



European Securities and
Markets Authority

Reply form for the Consultation Paper on the RTS 1 and RTS 2 Review



9 July 2021

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the RTS 1 and RTS 2 review 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 properly. 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 (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_RVEW_0> - 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;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

Naming protocol

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

ESMA_CP_RVEW_NAMEOFCOMPANY_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA_CP_RVEW_ESMA_REPLYFORM or

ESMA_CP_RVEW_ANNEX1

Deadline

Responses must reach us by 1 October 2021.

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

Name of the company / organisation	Nasdaq
Activity	Regulated markets/Exchanges/Trading Systems
Are you representing an association?	<input type="checkbox"/>
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_RVIEW_1>

<ESMA_COMMENT_CP_RVIEW _1>



Q1 : Do you agree with the proposed amendment to Article 7(2) of RTS 1? If not, please explain your concerns about the proposed increase of the threshold.

<ESMA_QUESTION_RVIEW_1>

Nasdaq has previously proposed that a threshold of 2 MEUR would best support the needs of market participants, and we maintain this view. This threshold is based on the estimation that very few orders in the Nasdaq Nordic markets would qualify for a higher threshold.

<ESMA_QUESTION_RVIEW_1>

Q2 : Do you agree with the proposed amendment to Table 5 of Annex II of RTS 1? If not, please explain why you are concerned about the proposed increase of the thresholds.

<ESMA_QUESTION_RVIEW_2>

Deferrals are rare. We do not have a strong opinion.

<ESMA_QUESTION_RVIEW_2>

Q3 : Do you agree with ESMA's amendments to Articles 2, 6 and 13 of RTS 1 described above? If not, please explain why.

<ESMA_QUESTION_RVIEW_3>

Yes we agree with ESMA's overall approach. The terminology and definitions currently used are inconsistent and not comprehensive. Streamlining the regulatory framework is necessary to ensure a clear and harmonised understanding across the EU (for example, in connection with Article 23 MiFIR and RTS 1 Articles 2, 6, and 13, and Article 2 RTS 22).

We also share ESMA's view that the notion of addressable liquidity is not limited to the place of execution and not limited to multilateral venues. Such an overly simplified view risks unforeseen major consequences on equity market structure: where MiFID II/MiFIR aims at increasing market transparency, an incorrect definition of non-addressable liquidity could be at odds with this main objective, and could jeopardise the concept of an efficient price discovery process. Whilst in this context it is relevant to recognise the distinction between price-forming and non-price-forming transactions, the notion of addressable liquidity refers to the interactive nature of liquidity and encompasses both categories. Likewise, mixing technical transactions, non-pre trade transparent trades, and trades without an economic trading interest is incorrect. For example, a significant number of non-price forming transactions (like those executed under the negotiated transaction waiver) are addressable, and would even be price forming if executed on a trading venue. Trades can be identified as addressable liquidity regardless of whether conducted OTC or in an SI.

The topic of non-addressable liquidity and non-price forming transactions should also be considered in the context of the STO as well as the consolidated tape, given that the design of a consolidated tape could be impacted by the type of trades under its scope. It is our opinion that a consolidated tape should encompass the whole range of transactions, so as to give market participants the full picture that can be expected from a tape, and to allow market participants to draw their own conclusions as needed.

However, we have a specific comment with respect to Article 6, where ESMA proposes to delete paragraph (j), the justification being that the transactions listed under paragraphs (a) to (i) of Article 6 of RTS 1 sufficiently cater for all possible circumstances. Via ESMA, the regulators in the Nordic markets have granted Nasdaq Nordic a pre-trade transparency waiver under the specific paragraph (j), that is now proposed to be deleted. The waiver in question is used in order to allow smaller members of Nasdaq Nordic to offer better execution to their clients without needing to technically connect to all European trading venues, by utilizing Nordic Order Routing service in an automatic and purely technical manner. The proposed new reference to Article 2(5) of RTS 22 is in Nasdaq Nordics' opinion challenging. It requires the contract to be **exclusively** for clearing or settlement purposes, which does not leave any room for the situation described above. Further, from a consistency point of view, it creates a situation that endangers the already



granted waivers, that ESMA has already deemed to be compliant with MiFIDII. These are in Nasdaq's opinion legitimate reasons to maintain paragraph (j) in Article 6 of RTS 1.
<ESMA_QUESTION_RVEW_3>

Q4 : Do you agree with the proposed description of FBA trading systems and the updated description of periodic auction trading systems? If not, please explain why and which elements should be added to the description and/or removed.

<ESMA_QUESTION_RVEW_4>

We note that any measures taken related specifically to FBA trading systems, will have different consequences depending on possible measures taken as a result of the overall expected MiFID review related to equity market structure. We suggest that instead a holistic approach is taken, with the aim of creating a market structure which serves all market participants, from the smaller to the bigger. This includes supporting transparent and multilateral trading, thereby ensuring a robust price formation process for the benefit of the overall market and its individual participants, not least retail investors.

Ideally, the transparency regime applicable to FBAs should be the same as for any other periodic auction, as is the case for the auction phase today. If identical transparency regimes would be maintained, there would be no need to create a separate definition for FBA trading systems.

