article 8)
Regarding DEA, we generally question the appropriateness of market operators doing a due diligence of SA clients, which in principle resembles the one for members of the trading venue. The market operator is not better placed to do such controls than the member is. Rather the contrary, and it is an unnecessary duplication of a control which risks creating a false picture of safety in the first part of the control.

We would like to see a clarification on the “post-trade controls” that trading venues are expected to perform. Post-trade controls are mentioned without a proper definition.

We questions how reasonable it is for trading venues to assess “experience of staff in key positions within the members” (1.(b)). How are trading venues supposed to mandate experience levels of its member’s staff, especially for venues with a very heterogeneous member base in terms of size and characteristics?

We disagree with the wording in 1.(e) where it states that the due diligence by trading venues of members should “ensure” that the members’ algorithms cannot create or contribute to disorderly trading. Conducting testing and due diligence of the members’ algorithms does not equate to a trading venue’s ability to “ensure” that such algorithms cannot create or contribute to disorderly trading in a live environment. We will return with further concerns regarding the expectations of trading venues to “certify” the members’ algorithms below.

We do not agree with the requirements in paragraph 3. regarding annual due diligence of all aspects in paragraph 1 including conformance testing, staff assessment, business continuity procedures, etc. This would impose a very onerous and time consuming obligation on the
trading venues. We advocate a risk-based approach in respect of identifying compliance breaches within member firms.

Further, we would like to have clarity of the requirement in paragraph 3 to annually verify that members remain as investment firms, since being an investment firm is not a requirement for some membership categories at our trading venues. We are assuming that this requirement is only applicable for membership categories where investment firm status is required.

**Prevention of disorderly trading conditions (Article 19)**
This article states what controls trading venues shall implement to prevent disorderly trading conditions. Among such controls are pre- and post-trade controls. Pre-trade controls are typically designed to prevent disorderly trading conditions, but that does not necessarily apply to post-trade controls. Post-trade controls upheld by investment firms measure i.a. risk exposure and trading restrictions can be initiated based on levels of such risk exposure. Trading venues typically do not operate post-trade controls of that sort, i.e. controls that would prevent a participant from engaging in further trading if certain net or gross volume thresholds have been reached. We do not believe that ESMA proposes such controls to be upheld by trading venues, but if so there should be clarifications with regards to the scope, nature and purpose of such controls. If the post-trade controls expected by trading venues are in fact about monitoring of trading, that could be made clearer.

**Pre-trade controls (article 21)**
In 1.(a) we would like to have clarity on how price collars should be applied “over a specified period of time”. While it is reasonably clear how price collars can be applied on an order-by-order basis it is not so in our opinion for the latter scenario.

We fail to see the value of applying a “maximum order volume” (1.(c)) for shares, especially if “maximum order value” (1.(b)) is already applied. A volume limit for shares would need to be applied individually per order book which would create operational risks, e.g. in connection with corporate events. We suggest that the requirement is reworded so that pre trade controls are implemented either with an order value limit or an order volume limit as applicable per traded security, since some derivatives may be better suited to lot limits whereas shares and other securities are better limited by order value.

We are concerned with the wording in 2.(b) where it states that “order submission is entirely stopped once a limit is breached”. In its current wording it appears to say that all orders for a member should be stopped if one individual order breaches a pre trade control. We are assuming that the particular order that breaches the pre trade control should be stopped, and not the firm’s entire order flow.

<ESMA_QUESTION_CP_MIFID_100>

**Q101. Is there any element in particular that should be clarified with respect to the outsourcing obligations for trading venues?**
We generally agree with the requirements regarding outsourcing.

Q102. Is there any additional element to be addressed with respect to the testing obligations?
Testing of members’ algorithms (article 11)

First, we believe that the heading of Article 11 of the draft RTS should be changed. The heading currently says "Testing the members’ algorithms to avoid disorderly trading conditions". While the draft text of the article makes clear, as expected, that trading venues should require and enable members to test their algorithms, the draft heading indicates that the responsibility for testing should rest with the trading venue. We believe that it is very important that delineations of responsibilities are made clear and we thereby think this heading should be changed.

Further, while we agree that trading venues should require its member firms to test its algorithms in separated and dedicated test environment that replicates the functionality of the production environment prior to live deployment, we generally think that article 11 sets expectations on the trading venue’s ability to “validate” or “certify” the members algorithms that are unrealistic and will be practically difficult or impossible to implement. We advocate that pre trade control requirements on market participants and to a certain extent pre-trade controls of trading venues are better tools to prevent disorderly trading.

Article 11(2) states that trading venues “shall design a set of appropriate scenarios … reproducing live environment conditions including disorderly trading circumstances”. The second sentence states that the scenarios should be “pre-determined” and should be “as close to market situations as possible”. The paragraph as a whole poses a number of questions and major concerns:

a) It is virtually impossible to implement scenarios that reproduce live environment conditions, especially in markets such as cash equities with fragmented liquidity. Secondly, reproducing a live environment requires that market participants interact with each other, not having one member testing against a predefined scenario. A trading venue could potentially replay a trading day, with various types of scenarios, in its test environment and enable a member to interact with that order flow but that would fall very short of replicating and reproducing a “live scenario”.

b) The scenarios cannot have a predefined outcome if the market participants can be expected to interact with the order flow.

c) Trading venues have very little insight into the mechanics and strategic objective of the algorithms deployed in the markets so designing “appropriate scenarios” to test these algorithms is a tall order to put on the trading venues.

d) Scenarios “including disorderly trading conditions” needs to be better defined.

e) Test environments of trading venues are generally openly accessible to all market participants, to replicate the live environment and enable interaction between market participants. That further complicates the ability to test “predefined scenarios” in a controlled environment as other market participants may react and interact in ways that disturb the testing scenario.

Article 11(3) states that trading venues shall provide a “self-certification front-end” to permit unusual scenarios to be simulated. This also raises a number of questions and concerns:
a) What is a self-certification front-end? It needs to be much better defined

b) The word “self-certification” appears to suggest that a market participant can “certify” its algorithms with the trading venue. If so, we do not agree. We think that the onus to certify its algorithms should be on the market participant.

c) The requirement appears to suggest that market participants should be able to run a selection of unusual scenarios through some sort of self-service menu in each trading venue’s test environment. How would that work in a test environment accessible by all market participants at the same time, or does the requirement imply that each participant should have a ring fenced test environment with each trading venue where they do not interact or disturb each other? The latter would contradict the ambition to replicate live environments.

As mentioned above, we believe that the requirement is poorly defined and overstates the expectation on trading venues to validate or certify market participants’ algorithms against potentially disorderly trading. We think that trading venues should require its participants to test its algorithms in suitable test environments provided by the trading venue that replicate live functionality and that trading venues should impose requirements on pre-trade controls to prevent disorderly trading. We do not believe that it will achieve the desired results if trading venues are expected to certify its participants’ algorithms. We believe that such requirement would provide a false sense of comfort and that the responsibility to validate its algorithms must ultimately remain with the market participant. That is also in line with the proposed requirements on DEA providers and its users in article 23 and 24. The current requirement in article 11 does not at all seem to consider algorithms deployed by DEA users of member firms, only algorithms implemented by the members, which only account for a part of the algorithms deployed on the different trading venues.

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

Pre-determination of the conditions to provide direct electronic access (Article 23)
We would like clarification on 1.(b) regarding the specific due diligence that member firms are expected to undertake as a requirement from the trading venue. Other than including the items as listed, e.g. “appropriate financial resources”, “sufficient knowledge ...”, etc are trading venues expected to further specify these requirements and quantify the appropriate financial resources, etc? If so, we do not think that it is an appropriate role for a trading venue.

From what we can tell, algorithms deployed by customers of member firms and submitted through DEA appear to be covered through pre-trade controls and monitoring responsibilities of the DEA provider, and to a certain extent the trading venue. While we agree with this approach, we notice the difference and inconsistency in approach compared to article 11 and its testing requirements of member firms’ algorithms. Is there a reason that the requirements in article 11 are not sub-delegated to clients of DEA providers?

ESMA has proposed in paragraph 3. that trading venues should make prospective Sponsored Access users subject to a specific authorisation process, with the same...
requirements as the authorisation process for members. We believe that trading venues should not be made responsible for any due diligence of clients of members. Trading venues should, as is also stated in the proposal, require that member firms shall perform due diligence with regards to clients and if clients considered for Sponsored Access should be subject to a more extensive form of due diligence ESMA could make clear its expectations around that. There should be a clear reason for implementing an additional level of controls and we do not see such reason in this context. The trading venue would not be in a better position to evaluate the appropriateness of the client, whereas duplicating part of the control mechanism would in this context reduce efficiency without adding value.

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

Yes, we are generally fine with ESMA's approach and the draft RTS.

Nasdaq understands the intent of the regulation to establish a structure and framework for conducting liquidity provision trading activity in assets that traditionally are not quote driven and secure the predictability of the apparent liquidity.