Auctions are introduced when there is a demand from the market and when an auction can serve useful purposes. Often, the auctions allow participants to actually stay on the lit and multilateral venues instead of going to the darker SI or OTC space, which is a positive effect. We believe the MiFIDII/MiFIR framework should continue to support a market structure that serves both larger and smaller participants.

Nasdaq's frequent batch auctions have been set up responding to market demand, and we believe they provide benefits beyond only managing the capped DVC impact:

- They are used both for shares which are captured by DVCs and those not.
- They also have a 'speed bump' on order cancellations and modifications, which helps minimize the risk of information leakage and price impact.
- Also, participants appreciate the feature of midprice matching, often between two ticks, inside or at the EBBO, as it gives confidence for the treatment of their orders.

In line with comments to previous consultations, we maintain that we see a risk in distinguishing between "conventional periodic" and "frequent batch" auctions. There may be auctions which will not fall exactly in those categories. For instance, trading venues could schedule very short duration auctions, which would probably not be considered conventional according to the description in ESMA's paper. As there would not be a trigger for such auctions, neither would they fall within the definition proposed for frequent batch auctions. When creating these two distinguished categories, we see a high risk that the respective regimes will become suboptimal and rather deteriorate the FBAs as such, instead of supporting them when and where they can be useful.

Instead we propose to maintain one regime but to put more emphasis on ensuring the FBAs as such fulfil certain criteria, such as importantly that they are price forming and that they are truly multilateral.

1. FBAs should be price forming.

The auctions operated by Nasdaq have been finetuned based on dialogues with supervisors. They are ex ante price forming in the sense that: (i) the matching algorithm seeks to obtain an equilibrium price at or within the EBBO; and (ii) traders can submit limit orders. We would also argue there is a valuable element of volume discovery in our auctions. From our data we see that the trade sizes in our FBAs, compared to a continuous trade, is on average 1.4x, 1.7x, and 3.0x larger for large, mid, small caps, respectively, which ultimately proves the value in current services like this since traders can execute more volume without causing unnecessary price movements compared to trading the larger sizes in the lit order books.

We do see a clear distinction between auctions like Nasdaq Nordic's 'Auction On Demand', which is price-forming, vs. auctions operated by others and which clearly are not price-forming, for instance due to the price being fixed when the auction is triggered. While there may be many such non-price-forming auctions, we do not believe that those models should form the basis for a tailored regime, which risks making any FBA, including those that are price-forming, uninteresting for any market participant. Damaging FBAs will lead to a migration of trading to mechanisms that deliver similar trading outcomes but with lower levels of pre trade transparency and price formation, such as SIs or OTC. In case a type of periodic auction does not fulfil the criteria of being price-forming, it should need to operate under a waiver. See also below in Q 5.

2. FBAs should be truly multilateral.

If the duration is too short, or if the transparency only applies at the very end of an auction, it does not seem appropriate. Nasdaq applies a duration of between 25 to 100 milliseconds. This period starts when there is a trigger in the form of matching orders. We believe this is appropriate. Orders to these auctions are to a large extent handled by algorithms and smart order routers, which operate at high speeds with limited or no human involvement. In addition, Nasdaq has, upon agreement with buy-side clients, implemented an extra safety measure in the form of a speed bump on the cancels, meaning that the orders in an auction are effectively locked in. This feature is very well received by market participants as it minimizes risk of information leakage while allowing them to trade in large sizes.

As a general and separate comment, we note that differences in features as well as supervisory approaches differ for auctions, FBAs as well as others. We reiterate that we encourage ESMA and the NCAs to find and maintain converging approaches to the enforcement of MiFID II provisions as regards auctions. We would propose moving some Level 3 Guideline measures to Level 2. Supervisory convergence is important within EU for a start, but it also illustrates the need for establishing an efficient mechanism involving both EU and national authorities as well as industry, in the case of equivalence with third countries.
<ESMA_QUESTION_RVEW_4>

Q5 : Which of the two options for the pre-trade transparency requirements for FBA trading systems do you prefer? Please explain in case you are supportive of a different approach than the two options presented.

<ESMA_QUESTION_RVEW_5>

We disagree with ESMA's statement that FBAs frequently result in no potential match. Our data show that in 90% (more than 95% for small stocks) of the auctions there is a match, and in almost 5% there are multiple matches. This means existing transparency arrangements are working quite well. Higher transparency requirements may lead to these percentages going lower if the requirements lead to increased risk of price leakage.

We have serious concerns with both ESMA's Option 1 and Option 2. It is our prediction that if there would be too much granularity required for transparency, market participants would opt for dark trading instead of staying on the lit venues, including opting for execution outside venues regulated and supervised by authorities within the EU. For instance, with UK's divergence post-Brexit, both proposals are likely to lead to further migration of order flow towards UK-based dark pools and UK-based periodic auctions (if UK doesn't apply similar pre-trade transparency requirements), especially for investment firms not covered by the STO.

One reason for concern is the fact that FBAs take place in parallel with continuous trading. Pre trade information that is published can be exploited by market participants. The existing regime prevents this by only publishing information about the equilibrium volume and equilibrium price. This still allows price and volume discovery without the risks of information leakage as would be the effect if any imbalance and direction, or, even worse, all orders would be published. Introducing any of these options would according to



our knowledge effectively terminate any meaningful trading in FBA's and shift trading towards darker venues and SIs. It is also worth reminding that ESMA's disclosure proposals would potentially minimize slower traders' ability to obtain executions in large sizes.

Option 1: Firstly, it is not clear to us how to interpret the sentence under Option 1: "Pending the identification of two matching orders the best price and the aggregated volume on both sides at that price shall be made public."? Irrespective of the intended interpretation, our comment is that flagging the first order as we understand will effectively reveal this first order, and could mean a price impact. There would be detrimental and severe risk for information leakage if imbalance information would be published at entry of the first order. The reason is that if a large trading interest is published, for instance a large buy order imbalance, this could most likely drive the price in the lit market, hence giving a large price impact. This is also important from another standpoint, where traders typically want to protect their orders with Minimum Acceptable Quantity (MAQ) or Minimum Execution Size (MES). In other words, they might have entered a very large order with an MES, meaning that any imbalance information may be misleading, since in order to initiate an auction at least the opposite size equal to MES needs to be entered as an opposite order. Also, we are concerned about how market makers would react to having their quotes flagged publicly. It is very likely they will find the regime uninteresting and reduce their activity, especially as they are subject to speed bump as well. The feature 'cancel speed bump' in Nasdaq's FBA means you cannot walk away from a started auction. For this reason we do not support the proposal to publish the first order coming in.

Option 2: We see a clear risk that this level of transparency would make the FBAs uninteresting for market participants, who would opt for transacting in dark pools or OTC, thereby reducing the overall liquidity and transparency in the market, to the detriment of all market participants, including smaller participants such as retail.

As stated under Q 4, our view is that the transparency regime applicable to FBAs should be the same as for any other periodic auction, as is the case today. For an alternative and compromise solution, ESMA could consider Option 1 but without publishing the first order. Our view is that when crossing orders have been entered and an auction has started, the indicative price and volume shall be published.

<ESMA_QUESTION_RVIEW_5>

Q6 : Do you agree with ESMA's proposals for 'hybrid systems'? If not, please explain why and which elements should be added and/or removed.

<ESMA_QUESTION_RVIEW_6>

Yes.

<ESMA_QUESTION_RVIEW_6>

Q7 : Do you agree with aligning both Table 1, Annex I of RTS 1 and Table describing the type of system and the related information to be made public in accordance with Article 2, of Annex I of RTS 2, to describe the same systems (with the exception of voice trading systems) and pre-trade transparency requirements? If not, please explain why.

<ESMA_QUESTION_RVIEW_7>

Yes.

<ESMA_QUESTION_RVIEW_7>

Q8 : Do you agree with ESMA's proposals to require a specific format and standardise further the pre-trade information to be disclosed? If not, please explain why. If yes, please clarify which elements should be amended, added and/or removed, if any.

<ESMA_QUESTION_RVIEW_8>



Nasdaq disagrees with ESMA's proposal to prescribe the format of pre-trade transparency information. ESMA's proposal is inflexible and unconventional in that it requires significant reference data to be included, as opposed to splitting reference and market data, and also data formats are not adapted for low latency streaming.

<ESMA_QUESTION_RVIEW_8>

Q9 : Do you agree with the changes proposed by ESMA to amend Article 15 (3) of RTS 1? If not, please explain your rationale.

<ESMA_QUESTION_RVIEW_9>

No, we do not agree with the use of MRM as the factor to determine the deadline. This adds complexity in the implementation and does not add any value. This proposal can lead to discrepancies in MRM causing differences in deadlines employed by different venues. The MRM data has been prone to errors due to reporting issues and differences in reporting practices between venues.

<ESMA_QUESTION_RVIEW_9>

Q10 : Do you agree with the proposed amendments to Article 17? If not, please explain.

<ESMA_QUESTION_RVIEW_10>

Yes.

<ESMA_QUESTION_RVIEW_10>

Q11 : Do you agree with the proposed amendment of Article 11(3)(c) of RTS 1? Please explain.

<ESMA_QUESTION_RVIEW_11>

We believe that a simple amendment to Article 11 should be made to include post-trade LIS transactions. This amendment would ensure that the SMS level is properly representative of liquidity in equity markets.

<ESMA_QUESTION_RVIEW_11>

Q12 : Do you agree with the changes proposed to Table 3 of Annex I of RTS 1 (List of details for the purpose of post-trade transparency) presented above? If not, please explain and provide any alternative proposal you might have. Are there other issues to be addressed and how?

<ESMA_QUESTION_RVIEW_12>

Yes.

<ESMA_QUESTION_RVIEW_12>

Q13 : Do you agree with ESMA's proposal not to change Tables 1 and 2 of Annex III of RTS 1? If not, and you consider that certain modifications shall be made, please explain.

<ESMA_QUESTION_RVIEW_13>

Agree.