However, Nasdaq is firmly convinced though that no further regulation is required when it comes to equity derivatives or cash equity markets. Equity derivatives markets are quote driven by definition and function based on well-defined and proven market making regimes that do not need further regulation. In cash equity markets the order books are also usually supplemented by market making.

Trading venue responsibility to detect market making activity

Nasdaq is of the opinion that it should be the investment firm’s responsibility to comply with the proposed regulation and pro-actively notify the trading venues that it is or intends to engage in market-making trading activity to a level that it would entitle them to join the market making schemes and enjoy the related incentives. This would be more efficient and less costly for the entire financial community (investment firms and trading venues) than having trading venues investing resources and systems to investigate and analyze the trading activity (that per-se is actually valuable to the market) and engage firms to sign them up as market makers.

Especially in equity derivatives markets that are fundamentally quote driven, the whole approach of detecting and chasing liquidity provision activity to the point of actually fining investment firms or preventing them from trading if they do not join a market making scheme seems punitive and counterintuitive.

Observation period for detecting MM activity:

An observation window of 1 day for detecting market making activities for the duration of more than 30% of the trading hours, is a very short and unpractical to implement as it would require a real-time monitoring capability for detecting market-making like activity on own account potentially disguised under the overall flow of a firm (i.e. including also client flow).
Should ESMA still propose that trading venues are responsible for detecting market making activity, Nasdaq suggests that an assessment over a longer period is preferable for processing and analyzing the data required and it is suggested to have at least 1 (one) month observation period. That is, there should be a more systematic liquidity provision activity (than just one day) carried out by a firm outside an MM agreement to require the trading venue to act on to secure the predictability of the apparent liquidity.

**Incentives for Market making under stressed market conditions**

Nasdaq does not agree with the proposals in the CP and RTS 15 –III – article 8-1 (iii) “Incentives offered in stressed market conditions to compensate for the additional risk taken by investment firms engaged in market making”

This could raise claims from market makers that could be very costly for trading venues. It is very risky to use the word compensate as effectively the level of risk at which MMs operates in such condition can be very different from firm to firm and be dependent on many factors such us current market exposure, efficiency of the specific quoting and hedging techniques adopted, technical and personnel capabilities, etc. The perception of what could be a compensation can be therefore very subjective.

**Definition of Stressed Market conditions:**

Nasdaq disagrees with the proposal (a) in RTS 15 – Chapter 1- Article 1 (8) Stressed Market condition.

“Situations where a significant change in the number of messages being sent to and received from, the systems of a trading venue” materializes may not per se represent a stress situation for the market and its participants.

Significant changes in number of messages and transactions are natural as a result of volatility changes, macro and corporate news, specific situations such us roll weeks, etc. All market participants and operators of trading venues should size their trading systems to cope with peak conditions. Therefore, if system load metrics reach levels of concern, providing incentives to participants to keep on quoting or even increasing their quoting (e.g. to gain more benefits), might only worsen the situation (i.e. snowball effect) leading to an instable trading environment. As long as these metrics are within the system capacity of the trading venue, they should not be of a concern and if they instead reach levels that are of concern, such situation should be considered as one of the “Exceptional Circumstances”.

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

Nasdaq understands the intent of the regulation to establish a structure and framework for conducting liquidity provision trading activity in assets that traditionally are not quote driven and secure the predictability of the apparent liquidity (e.g. cash-equity markets).

The trading venue should be able to decide the level. The proposed threshold of 30% is in our opinion much too low and could have adverse consequences. There are many reasons
why a firm may meet such criteria only on one day but not in general, for example due to a particular increase in activity in a stock on one day due to an announcement. It should in our opinion be set taking the percentage of the market making requirement in careful consideration, including over a longer period of time than one day. If a firm would choose to quote prices during 30% of the day, the proposed regulation would force the firm to either increase its level of activity to cover 50% of the trading day or not quoting all. That could potentially contribute to an increase in liquidity or lead to the opposite result. The proportionality of such rule could be questioned. We believe that the purpose of this part of the regulation is to place requirements to perform market making on firms that by choice would engage in market making activities, whereas there should be harmonization between the thresholds for qualification and the threshold of the requirement.

Further, for equity derivatives, Nasdaq is firmly convinced that no further regulation is required. Such markets are by nature quote driven, supported by liquidity providers based on well-established and proven markets making practices and agreements that already guarantee the predictability of liquidity. The ESMA proposal would instead force all liquidity provision activity to be conducted exclusively under an MM agreement and related obligations could have a negative impact on the current levels of liquidity (especially the most vulnerable liquidity, i.e. on-screen), as some market makers may not be willing to commit to strict obligations to continue the free-will liquidity provision that they may be conducting today on product classes that are outside of the scope of their existing market making agreements. This effect might be particularly severe in smaller or regional markets and/or less liquid products or newly launched products.

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

For equity derivatives markets, Nasdaq believes that a minimum of 50% presence in the market is quite high. We would welcome a lower threshold which still provides flexibility to the trading venues to set a higher threshold relevant to its market.

In equity markets, the obligation should be higher than 50 % in order for the purpose of the market making to be satisfied. The trading venue should also be able to decide on a higher level.

However, we are generally concerned with how the proposed 50% will be monitored and we request further clarity on the exact nature of this 50% participation, i.e. is it specifically 50% at BBO or 50% participation on the order book.

**Q107. Do you agree with the proposed circumstances included as “exceptional circumstances”? Please provide reasons for your answer.**
Nasdaq would seek clarification from ESMA on exceptional circumstances due to political and macroeconomic events, to understand if terror attacks on a large scale and impact are to be included and/or considered as an act of war.

Furthermore Nasdaq suggests that “System and operational matters that imply disorderly trading conditions” is further detailed to include “significant changes in the number of messages being sent to and from, systems of a trading venue” as these conditions could lead to an instable environment.

Also, a market maker may need to temporarily withdraw from its quoting obligations. In particular, ESMA has not recognised the fact that a firm may be prohibited from dealing on its own account when connected to the offeror or offeree in relation to a merger or acquisition situation.

We also believe events that are specific to one or some stocks should also be included as an event should not have to affect all financial instruments on the market in order to be deemed exceptional circumstances.

In addition we are of the view that this should be a non-exhaustive list in order to provide trading venues with some flexibility in determining when such a situation has arisen on their markets.

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

We agree that general caps should not limit the number of market makers. However, incentive caps are part of existing market maker incentive schemes, in the sense that market makers frequently demand trading venues to limit the number of market makers accessing the highest level of incentives.

- RTS 15: Recital 13 should be amended: “This Regulation bans capping the number of members that may take part in a market making scheme. However, nothing prevents trading venues from establishing systems whereby only those firms providing a certain degree of quality in the liquidity provided, measured in terms of presence, size, volume and spread, can access the incentives.

A three month pre-announcement is operationally inefficient and it will not be possible for trading venues to efficiently handle the high number of required market making schemes for its products.

- RTS 15 Ch. III Article 9(2) should be amended to read: “Any proposed material changes to the terms of the market making scheme shall be communicated to the existing participants not less than one month three months ahead of the proposed effective date. A one month preannouncement also applies to new market making schemes. This shall not preclude a trading venue from amending certain quoting parameters for particular instruments due to changes in trading conditions of
those instruments within a shorter timeframe provided that sufficient notice is provided to the market makers in those instruments.”

ESMA proposes that “Trading venues not allowing for or enabling algorithmic trading through their systems or a specific segment of their systems shall not be required to establish market making schemes…” Such regulation puts trading venues with public, electronic order books at a competitive disadvantage over trading venues that do not make algorithmic trading available through their systems.

However, in absence of their own publically transparent price finding, such matching systems or TCPs will utilize end of day settlement prices or centralized clearing from trading and clearing venues, without the necessity of operating and maintaining liquid markets with respective market making schemes and incentives.

- RTS 15 Ch III Article 7 should be amended to remove the exemptions for trading venues that opt not to offer algorithmic trading.

Adding volume to the dimensions of effective liquidity contribution would further ensure proportionality of incentives under RTS 15 Chapter III Article 9 point 5, as liquidity contributed by market maker quotes at best leads to trade executions that is reflected in traded volume. Restricting proportionality by scoring models bear the potential consequence that up to 2/3rds of market makers will not have access to these rebates and over time may reconsider operating liquidity providing strategies. This also raises barriers to entry such that only the market makers with the fastest systems and biggest balance sheet will remain active in the market.

- RTS 15 Ch III Article 9 point 5 should be amended as follows: “The incentives offered under the market making scheme have to be proportionate to the effective contribution to the liquidity in the trading venue measured in terms of volume, presence, size and spread. In particular, those incentives shall promote the presence of members engaged in market making agreements in case of stressed market conditions.”

Regarding trading venue capacity, we consider that ESMA’s approach does not allow trading venues to downsize their capacity even when drivers of trading system capacity requirements, for example the number of instruments traded, decrease. We recommend differentiating between continuous load and peak load, defining trading venues’ capacity (see RTS Chapter III Section 3 Article 12). Peak loads occur rarely and short-term and shall be handled by the systems with enough headroom above (but less than twice ever). For an arithmetic average twice on p.a. yearly basis the load ever reached could be reasonable, but the possibility of downsizing the relevant infrastructure components should be allowed as well. For the purpose of downsizing opportunities, a reasonable baseline and procedure should be defined. RTS 14 Chapter III Section 3 Article 12 should be amended: 1. Trading venues shall ensure that their trading systems have sufficient capacity to accommodate at least twice the average of the highest number of messages per second and per value on a yearly basis as the maximum recorded on that system in one day (historical peak).

Alternatively to the proposed trading system capacity baseline definitions, it might be a feasible approach to think about Service Level Agreements between trading venues and their
members and participants. The procedure to inform the NCA sounds feasible together with the statements given in the draft regulatory standards.

Q109. Do you agree with the proposed regulatory technical standards? Please provide reasons for your answer.
We believe that there should be a floor included for market makers with regard to OTRs as they will have very high OTRs due to the nature of their business.

Regarding the class of instruments to be subject to certain OTR levels, we would consider that ESMA should take into account the liquidity classes that are also included in the tick sizes proposal.

For equity derivatives products, that are by definition quote driven and whose existence is based on the key role played by MM, and also in light with the ESMA proposal in 4.3 that any MM like activity is to be conducted under the obligations set forth by a MM agreement, imposing OTR limits is just disruptive for a proper MM activity.

Therefore the ability to derogate from the OTR regime for market makers as proposed in RTS 16-(7) is a key element for the well-functioning of quote driven markets.

**Formula for calculating the maximum ratio of unexecuted orders to transactions:**
The maximum allowed OTR should be based on an assessment related to trading venue’s and members’ system capacity, latency problems, excessive market data flows, etc., to safeguard orderly and sound trading activity. The proposed method does not specifically focus on any of these aspects as it is just based on the actual volumes seen in the previous 12 months.

With the proposed approach based on a consolidation of all members’ contribution (i.e. a sort of average of all participants OTR is calculated), there will always be some participants that will be on the edge of exceeding the max OTR ratios irrespective of whether their OTRs are excessively high in absolute terms and pose or not any issue in the well-functioning of the trading venue.

Prolonged periods of low volatility could bias the calculation of max OTR ratios which could then result in the ratios being excessively limiting in case of increased of volatility for firms with higher OTR profiles.

Furthermore, the proposed model does not consider the implications related to increased adoption rate of execution algorithms (e.g. VWAP, TWAP, etc.). A broad adoption of such technology by one or more market participants might put them in breach of the max OTR values (for no real reason) established based on the previous 12 months. The same situation could arise if a trading venue traditionally based on predominantly retail and/institutional flow, sees the entrance of more firms engaged in automated trading strategies, these could be immediately in breach of the max OTR.

With this proposal, an investment firm engaged in automated trading activity on a product class on multiple venues with the same OTR profile, could also end up being in breach in some venues and not in others simply because of the different OTRs profiles of the members participating on each venue.
For these reasons, Nasdaq proposes that trading venues shall be allowed when determining the maximum values, to mark-up the value calculated with the proposed formula by a given % (30%) to allow for the flexibility required to address the above scenarios.

Q110. Do you agree with the counting methodology proposed in the Annex in relation to the various order types? Please provide reasons for your answer.

Q111. Is the definition of “orders” sufficiently precise or does it need to be further supplemented? Please provide reasons for your answer.

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

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

Determination of the maximum OTR should be consistent and changes should be made only if there are strong arguments to change it, therefore time interval of one year is sufficient.

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

We agree with monthly monitoring and are of the opinion that only continuous trading should be included, as excessive orders in auction do not cause any issues and the number of transactions executed in the auction is not known in advance. If auctions are included it may have impact to liquidity of auctions.

Q115. Do you agree with the proposal included in the Technical Annex regarding the different order types? Is there any other type of order that should be reflected? Please provide reasons for your answer.
Yes, we agree, but we believe illiquid instruments and market makers should have less stringent treatment. Quote transactions should be excluded as they specifically serve the purposes of liquidity provision and typically are allowed only under an MM agreement.

Also, we believe the Annex referred to should be included in the final RTS. If it is not, ESMA should in the RTS ensure that all trading venues treat message counts in the same way, i.e. the same number of orders counted for each quote.

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

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

Q118. At which point rebates would be high enough to encourage improper trading? Please elaborate.

Q119. Is there any other type of incentives that should be described in the draft RTS?

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

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

Q122. Is the distinction between volume discounts and cliff edge type fee structures in this RTS sufficiently clear? Please elaborate
Q123. Do you agree that the average number of trades per day should be considered on the most relevant market in terms of liquidity? Or should it be considered on another market such as the primary listing market (the trading venue where the financial instrument was originally listed)? Please provide reasons for your answer.

Q124. Do you believe a more granular approach (i.e. additional liquidity bands) would be more suitable for very liquid stocks and/or for poorly liquid stocks? Do you consider the proposed tick sizes adequate in particular with respect to the smaller price ranges and less liquid instruments as well as higher price ranges and highly liquid instruments? Please provide reasons for your answer.

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

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

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

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

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

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

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

Q132. Do you agree with the proposed regulatory technical standards?

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

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

<ESMA_QUESTION_CP_MIFID_134>
Nasdaq supports ESMA’s approach to detection and correction of errors and omissions by DRSP. We also support that CTPs are not required to detect errors or omissions in the information they received from ARMs and trading venues. We consider that it is not appropriate to have wide scale reconciliations but to have straightforward reconsolidations only for reporting entities.
<ESMA_QUESTION_CP_MIFID_134>

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

<ESMA_QUESTION_CP_MIFID_135>
We do not agree with imposing hard maximum recovery times. In extreme situations, they may prove to be inappropriate whereas DRSPs will make their best efforts to resolve matters as soon as possible in view of commercial incentives to provide a resilient service. Transparency of the continuity arrangements towards the customer appears more appropriate.
<ESMA_QUESTION_CP_MIFID_135>

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

<ESMA_QUESTION_CP_MIFID_136>
We support ESMA’s proposal that DRSPs (incl. APAs) should be able to establish their own opening hours.
<ESMA_QUESTION_CP_MIFID_136>

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

<ESMA_QUESTION_CP_MIFID_137>
We generally agree with the draft technical standards with the exception of the following aspects:
- We consider that CTPs should be able to offer additional services, as restricting this possibility risk deterring possible candidates to operate a CTP. We therefore suggest adapting Recital 22 and art. 18 of RTS 20 so that CTP may perform additional services except those services that would affect the quality or availability of the tape if such a situation cannot be adequately mitigated.
- As regulated markets have extensive experience in data processing and publication and are already appropriately regulated and supervised in this respect, we consider that imposing additional administrative burdens would be unnecessary and disproportionate. We therefore recommend amending RTS 20 to make clear that when DSRPs are already approved and
supervised as a trading venue, requirements of articles 9 and 10 are deemed to be complied with.

Q138. Do you agree with ESMA’s proposal?

The approach proposed by ESMA should be reconsidered, adopting a more quantitative criteria in assessing whether or not there are sufficient levels of liquidity for determining whether the venue should be included by the CTP.

The proposed three month timeline is not adequate and risks preventing the emergence of CTPs in the market. Nine months would be a more workable timeline, both for establishing the necessary infrastructure (e.g. for software development and testing) and to estimate whether the new trading venue has sufficient liquidity to be included by the CTP.

We also oppose the ESMA cost-benefit analysis on this issue which states that there is zero compliance cost to fulfil these requirements.

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

Nasdaq agrees with ESMA’s proposal for “machine readable”.

However, we do not agree with ESMA on using free open source software only or on a 1 month only notice period. This is because the source code is not always openly shared due to the fact that software contains certain assets as well as IP rights. Moreover, regarding the notice period 3 month advance notice is the market standard (rather than one month) while consolidators usually appreciate even longer advance notices where possible.

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

We agree with the ESMA proposal.

Q141. Do you agree that CTPs should assign trade IDs and add them to trade reports? Do you consider necessary to introduce a similar requirement for APAs?

Yes, we agree there should be a trade ID. But this trade ID should be issued by the APA and not the CTP. The CTP would then in turn disseminate the original trade ID with other information regarding the trade.

Q142. Do you agree with ESMA’s proposal? In particular, do you consider it appropriate to require for trades taking place on a trading venue the publication time as assigned by the trading venue or would you recommend another timestamp (e.g. CTP timestamp), and if yes why?
Yes, agree.