<ESMA_QUESTION_RVIEW_13>

Q14 : Do you agree with ESMA's proposal on the new Tables 1 and 2 of Annex IV of RTS 1? If not, please explain and provide any alternative proposal you might have.

<ESMA_QUESTION_RVIEW_14>

It is proposed that Non Price Forming transactions should be part of the Transparency Quantitative Reporting under RTS 1. It would be appreciated if ESMA could clarify what combinations of Non Price Forming should be included/excluded given that not all combinations are subject to STO.



It is also unclear how the proposed indicator would be implemented when reporting total volumes - see last cell no 21 of proposed table, page 67.

Please also see comments in Q 3 above. Without clear-cut regulatory requirements there is a risk different venues will continue to treat subsequent reporting differently.

<ESMA_QUESTION_RVIEW_14>

Q15 : Please provide concrete examples or scenarios when the price cannot be determined as described or cases of the need to set a zero price for the different types of instruments: shares, ETFs, depositary receipts, certificates, other equity-like financial instruments.

<ESMA_QUESTION_RVIEW_15>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_RVIEW_15>

Q16 : Do you agree with the deletion of the SI flags 'SIZE', 'ILQD' and 'RPRI'? If not, please explain what you consider to be their added value.

<ESMA_QUESTION_RVIEW_16>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_RVIEW_16>

Q17 : Do you agree with the deletion of the ACTX flag? If not, please explain what you consider to be its added value.

<ESMA_QUESTION_RVIEW_17>

Agree. We do not use this flag.

<ESMA_QUESTION_RVIEW_17>

Q18 : Do you agree with the approach suggested for non-price forming transactions? If not, please explain.

<ESMA_QUESTION_RVIEW_18>

We agree with ESMA's general approach for non-price forming transactions in RTS 1, which would improve data quality and facilitate the aggregation of information. At the same time, to preserve fair, stable, and transparent markets, loopholes in the definitions should be avoided. One example of such loopholes could be found in what exactly defines a portfolio trade "PORT". This is important in order to ensure a common understanding and avoid necessary adaptations in the future.

<ESMA_QUESTION_RVIEW_18>

Q19 : Do you agree with ESMA's proposal to introduce a pre-trade LIS waiver flag for on-book transactions? If not, please explain. Should it be limited to completely filled LIS orders?

<ESMA_QUESTION_RVIEW_19>

We don't necessarily agree - the information is already given in trade feed in MMT format where it can be deduced that LIS order was involved in trade.

<ESMA_QUESTION_RVIEW_19>

Q20 : Do you agree with ESMA's proposal to introduce a pre-trade LIS waiver for off-book transactions? If not, please explain.

<ESMA_QUESTION_RVIEW_20>

Agree.



<ESMA_QUESTION_RVIEW_20>

Q21 : Do you agree with the proposal not to add such additional flags? If not, please explain why those flags are needed in your view.

<ESMA_QUESTION_RVIEW_21>

We agree with ESMA's proposal not to add such flags, especially looking at redundancy and complexity issues as well as misconceptions linking some new flags with addressable liquidity. For example, trades occurring outside of trading hours can be addressable, the same applies to transactions like inter-affiliate trades and internal crossing network executions. Any additional flags should be properly justified and defined, not only in order to ensure regulatory certainty (which is necessary for correct reporting of off-venue transactions) but also to avoid any potential loopholes reducing transparency at the cost of investors.

<ESMA_QUESTION_RVIEW_21>

Q22 : Do you recommend adding/deleting/amending any other flags? If yes, please explain.

<ESMA_QUESTION_RVIEW_22>

We would in principle caution on introducing too many flags.

<ESMA_QUESTION_RVIEW_22>

Q23 : Do you agree with the proposal to prescribe the order of the population of flags? If not, please explain and provide an alternative proposal.

<ESMA_QUESTION_RVIEW_23>

We underline the importance of avoiding conflicts with MMT logic.

<ESMA_QUESTION_RVIEW_23>

Q24 : Do you agree with the proposed amendments above? If not, please do not reiterate the arguments made under the previous question asked for equity instruments and please rather explain why those amendments are not suitable for non-equity financial instruments.

<ESMA_QUESTION_RVIEW_24>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_RVIEW_24>

Q25 : Do you agree with the proposal to specify the fields to be populated for pre-trade transparency purposes? If not, please explain. In case you support the proposal, please comment on the fields proposed, in particular whether you would consider them necessary and/or whether additional information is required.

<ESMA_QUESTION_RVIEW_25>

Nasdaq disagrees with ESMA's proposal to prescribe the format of pre-trade transparency information. ESMA's proposal is inflexible and unconventional in that it requires significant reference data to be included, as opposed to splitting reference and market data, and also data formats are not adapted for low latency streaming data.

<ESMA_QUESTION_RVIEW_25>

Q26 : Please indicate, if applicable, which medium-term targeted improvements you would like to see to the threshold calibrations in RTS 2.

<ESMA_QUESTION_RVIEW_26>



As regards equity derivatives, we are supportive to the general proposal to the transparency regime of (i) the deletion of the SSTI waiver and deferral, (ii) the removal of the discretionary supplementary deferral regime available to NCAs and (iii) a streamlined deferral regime.