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

With regard to the timestamp accuracy of an APA we would suggest that accuracy to the second is sufficient (regardless of the trade being executed on an electronic system or not). This is to avoid confusion to the market (some trade reports would have an accuracy to the second and others an accuracy to the millisecond) and also because an APA is only relaying the information received by other sources and, therefore, the latency introduced by sending the report from the original source to the APA and the latency the APA itself will introduce so as to comply with the requirements for the detection of errors would make the accuracy to the millisecond useless.

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

Nasdaq points out that the MMT proposal has existing standards which need to be used to flag the source of a trade. We consider that the MIC code is the best tool for this standardisation and that all trading venues must have a MIC code in place in order to make it more practical to consolidate data.

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

Nasdaq disagrees with Article 2 of the RTS and believes that ESMA must delete it.

Level of disaggregation required

We note that any unbundling of current data packages that must be undertaken by data providers will increase costs. This should also be taken into account in relation to the Technical Advice on “reasonable commercial basis” for market data.

The objective of data disaggregation is to offer the most appropriate data packages to some more or less homogeneous groups of data consumers. Therefore, we propose that packages be unbundled around the three main groups of activities traditionally present in investment banking:

- Equities
- FICC (Fixed-Income, Currency, Commodities)
- Derivatives
Any further disaggregation of derivatives products is too granular and would face a too limited audience. Only very few retail investors would subscribe to these derivative packages.

If all the regulated markets are to disaggregate on all of the different levels suggested by ESMA, it will be a massive increase of number of data packages in Europe. It will be difficult as well as costly for vendors to handle the massive number of data packages and this will increase costs for end customer. In addition, in order to technically deliver the data packages on all required levels, new functionality will have to be added to exchanges’ distribution platforms, as exchanges in general including Nasdaq, do not offer this functionality today. This will be very costly to implement and operate.

We also stress that if trading venues were forced to disaggregate but there was no requirement for vendors to do the same, then vendors would most likely just re-bundle the data. It is important to note in this respect that 90% of trading venue data is consumed by data vendors and not directly by trading participants.

We believe that ESMA must consider further the customer demand for data streams and consider exemptions for trading venues to provide a data package where there is not sufficient demand to justify the cost of providing this data stream. Moreover, this must be consistently applied across the European market.

Currently, exchanges disaggregate their pre and post trade data. However we do not support the introduction of an obligation to disaggregate pre- and post-trade data by asset class as this should be left to the discretion of the venue in response to consumer demand. Especially for less liquid markets, such an obligation represents an additional burden which we do not consider justified in the light of the lack of customer demand for this level of disaggregation.

**Unintended consequences of increased data packages**

Greater disaggregation will not only result in significantly higher costs in distributing market data, but it will also lead to confusion among investors who no longer can rely on receiving all the relevant market data. As the administration of market data already represents a burden for trading venues, vendors and end users, anything which adds to this burden is unhelpful and does not serve the purpose. In our view, market forces should decide on the level of disaggregation. Unless the regulator is in the position to control the way data vendors proceed with the data, there is no point in imposing such an obligation on trading venues which might as well then be ignored by data vendors.

In addition:
Trading venues, data vendors and brokers would have to massively enlarge their administration operations to manage access rights. This would, as a consequence, add to the cost of market data.

Categorising in an unambiguous manner a very large universe of securities according to hard scientific criteria is a burdensome task. Specialised vendors and proprietary standard owners (ICB, GICS) charge some substantial amount of money for this type of activity.

While the classification of securities is advanced for plain-vanilla equities, it is fragmented, incomplete and not widely accepted for other asset classes.

Disaggregation based on multiple securities classification standard simultaneously will trigger confusion and costly bug fixing considering the large complexity of the market segmentation matrix.

Moreover, disaggregation that separate large cap and SMEs like the proposed requirement to disaggregate on the basis of membership in a major index will result in a loss of visibility for SMEs as data vendors are unlikely to want such data separately. This will create a barrier for SMEs to access market financing in total contradiction with the stated goals of the Capital Markets Union.

Furthermore, the disaggregation by trading venues, as well as possible re-aggregation by vendors will add latency giving an edge to HFTs that take the full range of data directly from the primary sources.

Q146. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that you envisage in case of implementation of the proposal.

We agree.

Q147. With the exception of transaction with SIs, do you agree that the obligation to publish the transaction should always fall on the seller? Are there circumstances under which the buyer should be allowed to publish the transaction?

We agree.

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

We agree in general with ESMA’s approach to the CCP’s ability to deny access. Our main concern is to ensure that the framework governing access rights is as objective and exhaustive as possible. Our concern is that subjectivity and open criteria will provide CCPs with an unreasonable opportunity to arbitrarily deny access, which will threaten the effectiveness of the provisions designed to facilitate the implementation of Level 1.

In particular we consider that:
(1) In relation to Art 3.2, the types of risk should be exhaustive to provide certainty and objectivity. We therefore suggest that ESMA deletes “types of” and “among others”.

(2) In relation to Art 3.2.(a), that denial of access for incompatibility of IT systems of CCP and trading venues needs to be qualified. It is our view that in the sophisticated markets within which we operate, in practice it should be possible to rectify connectivity issues during development. Accordingly, this should be a reason to deny access only if the incompatibility cannot be remedied in co-operation with the trading venue.

(3) In relation to Art. 4.1(c), ESMA should retain a restrictive definition of “legal risks” (Art. 4.2(a) & (b)) since expansion beyond the two scenarios envisaged by ESMA, or indeed by taking a broader approach, is likely to lead to CCPs finding too many opportunities to arbitrarily deny access, at the expense of Level 1 expectations.

(3) In relation to Art. 4.1(d), it is not clear that the incompatibility of CCP and trading venue rules is likely to ever be an issue in practice, but we support the inclusion of this since it re-enforces an overarching principle that both trading venues and CCPs must be able to regulate the markets that they operate.

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

We agree that the reasons for denial by a trading venue should be fewer and agree with the approach proposed by ESMA, except that:

(1) In relation to Art 5.2 we do not expect in practice (as mentioned also in our answer to Q148) ‘incompatibility of CCP and trading venue IT systems’ to be an issue in these sophisticated markets. Any such issues should reasonably be rectified when developing and establishing the connectivity.

(2) In relation to Art 6(b), (and as mentioned in our answer to Q148) we do not consider that the incompatibility of CCP and trading venue rules is likely to ever be an issue in practice.

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

We agree with ESMA’s assessment.

Q151. Do you agree with the elements of the draft RTS that cover an CA’s ability to deny access? If not, please explain why and, where possible, propose an alternative approach.
We agree generally with the approach proposed by ESMA. As mentioned, our main concern is to ensure that the framework governing access rights is as objective and exhaustive as possible, which applies also to the rights of competent authorities’ (CA) ability to deny access. This is to ensure the effectiveness of provisions and to facilitate implementation of Level 1 across the Union.

In particular we consider that:

1. In relation to Art. 7(a), denial by a CA due to access threatening the smooth and orderly functioning of markets or adversely affect systemic risk should not be valid if a party would only be ‘unlikely’ to meet legal obligations. We consider that the test should be more objective and certain, and should for example be replaced with “will not”.

2. Further in relation to Art. 7(a), we consider it is necessary to more narrowly define what ESMA considers to be ‘legal obligations’, which we think should read ‘regulatory obligations’, since it is regulatory obligations that CAs have the responsibility to consider and not all possible legal matters.

3. In relation to Art. 7(b), we consider that ESMA should clearly define the meaning of ‘wider negative impact on the market’, to more clearly align it with CA obligations to ensure the market is ‘orderly’.

4. In relation to Art. 7(c), we re-iterate the points made in relation to Art. 7(a) that the ‘legal obligations’ should read ‘regulatory obligations’.

We agree that the test to be applied by CAs should be cumulative to ensure the standard for denial by a CA is high. This is consistent with the principle outlined by ESMA in the Consultation Paper, that access arrangements are purely a bilateral matter between Trading Venues and CCPs. This is an approach with which we strongly agree.

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

Yes, we agree with the conditions listed in Art. 8.

Q153. Do you agree with the elements of the draft RTS that cover fees? If not, please explain why and, where possible, propose an alternative approach.
Yes, we agree with the provisions in Art. 9. It is important to us that fees charged by CCPs are justifiable, reasonable and non-discriminatory. Transparency of fee schedules is important to ensure non-compliance and discriminatory treatment is evident to the market as a whole, which will encourage fair and reasonable behavior.

Q154. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that do you envisage in case of implementation of the proposal.

ESMA’s approach is broad but on balance we think it should work. We do consider however, that the determination of which products are economically equivalent should be certain and should not be determined by the CCP, as is currently envisaged by Art 11.1. The CCP can also introduce changes to models and parameters to the clearing of economically equivalent contracts as decided by its risk committee. We consider that this is not sufficiently objective, and at the very least the assessment considered by the risk committee should be transparent to the trading venue.