We also wish to take this opportunity to agree that the LIS thresholds for ETDs need some recalibration. Most of the current LIS-thresholds are appropriately set to strike a sensible balance between high levels of transparency and unwanted market effects. However, we would like to highlight that the LIS-thresholds for certain ETD products or sub-asset classes have detrimentally impacted the liquidity of these products. Higher thresholds for off-book on-exchange trading, compared to pre-MiFID II conditions, have moved trading volumes away from exchanges and into the OTC market.

As regards fixed income products, we agree that LIS thresholds – especially for sovereigns – are too high for small markets as there is no distinction based on the size of the market or liquidity of the bonds in question. This can have a detrimental effect on liquidity, reduce the depth of small country sovereign orderbooks and harm price formation. Therefore it is a matter of urgency to better calibrate thresholds for sovereign bonds in the very near future.

<ESMA_QUESTION_RVEW_26>

Q27 : Do you agree with the proposed changes to Article 13? If not, please explain.

<ESMA_QUESTION_RVEW_27>

Yes, we agree with the proposed changes regarding the date of application of the transparency calculations. Monday is an ideal effective date from a system perspective. Allowing trading venues to implement technical changes over the weekend helps us ensure the smooth functioning of our systems. It also leaves more time for the verification of the changed configuration.

However, we do not consider the first Monday of June as appropriate application date, for the following reasons:

- The first week of any month is often preceded by the weekend following the expiries of commodity derivative contracts. During the weekend, both our exchange and clearing house are focusing our resources ensuring that this life cycle event is completed correctly;
- In the past, new transparency calculations sometimes coincided with the use of a different data template from ESMA. If this occurs, there is simply too little time between April 30 and the first Monday of June to work through the impact of the changes to the data template and implement the updated transparency calculation at the same time. A period of 5-6 weeks seems more suitable to ensure that the deadline is met, and the changes are implemented in an orderly manner.

We therefore believe that a change of trading parameters before the expiry week risks creating uncertainties amongst market participants and ultimately might destabilise the functioning of financial markets. Furthermore, it is important to highlight that different contracts have different expiry weeks and that these different timelines need to be taken into consideration so as not to create disruptions.

To prevent the potentially detrimental effects described above, we urgently request ESMA to move the effective date of the updated transparency calculations for non-equity instruments across all EU trading venues to the second Monday following the different contracts' expiry weeks in June.

<ESMA_QUESTION_RVEW_27>

Q28 : Do you agree with the proposed changes to Article 4? If not, please explain.

<ESMA_QUESTION_RVEW_28>

We agree and support the proposal, understanding it confirms the status quo.

<ESMA_QUESTION_RVEW_28>



Q29 : Do you agree with the proposed changes to Article 12? If not, please explain. Please do not reiterate the general comments made in the equity section and try to focus on arguments that are specific to non-equity financial instruments.

<ESMA_QUESTION_RVEW_29>

We urge ESMA to issue clear cut guidelines on what non price-forming transactions should be included/excluded to prevent misalignment between reporting parties.

<ESMA_QUESTION_RVEW_29>

Q30 : Please provide your comments on the analysis and proposals related to the liquidity framework applicable to commodity derivatives, EA and DEA detailed in Section 4.2 and summarised in Section 4.2.5. Please list the proposals with their ID (#1 to #9) for ease of reference.

<ESMA_QUESTION_RVEW_30>

We have a few comments on the various proposals, according to below.

Proposal Commodity Derivatives 2: [ADNT] Maintain the criterion “average daily number of trades” (do not switch to “median daily number of trades”)

First of all, on the basis of the data provided by ESMA, we agree and support the proposal.

We are however concerned about bundling pre-arranged and screen trades. The average daily number of trades should be focused on the number of trades being executed on screen. Alternatively, the fact that there is large difference in share of screen vs pre-arranged should be taken into account in the liquidity assessment. ESMA could potentially add a second criteria that would check the liquidity purely on screen, as well as the combined. ESMA could for instance check if more than 50% of the trades are conducted off or on screen. If the activity is above 50%, as well as an ADNT of 50 trades (however preferably 100, see below), the ADNT criterion is fulfilled (i.e., liquid). By doing this, commodity products that does not fit the somewhat limited screen environment would not be deemed liquid, as for instance option contracts that are traded in a complex way that does not fit for screen activity.

Proposal Commodity Derivatives 3: [ADNT] Increase the parameter of the ADNT to 50 trades per day for all commodity, C10, EA and DEA sub-classes.

We strongly support at least 100 ADNT, as 50 is not high enough. 100 trades equal 1 trade every 6th minute during a 10-hour trading day, which should be the bare minimum. Given that trading is rarely uniformly distributed throughout the day, a higher threshold is a better basis for determining liquidity and, thus, an indication of the ability to find a counterparty in a relatively short period of time within a given trading day. When ESMA includes the off-screen (pre-arranged) trading activity, the number of trades (off and on combined) would in our opinion not be a qualified measure to assess if a market is liquid or not. E.g., a product that has 45 trades pre-arranged trades and 5 screen trades (total of 50) on average versus a product that has 5 pre-arranged trades and 45 screen trades, would from a commodity market perspective be very different in terms of liquidity. I.e., the former example would not be liquid and/or mature enough for screen trading, while the latter would most likely be. See also comment to Proposal 2 above.

Proposal Commodity Derivatives 4: [ADNA] Replace the criterion “average daily notional amount” with the criterion “standard trade size” calculated as the most frequently traded size (mode) and set the parameter of the STS_mode at 5 lots for futures: any class for which the most frequently traded size is lower than or equal to 5 lots would be deemed liquid (provided the other quantitative liquidity criterion is also fulfilled).

First of all, Nasdaq reiterates our comment under Proposal #2 that it is crucial that only actual on-screen transactions count for determining whether a market is liquid or not. This is valid for both STS and ADNA.

We welcome the introduction of the new Standard Trade Size (“STS”) criterion, as it is in some cases slightly more accurate than its predecessor ADNA, as it adds a new dimension to the liquidity assessment. STS would to some extent fix the current problem for product that has on average a few large trades (potentially illiquid), but STS should however be used as an additional parameter, as it does not measure liquidity in a sufficient way as criterion, when removing the ADNA and that the ADNT criterion is too low and the assessment is based on both on-screen and pre-arranged transactions.

Firstly, STS does not take into account the number of “units” in each lot when arguing that any class for which the most frequently traded size is lower than or equal to 5 lot would be deemed liquid. As an example, an average monthly contract has 720 MWh per 1 lot. A yearly contract has an average of 8,760 MWh per 1 lot (i.e., 12 times the monthly). In theory, when trading a single year contract, the market participant is trading 12 x monthly contracts, equalling 12 “monthly” lots. The criterion is hence dependent on the technical contract setup, and does not reflect the liquidity in the contract, especially for a contract with a large number of “units”, in this case the number of MWh embedded in 1 lot. Having a fixed parameter at 5 lots deciding if a market is liquid or not, would in this instance not be suitable.

Secondly, as an example the trading pattern for a monthly contract and a year contract differs significantly, as a trader looking to hedge long term would gradually build his/her book with yearly contracts as a foundation (small percentage of his exposure), and gradually trade more coming the next quarter and months. This can easily be reflected in the open interest building up in the short end of the curve, versus the long. I.e., STS would faster deem a “large” contract (e.g., year contract) as liquid, purely based on being traded in smaller lot sizes, versus “smaller” contract that more often trades in larger lot size. When determining the LIS threshold, using ADVL or the percentile approach, the LIS would become disproportionately high for no logical reason.

Lastly, when looking at the proportion of what has historically been traded (in lots) on screen versus pre-arranged, it varies a lot – and it is especially dependent on the number of “units” in the contract trade (e.g., month, quarter, year). The smaller the number of “units” in the contract, the trades are relatively larger on screen than the contract with a large number of units, which in our opinion is only logical – especially when comparing a monthly contract to a yearly contract. The STS fails to demonstrate liquidity in this respect.

To conclude, the STS liquidity criterion should complement the ADNA liquidity criterion and not replace it. ESMA should be careful when deciding upon a fixed parameter for STS_mode, as it in our view has some unintended consequences, though mostly due to the aggregation of screen and pre-arranged trading activity. Moreover, we would like to see the ADNA be measured in volume (lots), and not as notional amount. With a third criterion and adaptation of the current ADNA measured in lots, we believe ESMA to be better equipped when determining whether a market is liquid or not.

Proposal Commodity Derivatives 5: [ADNA] Set the same parameter of the STS_mode for all contract types, including options (5 lots)

With reference to the above, we do not believe STS is able to demonstrate what a liquid contract really is. However, we do not oppose that ESMA use the same parameter for options as for futures. If STS and STS_mode (5lots) is applied, we would like to see that ESMA only take into account screen trades and/or lifts the ADNT to at least 100 trades on average per trading day, or alternatively make use of the suggestion proposed under Proposal #3 and #6.

Proposal Commodity Derivatives 6: [LIS/SSTI] LIS and SSTI thresholds are equal to a set percentage of the average daily volumes (in lots), rounded to the nearest 5 lots and bounded by a floor and a cap.

The introduction of ADVL as a benchmark to set the LIS and SSTI thresholds does not make sense in many ways. Again, it fails to address the number of “units” in the contract being traded. By introducing a floor at 5 lots makes in this case little sense as well, as the former remark makes the methodology fail.

As an example, the Nordic Electricity futures would wrongfully suffer from this methodology. If we take a look at the Nordic Baseload Yearly Futures in maturity bucket 3 number, the contract, based on 2020 figures, ESMA has calculated the following:

- ADNT = 58 trades (liquid per criterion 2)
- ADVL = 119 lots
- STS_MODE = 1 lot (liquid per criterion 1)
- % of ADVL, pre-trade LIS = 5.95 lot = 5 lots rounded down to the nearest 5 lot.

When looking at the actual distribution of the trade, i.e., the percentage of trades traded in the different lot sizes (1,2,3 etc.), we see the following.