We also consider that the exemption in Art 12.2 should be more restrictive, since the drafting in our view provides an opportunity for arbitrary discrimination. For such economically equivalent contracts, it is important that the same margining and collateral methodologies are applied irrespective of the place of execution. We questions whether there is also value in aligning the reference to economically equivalent contracts as contracts with the same “risk characteristics”, thus benefiting from consistency with the EMIR RTS, Art 24.4.

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

Yes, we agree.

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

We agree that benchmark data can be required for the purpose of trading and clearing. However, as each product is different, the information requirements should be agreed upon by both parties as a commercial relationship. Outlining the specific information needs in the RTS which can cover all potential products may cause a breach of data distribution policies
and an unforeseen cost burden. As this will be a commercial relationship between the trading venue or CCP and the benchmark provider, the data needed should be negotiable and tailored to the specific requirements and commercial benefits to the product traded or cleared.

<ESMA_QUESTION_CP_MIFID_157>

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

<ESMA_QUESTION_CP_MIFID_158>

In principle yes, we agree with elements. Our concerns are that each agreement should be made on the commercial and economic value between the two parties taking into account the cost and benefit structure of each party in association with the license. By having the same conditions apply to each licensee an unforeseen benefit may arise if retro-actively applied. Setting the minimum requirements to a package of data, usage and rights can lead to an adverse effect on cost by including more commercial value than the commercial relationship requires. We believe that in principle the potential differences in conditions between different entities would not constitute an un-level playing field across trading venues or clearing agencies and can be objectively justified.

<ESMA_QUESTION_CP_MIFID_158>

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

<ESMA_QUESTION_CP_MIFID_159>

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<ESMA_QUESTION_CP_MIFID_159>
5. Requirements applying on and to trading venues

Q160. Do you agree with the attached draft technical standard on admission to trading?

Firstly, we welcome that Article 1(5) carries forward the established position from MiFID I and clearly sets out that a transferable security that is officially listed in accordance with Directive 2001/34/EC, and the listing of which is not suspended, shall be deemed to be freely negotiable and capable of being traded in a fair, orderly and efficient manner.

However, we have a number of concerns in relation to Art 4 as set out in Q161.

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

Nasdaq does not fully agree with these arrangements. As a regulated market, we are obliged to publish conditions for admission to trading and must ensure an issuer complies with these. However, we believe these new requirements for publishing information on how we verify compliance by issuers with obligations under Union law go too far, as it should be the competent authority designated under the relevant EU legislation that is responsible for monitoring and enforcing this.

ESMA suggests that a regulated market must publish its policy on its website which should give guidance to issuers on how best to demonstrate compliance with EU law; but in our view, each issuer must determine this for itself in accordance with the relevant legislation and any guidance from relevant competent authority. It is unclear what regulatory risk or objective the proposed policy requirement is seeking to address and in our view could lead to the adverse outcome where a regulated market’s policy is determining how an issuer best complies with the requirements of certain EU directives, rather than an issuer achieving compliance in a manner that is best suited to its own business and activities.

With regards to ETFs, Nasdaq is of the opinion that it is not necessary to deviate from the current practice.

Q162. Do you agree with the arrangements proposed by ESMA for facilitating access to information published under Union law for members and participants of a regulated market?
We believe that the proposals are adequate if the intention is that the regulated market’s obligation in facilitating access can be met when it provides a link to where the information is available, i.e. to the national appointed storage mechanism (the OAM) under the Transparency Directive. As the obligation to make this information public under EU law falls on the issuers themselves, we do not think any further requirements should be applied to the trading venue, other than to direct members to where the relevant information is available.

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

Nasdaq supports in general the proposal for suspension from trading of a financial instrument and related derivatives. It should be considered to also include other types of financial instruments, such as warrant and certificates, fully related to the suspended instrument.

It should be clarified who of the market operator or the competent authorities can make decision to resume trading again after a regulatory suspension.

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

Yes.

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

Yes.

Q166. Do you think that there should be one standard format to provide the information to the competent authority? Do you agree with the proposed format?

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Q167. Do you think that there should be one standard format to notify to ESMA the authorisation of an investment firm or market operator as an MTF or an OTF? Do you agree with the proposed format?

Yes, we would generally welcome standardised formatting.
6. Commodity derivatives

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

We recognize the need to take into account the specificities of commodities markets and the need for regulation to support the maintaining of those markets which are already well developed and efficient, and to achieve improvements in less mature markets. The Nordic power market is particularly well developed, with many direct market participants from the energy sector, i.e. not the core financial sector. It is indeed important to strike the right balance of legislation in order to support a liquid market.

The risk of not finding the right balance is that market participants may withdraw from the market, thus reducing liquidity. This would be an unfortunate negative development, which we believe is not intended.

One example of regulation which is not supporting liquid commodity markets is the provision in the EMIR Level 2 legislation, Regulation 153/2013, section 2.1, point h) in Annex 1, which requires the full backing of bank guarantees used as collateral towards the CCP by non-financials. When this requirement starts applying, in March 2016, the signals we get from participants in the Nordic power market is that they will withdraw liquidity and revert to bilateral contracts. If on the other hand bank guarantees would continue to be allowed without full cash backing, it would facilitate for many market participants to join the market and provide liquidity.

We agree with what is stated in the CP page 503 para 2, namely the assumption that commercial firms and specialist commodities firms do not pose systemic risk comparable to traditional financial institutions or interact with investors.

With this we want to point at the importance of recognizing that the specificities of the commodities markets do motivate different legislative considerations than for the general financial sector.

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

Q170. Do you consider the revised method of calculation for the first test (i.e. capital employed for ancillary activity relative to capital employed for main business) as being appropriate? Please provide reasons if you do not agree with the revised approach.
Q171. With regard to trading activity undertaken by a MiFID licensed subsidiary of the group, do you agree that this activity should be deducted from the ancillary activity (i.e. the numerator)?

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

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

Q174. Do you agree with ESMA’s intention to use an accounting capital measure?

Q175. Do you agree that the term capital should encompass equity, current debt and non-current debt? If you see a need for further clarification of the term capital, please provide concrete suggestions.

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

Q177. Do you agree that the calculation in relation to the size of the trading activity (numerator) should be done on the basis of the group rather than on the basis of the person? (Please note that altering the suggested approach may also have an impact on the threshold suggested further below)
Q178. Do you agree with the introduction of a separate asset class for commodities referred to in Section C 10 of Annex I and subsuming freight under this new asset class?

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

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

Q181. Do you agree with the conclusions drawn by ESMA in relation to the privileged transactions?

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

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

We support the overall framework. We agree with ESMA that deliverable supply is the most appropriate basis for the EU position limits regime, both for the spot month and for other months. This is because undue influence and control over deliverable supply, coupled with holding a significant futures position, is the key factor which can give rise to a disorderly market. In contrast, we do not believe open interest is a suitable basis for the EU position limit regime because holding a significant proportion of open interest in the futures contract in isolation does not create a disorderly market.

Further, especially in gas and power markets, due to the shift in markets that may be expected as a result of the MiFID C6 carve-out for “must be physically settled contracts”, financial instruments may only represent the minority of trading volumes compared to the whole market. As a result, open interest in financial instruments only represents a limited part
of the whole market. Against this backdrop, a large relative position in the open interest in financial instrument can be a small position in the whole market.

However, we argue that the same reference should be used for both physically settled and cash settled contracts as both types may be traded as substitutes in the same derivatives market. Thus, for power contracts we believe either the actual total delivery of the commodity or the installed capacity relevant for the underlying market would be the most appropriate basis.

We question whether trading venues are, generally and for all various types of commodities, the best placed organisations to source and provide data in relation to deliverable supply to the relevant National Competent Authority. This is because commodities trading venue do not always know what the deliverable supply of a commodity is at any given moment, and neither is it necessary to know that to operate an orderly market. For some commodities the organisations most likely to know this are industry organisations (or TSOs for gas and power markets).

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

A 25% baseline level is a suitable starting point for calculating the position limits which will be applicable to commodity derivatives within the EU. Having established the baseline for each commodity derivative, it will of course be necessary to consider the extent to which the seven factors enumerated in the MiFID Level 1 text should increase or decrease that level in order to establish the spot month and other months position limits for each commodity derivative.

It also depends what will be the basis for deliverable supply for cash-settled products. For electricity derivatives, if the chosen basis is either the actual total delivery of the commodity or the installed capacity, 25% is adequate. However, if the basis for deliverable supply is the volume of the pricing reference market (underlying commodity market) this number should be increased as some European electricity underlying markets are only used for adjustment trading of smaller volumes compared to what is totally delivered in the market.

Q185. Would a maximum of 40% position limit be suitable for all commodity derivatives to meet position limit objectives. For which commodity derivatives would 40% not be suitable and why? What maximum position limit would be suitable and why?
We believe that 40% of deliverable supply should be an indicative boundary rather than a hard cap. This is because there may be particular circumstances in which greater flexibility is appropriate. For example, a figure of 40% may be too restrictive for certain nascent or niche products (please see the answers to Questions 189 and 195 below).

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

The adjustment parameters are set at the appropriate level, provided they are used as indicative boundaries rather than hard caps and floors.

We believe that some of the factors which ESMA may use to alter the baseline level should be given greater weight than others, given their greater relevance to orderly markets and pricing considerations (please see the answer to Question 187 for further details).

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

The factors in question should not carry equal weight. We favour the option to take deliverable supply as a baseline on which to apply position limits. For parameters altering the baseline position, most weight should be ascribed to the size of deliverable supply, maturity of the contracts and the state of development of the market, as these are the key factors which are relevant to the design of position limits which support orderly pricing and settlement conditions and prevent market abuse. A second category of factors should be given a medium weighting (i.e. number and size of participants, characteristics of the underlying market and new contracts), as they are also relevant to calibrating the application of position limits to the market in question. A third category should be given a low weighting (i.e. open interest and volatility) for the reasons explained below.

Open interest should not be viewed in isolation. It is unavoidably backward-looking and it further presupposes a certain number of participants in the market in order to work. For instance, a per-participant limit of 5% of the open interest would require there to be at least 20 participants. This cannot be assumed always to be the case. Indeed, in the interests of the efficacy of nascent or niche markets – in which there may be only a handful of active market participants – it might be necessary to introduce a threshold level below which the application of position limits would be suspended.

Turning to “volatility”, that term is often a misnomer for the pricing distortions which can occur (whether for technical or nefarious reasons) in commodity markets as a contract approaches maturity. Rather than volatility per se (which implies that the price of the spot month is rising and falling sharply during a short space of time), it is more likely that any pricing distortions would be characterised by increases or decreases in price in a clear direction and/or a change in the pricing relationship between the spot month and the next delivery month.
Q188. Do you consider the methodology for setting the spot month position limit should differ in any way from the methodology for setting the other months position limit? If so, in what way?

As ESMA has proposed, the baseline level for both the spot month position limit and the other months position limit should be based on deliverable supply. This is because it is undue influence and control over deliverable supply, coupled with holding a significant futures position, which can give rise to a disorderly market.

The only distinctions which the methodology needs to permit – and already does permit - between the spot month position limit and the other months position limit are to recognise the facts that:

- the other months position limit is likely to cover many production periods, rather than just one, and thus will be based on a wider measure of deliverable supply than the spot month position limit; and
- the other months position limit is a single limit covering multiple delivery months, rather than just one.

As a result, position limits will be broader in relation to delivery months which are far from maturity (i.e. the “other months”) and will become narrower and more restrictive as maturity approaches (i.e. once the delivery month in question becomes the spot month). This will reflect the availability of deliverable supply during two distinct phases in the life cycle of the delivery month. By doing so, the level of position limits during those different phases will reflect the extent to which the price of the delivery month is susceptible to distortion or manipulation.

Q189. How do you suggest establishing a methodology that balances providing greater flexibility for new and illiquid contracts whilst still providing a level of constraint in a clear and quantifiable way? What limit would you consider as appropriate per product class? Could the assessment of whether a contract is illiquid, triggering a potential wider limit, be based on the technical standard ESMA is proposing for non-equity transparency?

In the definition of new markets we suggest to include markets established by authorities to serve certain purposes, e.g. the Norwegian-Swedish Electricity Certificate Market.

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

In relation to the “other months”, the key factor is the number of production periods between the time at which the position limit is set and the maturity date of the relevant contracts. In most cases, the trading venue should have considered this in calculating a deliverable supply measure for the “other months”.
In relation to the spot month, the key factor will vary depending on the product concerned (again, this should have already been taken this into account in calculating a deliverable supply measure for the spot month).

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

The same reference should be used for both physically settled and cash settled contracts as both types may be traded as substitutes in the same derivatives market. Thus, for power contracts we believe either the actual total delivery of the commodity or installed capacity relevant for the underlying market would be the most appropriate basis.

One will also need to consider the likely impact of any exogenous events or longer-term trends, which could affect future deliverable supply positively or negatively.

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

Care needs to be taken in applying the position limits regime to less liquid markets, in which there may be only a handful of active market participants either at the outset or on an ongoing basis. Less stringent position limits should apply, if any.

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

Care needs to be taken in applying the position limits regime to nascent or niche markets, in which there may be only a handful of active market participants either at the outset or on an ongoing basis. It might be necessary to apply a threshold test – for instance, expressed as a number of active market participants - below which the application of position limits would be suspended until such time as participation increased. If such a measure is not introduced, it is possible that many nascent and niche markets will not be able to co-exist with the position limits regime.

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

ESMA has correctly identified the main features of the underlying commodity markets which would need to be taken into account by National Competent Authorities in establishing position limits.

Q195. For what time period can a contract be considered as “new” and therefore benefit from higher position limits?
It is not possible to quantify a meaningful time period which is applicable to all contracts because:

- contracts mature at different rates;
- once they are mature, some contracts will become benchmark products whilst others will remain niche products that are characterised by limited participation.

Furthermore, we believe that applying an arbitrary cut-off point beyond which a contract is no longer regarded as “new” – at which point lower position limits would automatically apply - may have the effect of stifling the development of nascent products and damaging the viability of niche products. Instead of applying an arbitrary quantitative cut-off point, National Competent Authorities will need to consider qualitative factors (such as those mentioned in the previous paragraph) when determining whether a contract should continue to be regarded as “new”.

Please also see the answer to Question 193, which is related to this issue.

Q196. Should the application of less-liquid parameters be based on the age of the commodity derivative or the ongoing liquidity of that contract.

Please see Q 195.

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

Most important is that the factors should be applied in the same consistent way for all derivatives within each asset class.

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

Yes. We agree that the factors enumerated under Article 57(3)(a)-(g) of MIFID II, and the manner in which ESMA proposes to frame the methodology, provides National Competent Authorities with sufficient scope to take into account the specificities of different markets without incorporating asset-class specific elements into the methodology.

Q199. How are the seven factors (listed under Article 57(3)(a) to (g) and discussed above) currently taken into account in the setting and management of existing position limits?
The main factors which are taken into account in the design and application of existing limits and controls by EU trading venues (e.g. delivery limits and accountability levels) are deliverable supply, the length of time to contract maturity, and – during the delivery period itself – the size of position which is capable of being delivered without causing logistical problems or delivery failure.

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

We agree with ESMA’s proposed approach of defining “risk reducing positions” in a manner which is consistent with the relevant definition under EMIR (EMIR (Regulation (EU) 638/2012), Article 10(4)(a), and Commission Delegated Regulation (EU) No. 149/2013, Article 10). The purpose of EMIR Article 10(4)(a) is to identify a non-financial counterparty’s positions which are “objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of the non-financial counterparty”. Such positions are disregarded for the purposes of calculating whether the non-financial counterparty’s overall position in OTC derivatives exceeds the EMIR clearing threshold. This is analogous to the process under MIFID II whereby position limits in respect of commodity derivatives shall be dis-applied to the positions of a non-financial entity which are “objectively measurable as reducing risks related to that entity’s commercial activity”. In both cases, ESMA has been requested to produce RTS which define the hedging activities of non-financial entities and it is appropriate that those RTS are consistent.

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

In its 2014 MIFID II Discussion Paper, ESMA noted that “non-financial entity” is not defined in MIFID II, and that it proposed to consider “non-financial entities” to be any entities which are not financial institutions under MIFID II or other relevant EU legislation. Such an approach may not work effectively in the context of MIFID II position limits, given that the participants in commodity markets are located across the globe. For example, a strict application of such an approach would suggest that an investment firm or bank located in a third country would be treated as a “non-financial entity” rather than a financial entity.

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

Please see the answer to Question 203.

Q203. Do you agree with ESMA’s proposal that a person’s position in a commodity derivative should be aggregated on a ‘whole’ position basis with those that are under the beneficial ownership of the position holder? If not, please provide reasons.

We believe that the methodology for aggregating positions - in a situation in which one company has an ownership interest in another - should be based on a discrete percentage
threshold which is used as a proxy for “control”. It suggests that the threshold should be set at 50%. Where the threshold is met, the totality of the position of the controlled entity should be added to the position of the controlling entity for the purposes of calculating the overall net position.

Q204. Do you agree with the proposed draft RTS regarding the criteria for determining whether a contract is an economically equivalent OTC contract?

Yes. ESMA’s proposed approach is similar to the CFTC’s proposal in relation to economic equivalence of swaps and futures contracts, which is designed to identify an entity’s overall influence on the demand and supply conditions in a particular commodity sector, whilst recognising that the component contracts of that entity’s position are not necessarily legally identical. However, one big difference between US and Europe seems to be that in the US position limits are set per trading venue, while in Europe it is supposed to be on aggregate across all venues. Given the global nature of many commodity markets, there would be clear benefits in the EU and US applying consistent definitions of “economically equivalent” for the purposes of operating their position limits regimes.