- 1 lots trade = 53% off all trades (79% screen, 21% pre-arranged)
- 2 lots trade = 25% off all trades (56% screen, 44% pre-arranged)
- Accumulated 1 and 2 lots = 78% off all trades
- 3 lots trade = 9% off all trades (49% screen, 51% pre-arranged)
- Accumulated 1-3 lots = 87% off all trades
- 4 lots trade = 3% of all trades (44% screen, 56% pre-arranged)
- Accumulated 1-4 lots = 90% off all trades
- 5 lots trade = 7% off all trades (24% screen, 76% pre-arranged).
- Accumulated 1-5 lots = 97% off all trades.

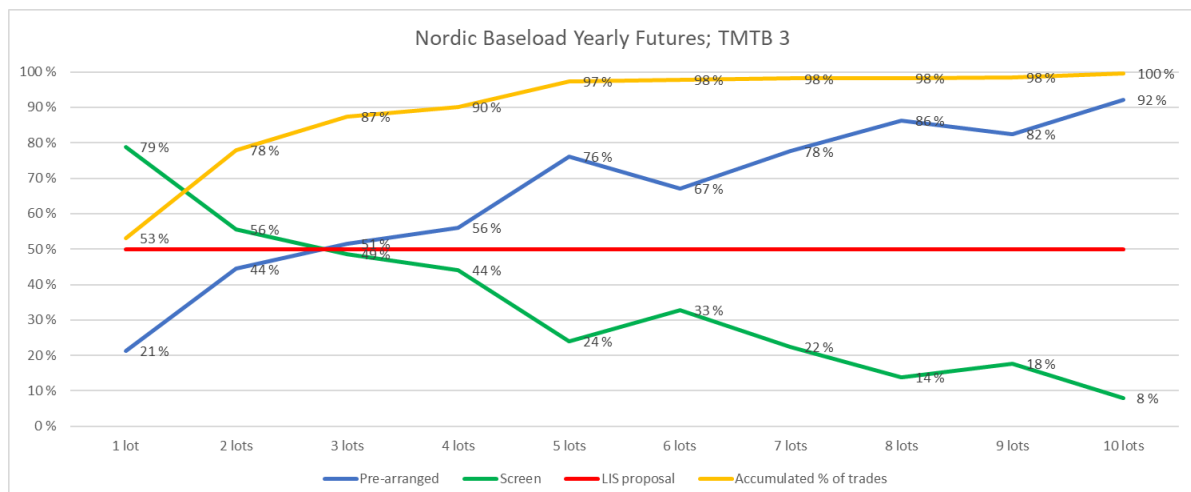
By this, it is clear to us that the methodology of setting a pre-trade LIS based on 5% of the ADVL does not reflect a logical pre-trade LIS value. With reference to our previous comments about the flaws of the methodology, the fact that the number of “units” – in this case MWh is not taken into account, eradicates the logic behind having a fixed floor at 5 lots as pre-trade LIS, in conjunction with the STS_MODE.

Below we propose what we believe is a more logical way to determine the pre-trade LIS threshold.

With reference to the above numbers for Nordic Baseload Yearly Futures we find merit in looking at the “breaking-point” between the time when a contract moves from screen to pre-arranged (i.e., at 50%). ESMA should in this instance consider to only look at screen activity, as suggested in the previous proposals.

The below figure demonstrates this:

Nordic Baseload Yearly Futures, TMTB 3



We believe that the shift at 3 lots for this particular contract is the correct pre-trade LIS. The contract is demonstrating liquidity on screen at 1 and 2 lots, but when moving up to 3 lots and above, the market shifts gradually to the pre-arranged market.

Why?

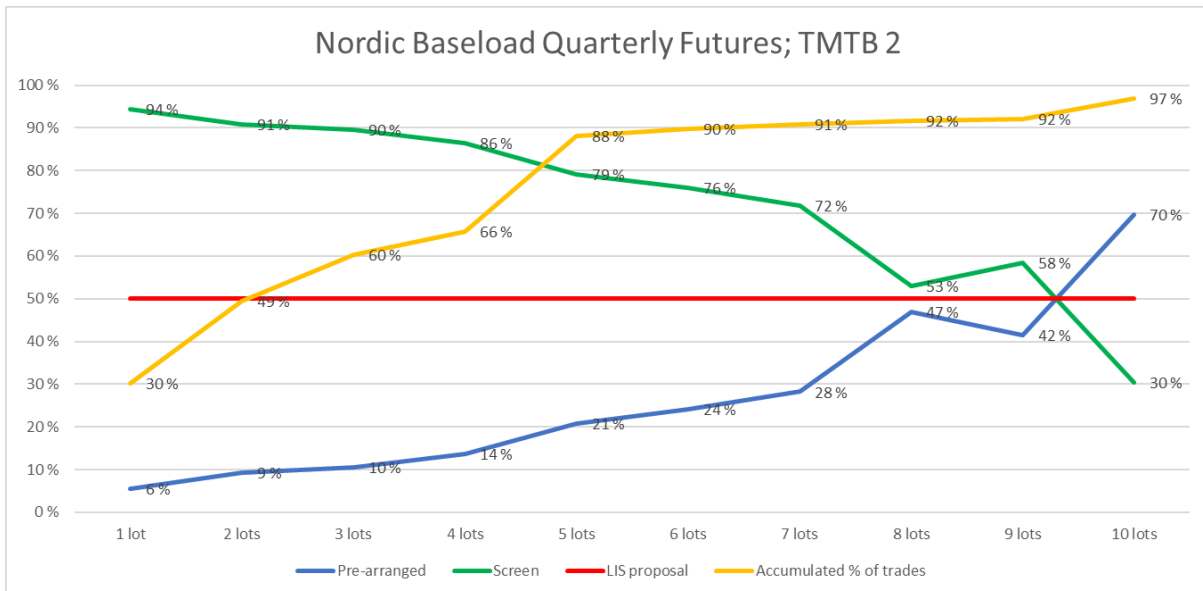
A trader is at 1 lot having an exposure (firm bid or ask) in the lit market at 8,760 MWh.