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

Care needs to be taken when using the term “same derivatives contract”. The purpose of the term (as it is used in Article 57(12)(d) of MIFID II) is to manage a situation whereby a single position limit needs to be set in relation to the trading of commodity derivatives at competing trading venues. In that context, we have no further comment on the proposed approach.

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

Yes.

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

Please see Q 204.

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

The draft Regulatory Technical Standards (Article 7 of RTS 30) states that a National Competent Authority shall have up to 30 calendar days to approve an application for an exemption. This is a significant period, during which the non-financial entity will face uncertainty about whether or not an exemption will be available to it.
Q209. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

Please see Q 204.

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

In general, we agree with ESMA’s proposal of reporting format.

However, the position reporting regime should ensure confidentiality by not disclosing details of position holders to the extent that they may be identifiable. Reporting of all fields with a distinction between ‘risk reducing’ and ‘other’ may put that confidentiality at risk if there is one holder in any of those two groups.

Example: Total number of position holders in one category exceeds four and therefore it should be disclosed. However, there is only one position holder out of four whose positions can be qualified as reducing risk. As a result, with reference to that position holder the number of long and short open positions would be made public. The same situation occurs if there is only one position holder out of four whose positions can be qualified as ‘other’.

Therefore, the field ‘number of position holders’ in a given category should not differentiate between ‘risk reducing’ and ‘other’.

Q211. Do you agree with the reporting format for the daily Position Reports?

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Q212. What other reporting arrangements should ESMA consider specifying to facilitate position reporting arrangements?

ESMA should take into account that market operators are not in possession of data on open positions of their members. Such information will have to be obtained from the CCPs. Therefore, market operators can bear responsibility for the adequacy of information only to a certain extent.

Also, if reports are required for markets with few participants it may be possible to deduce individual market participants’ positions, which is undesirable.
7. Market data reporting

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

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

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

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

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

We ask for clarity on the inclusion of a ‘trading venue’ as a counterparty to a trade. We consider this that this is a misunderstanding of the role of a trading venue and we consider that a trading venue can never be a ‘counter party’ to a trade.

We consider that this may refer to the possible liability of a trading venue to a transaction report that is reported by a third country firm outside of the EU.

Q218. We invite your comments on the proposed fields and population of the fields. Please provide specific references to the fields which you are discussing in your response.

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

No, we disagree with the proposals under Article 1(b) concerning matched principal trading. Under Section 8.3 of the CP, ESMA explains that the definition of matched principal trading
included in Article 1 is based on the results of the 2014 ESMA CP consultation, together with the July 24 CWG Meeting where ‘stakeholders requested for interpretative guidance from ESMA on the application of the principal and agency concepts’.

As a result of these discussions, Article 1(b) states that:

‘Matched principal capacity’ means dealing on own account as defined in Article 4(1)(6) where the concerned entity enters into a transaction as defined in Article 4(1)(38) of Directive 2014/65/EU as a facilitator by interposing the firm between the buyer and the seller to the transaction in a way whereby the firm is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.

We have a major problem with the cross-reference to Article 4(1)(6) in this provision. Article 4 includes both a definition of dealing on own account (point 6) and matched principal trading (point 38). For the purposes of clarifying reporting obligations under MIFIR Article 26, we believe that the reference to matched principal trading should only refer back to the definition in the Level 1 text.

This is important in the sense that it respects the definitions established in Article 4 regarding the systematic internaliser. Article 4(1)(20) defines an SI as:

‘systematic internaliser’ means an investment firm which, on an organised, frequent systematic and substantial basis, deals on own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system;

The critical definition of dealing on own account is outlined in Article 4(1)(6):

(6) ‘dealing on own account’ means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

Including the cross-reference to Article 4(1)(6) in the RTS 13 undermines the definitions in Article 4 which are clear in determining that an SI can only deal on own account. In contrast, it is the OTF which has the ability to trade on a matched principal basis under certain conditions, these being outlined in MIFIR Article 20 based on the definition of matched principal trading in Article 4(1)(38).

Proposal:
We suggest amending Article 1(b) of RTS 32 as follows:

‘Matched principal capacity’ means dealing on own account as defined in Article 4(1)(6) where the concerned entity enters into a transaction as defined in Article 4(1)(38) of Directive 2014/65/EU as a facilitator by interposing the firm between the buyer and the seller to the transaction in a way whereby the firm is never exposed to market risk throughout the
execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.

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

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

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

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

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

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

Article 26(5) of MiFIR obliges trading venues to “report the details of transactions in financial instruments traded on its platform which are executed through its systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3” (of the Article 26). In this respect we would like to stress the following issues:

First, a trading venue might not obtain all the requested information from its clients, provided data protection constraints, for example a firm might not disseminate client identification data to third parties. Thus, a trading venue will not be able to fulfil its reporting duties when reporting on behalf of firms that are not subject to this regulation. It is therefore of utmost importance to have a clear definition of mandatory fields which should be reported in this case, a definition that will take data protection confidentiality into account.
Second, we request that a clear guidance as to how a trading venue can identify firms that are not subject to this regulation in order for it to report on its behalf. The lack of such provisions will ultimately result in over or under reporting.

Finally, it is crucial to point out that a trading venue is not, and **shall not**, be responsible to determining whether or not a given counterparty is subject to MiFIR or not.

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

In general, requirements on order fields may potentially lead to additional characters to be added to order messages. The length of the fields can be a problem for high performance order entry protocols. Furthermore, it is unfeasible for a venue to register all potential end-clients (non-members). As a consequence a long field (up to 50 characters) would need to be added to order entry messages. This is very bad for high performance order entry protocols.

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

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

We do not foresee any difficulties with the proposed differentiation. However, if voice trading venues receive orders electronically, the same time stamping requirements should apply for these transactions as for electronic trading venues.

Q229. Is the approach taken, particularly in relation to maintaining prices of implied orders, in line with industry practice? Please describe any differences?
We disagree with the ESMA proposal as it does not reflect standard market practice. Typically, trading venues store data in the respective order books and are able to replay actual markets using the relevant order books. The matching engine principles/market models give advice on how to use and combine different order books and thereby reconstruct the actual order flow and information for the market participants. Therefore, market data dissemination procedures always cover the aspect of implied prices during live data dissemination.

Market participants are used to this procedure already as they do this on every single trading day. We consider that listening and recording market data dissemination would give the full picture of the order book situation at any given point in time.

For the purpose of passing information to an NCA, this information can easily be reconstructed and provided. As order references are available in trade information as well as order book information, the reconstruction can take place at any time. A double listing of orders in different order books would thereby only increase inappropriately the efforts (e.g. cost & storage) on the trading venue side, without further benefit for participants or regulators.

We strongly suggest not storing implied orders within single order books but to maintain industry standards and keep orders only in their origin instrument. Therefore Article 6 (3) of the RTS should be deleted.

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

Trading venues do not have insight into the provided and stored information within an investment firm’s data warehouse concerning client data and internal factors. From a theoretical perspective, due to the inability to separate different trading strategies into HFT and non-HFT business, the whole firm would be deemed to provide that information. Hence, large investment firms having different strategies implemented would always have to stick to HFT characteristic and thereby would have to timestamp in micro seconds even if the majority of their business is customer related and non-HFT business. That could lead to disadvantages for investment firms having a distributed business model. Firms purely engaged in HFT business strategies should typically have no problems fulfilling the respective requirements for all business areas they engage in.

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

No.

Q232. Do you agree with the proposed record-keeping period of five years?
We agree. Typically the requirement to store data is already part of market risk and structural risk assessments of NCAs and thereby already incorporated into national regulation. In practice, 5 years may be already shorter than national regulation foresees.

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

We wish to comment that it is not technically feasible to do clock synchronisation with a maximum divergence of 1 nanosecond.

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

We foresee certain difficulties as investment firms do not always know about upgrades of the hardware / software of trading venues, especially if those upgrades only have venue internal dependencies. This could lead to situations where the upgrade of internal systems to the new bucket of a venue could cause a complete overhaul of their systems even if they only trade a minor share of their total order flow with this venue.

An investment firm will always end up in a position where the economic benefit will be challenged by the cost to upgrade their systems and fosters the move of their liquidity to another venue that does not force them to upgrade. Unpredictable liquidity moves are a consequence which can increase the risk of investment firms bound to trade at a particular venue.

In a situation where a venue faces 99th percentile latency close to the borderline of the level of accuracy, it can be hard to predict which latency effect will be caused by the upgrade in a production environment. Hence, this leads to an inner resistance to upgrade to the technically possible best solution for the market.

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

ESMA needs to clarify its draft regulatory technical standard (RTS 33) on the obligation to supply financial instrument reference data (Article 27 MiFIR) in order to avoid any potentially disproportionate burden on trading venues or even a legal dilemma situation.

According to Art 27.1 in MiFIR, trading venues as well as SIs “shall provide competent authorities with identifying reference data for the purpose of transaction reporting under
Art 26." Furthermore, Art 27.1 in MiFIR states that “The financial instrument reference data shall be updated whenever there are changes to the data with respect to a financial instrument. **Those notifications are to be transmitted** by the competent authorities without delay to ESMA, which shall publish them immediately on its web-site. ESMA shall give competent authorities access to those data.”

In RTS 33, ESMA is developing technical standards both for MAR and MiFID II at the same time. While “notifications” in the context of L1 are clearly defined within MAR as encompassing four data fields only (ref Art 4 3. MAR), MiFID clearly refers to reference data for the purpose of transaction reporting only. In this context, the scope of reference data ESMA has specified within L2 is a) significantly too broad and not required for NCAs in order to fulfil their obligations as regards Art 26 MiFIR, and b) substantially more than requested by MAR, and c) even infringes IP rights of third parties.

The world of reference data is not harmonized, neither on a global scale nor on EU level. Reference data information is very costly to produce and maintain, and most importantly different IP holders exist in this field, and in many cases trading venues are not the ones holding the IP rights.

The problem we see with the large set of data point suggested by ESMA is twofold. While we still cannot see the pressing needs for such a large set of data for the issue of transaction reporting, providing access to the regulator to a larger set of data is in no way the biggest problem. In contrast, a publication of the large set of data as requested by ESMA on the ESMA web-site would clearly infringe existing IP rights of the reference data provider, by no means only trading venues. In order to achieve a proportionate solution and in order to support ESMA while paying attention to the business of third parties, there are two potential ways to solve this dilemma:

a) Align scope of reference data fields for both public and regulator to a standard set of data which can be made available to a broad public free of charge. Data fields free of data license fees usually encompass the following data fields (e.g. as defined by Association of National Numbering Agencies ANNA):

- ISIN
- Instrument status
- Instrument category
- Issue description
- Issue currency
- Maturity/expiry date
- Type of interest
- Issuer long name
- Issuer legal registration country

Any additional data field submission above those mentioned above would require a license agreement between the user of the data (in this case the NCA, ESMA and any other data user who accesses the ESMA webpage) and obviously public display of that data (apart from the free of charge data) on the ESMA web-page would not be allowed.
b) In case the NCA or ESMA would need additional data for NCA or ESMA internal use only, a contract with the respective NNA would usually be necessary, though trading venues would be in the position to provide the technical delivery to the NCAs. Even in this case public display should be restricted to those data which are made available free of charge by NNA’s already.

As pointed out above, we cannot support the very detailed reference data list for the purpose of public disclosure, but we stand ready to be part of finding a proportionate solution for Technical Standards to be defined for Art 27 MiFIR (taking into consideration as well Art 4 MAR).

Should the same set of reference data submitted by trading venues to its NCAs be made available to the public in ESMA website, it would be tantamount to an expropriation of those data by ESMA and would kill a legitimate line of business of trading venues, favouring vendors and other data providers that could take that information from ESMA website for free and include it in the data packages they sell to their clients.

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

We agree.

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

We agree.

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

We agree to use an ISIN where available but that this field should not be mandatory.
8. Post-trading issues

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

Nasdaq strongly disagrees with this proposal. Specifically for equity derivatives traded on venues, there is already in place well-functioning solutions that provide sufficient certainty for clearing of exchange traded derivatives.

We note that Art. 29(2) of MiFIR state that “CCPs, trading venues and investment firms which act as clearing members … shall have in place effective systems, procedures and arrangements … to ensure that transactions … are submitted and accepted for clearing as quickly as technologically practicable using automated systems”, and that the draft RTS should specify the minimum requirements for these systems, procedures and arrangements to secure this. With this in mind we believe current practices for ETDs are already today well aligned with the objectives of the level I text and to us it is not obvious why ESMA would want to change them.

ESMA's proposed complex framework based on pre-trade checks to be implemented by trading venues on behalf of clearing members, appears to go beyond what the original mandate of the level 1 text is, i.e. to develop minimum requirements. In the world of ETDs, clearing members (CMs) are already today required by CCPs to have in place proper real-time risk management solutions to proactively engage their customers should they get close (i.e. different warning levels) to the credit risk limits that have been agreed between the parties, and to take necessary actions. CMs access real-time pre- and post-trade data about their clients as well as static data like margin parameter files from trading venues and CCPs, to be able to perform these duties in an effective way using pre-trade and post-trade risk management solutions, either developed in-house or provided by 3rd party vendors. The benefits of the ESMA proposal to have client specific pre-trade checks performed by trading venues on-behalf of the CMs, rather than by the CMs themselves, would be very limited, if any, compared to current practices, and at a very high implementation and maintenance cost and also increased operational risks for the trading venues and investment firms.

Instead we suggest that ESMA uses the current rule-based practices in place for ETDs as a base when drafting the minimum requirements for CCPs, trading venues and investment firms. E.g. formalizing the minimum requirements across the union on CCPs and trading venues to make available the pre- and post-trade data needed by CMs to monitor their clients, and the minimum requirements on CMs and their risk management software and procedures to control that clients do not exceed their agreed exposure levels and risk limits. Furthermore, in a fragmented market landscape (both on trading and clearing side) it would be of very limited use to provide credit-risk/position limits to each venue while the customer can access and trade on multiple venues and clear on multiple CCPs, as from a risk point of view there is a need for an holistic view of the customer activity and its risk limits.
Also noting that the draft RTS does not detail enough what type of limits should be provided, how the format should be specified and by whom (the trading venue?) and how frequently these could be updated by clearing members (once a day? automatically via electronic interface? in real-time?).

Last, it is also unclear how the ESMA proposal would work when it comes to executed trades that would then be given-up.

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

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

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

Nasdaq can agree to the 10-second rule of accept or reject a trade for clearing, provided OTC instruments, reported for clearing, are submitted to a specific framework. We propose that, for OTC derivative instruments, “pre-novation checks” are possible to use whereby a check is made by the CCP to ensure that sufficient collateral has been posted, before novating the trade. If sufficient collateral does not exist, the trade is put in a “pending” state (i.e. neither accepted nor rejected), and as soon as sufficient collateral is posted, the trade is accepted and novated. Our interpretation of the current proposal is that such a trade would have to be rejected, and re-entering would not be allowed. This would actually decrease the speed of clearing, rather than contribute to STP. This would also increase the administrative burden. Technical solutions like pre-novation checks should be promoted as they lead to greater transparency and certainty in the process of novating trades for clearing. Alternatively, if a “pending” state is not allowed, we would advocate the possibility to re-enter a rejected trade. This would enable the re-entry of a trade that would have been previously
rejected in the pre-novation check described above, after sufficient collateral has been posted.

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

We do not agree that the pre-trade check regime suggested in the draft RTS 37, Article 3 will limit the occurrence of rejected transactions since it is the Clearing Members that are providing the trading venue with limits that are applicable to its clients and not the CCP.

It is also our view that all trading venues (RM, OTF, MTF) should be subject to the same regulations for treatment of rejected transactions. A regulated market should also be able to regulate in the rules what happens with a rejected transaction. The requirement could be different depending on type of transaction (e.g. executed electronically or not).

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

We are fine with the proposed draft RTS but have a major concern with the offer of a gross omnibus account. Although we understand what ESMA is trying to achieve with the option of a gross omnibus account, we believe that this option is unlikely to achieve the objective of fostering the use of indirect clearing services. The gross omnibus account solution will be less attractive economically than the net omnibus account and therefore unlikely to be used.

If ESMA forces CCPs to offer this choice, CCPs will have to implement infrastructural changes to meet the proposed requirements, and then find that there is no uptake of the gross omnibus account solution. This is because in order to cater for the gross omnibus accounts for indirect clients, the CCPs are required to i.a. hold the value of collateral posted by each individual indirect client, which will need system development to accomplish and also on-going checks. The added costs will have to factor in the offer of this gross omnibus account making it unlikely to be used. Consequently, we are concerned that there will be very limited uptake of the gross omnibus model and investments in infrastructure will have been unnecessary and will have increased costs for the industry overall.

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

The gross omnibus account solution will be less attractive economically than the net omnibus account and therefore unlikely to be used. This is because in order to cater for the gross omnibus accounts for indirect clients, the CCPs are required to i.a. hold the value of
collateral posted by each individual indirect client, which will need system development to accomplish and also on-going checks. The added costs will have to factor in the offer of this gross omnibus account making it unlikely to be used. Consequently, we are concerned that there will be very limited uptake of the gross omnibus model and investments in infrastructure will have been unnecessary and will have increased costs for the industry overall.

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