At 2 lots (firm bid or ask) the trade is having an exposure in the lit market 17,520 MWh.

At 3 lots it's at 26,280 MWh. As clearly illustrated, the lot size in this particular example does not correspond well with the methodology. If we accept the 50 trades on avg. for a contract being liquid, we need a methodology that caters for this difference, i.e., a fixed floor at 5 lots does not work.

To add a few more examples, we have looked at the liquid Nordic Baseload Quarterly Futures (TTMB 2), as well as the liquid Nordic Baseload Monthly Futures (TTMB 2), below.

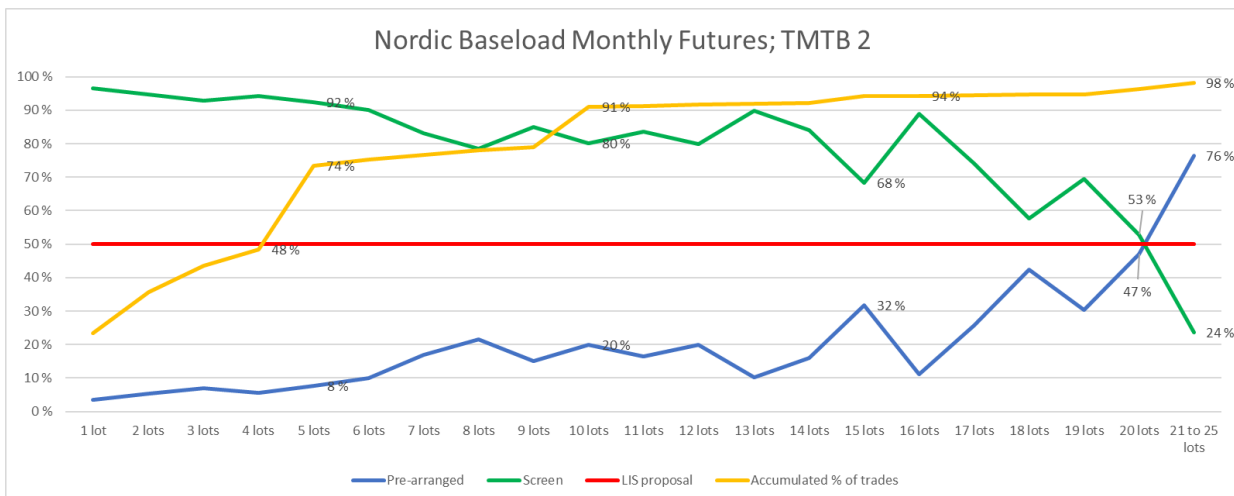
Nordic Baseload Quarterly Futures, TMTB 2



As per the above, we believe that the shift at 9 lots for this particular contract is the correct pre-trade LIS. The contract is demonstrating liquidity on screen until 9 lots, but when moving up to 10 lots and above, the market shifts radically in favour of the pre-arranged market.

When comparing the “ADVL approach” with the “Percentile approach”, the ADVL calculated by ESMA gives us a 25 lots pre-trade LIS (16 lots higher LIS, or 35,040 MWh), while the Percentile approach gives us a 10 lots pre-trade LIS lots, more in line with the actual market behaviour (1 lot higher still).

Nordic Baseload Monthly Futures, TMTB 2



As per the above, we believe that the shift at 20 lots for this particular contract is the correct pre-trade LIS. The contract is demonstrating liquidity on screen until 20 lots, but when moving above this level, the market shifts radically in favour of the pre-arranged market.

When comparing the “ADVL approach” with the “Percentile approach”, the ADVL calculated by ESMA gives us a 25 lots pre-trade LIS (5 lots higher LIS, or 3,600 MWh), while the Percentile approach gives us a 20 lots pre-trade LIS lots, more in line with the actual market behaviour, and equal to the approach suggested.

It should though be noted for all the examples presented above, when moving into the area above 50% off all matched trades, there is scarcity in liquidity in both at screen and pre-arranged. The yearly contract is traded 53% of the time at 1 lot, the quarterly 49% between 1 and 2 lots, while for the monthly contract 74% of all matched trades are concluded at 5 lots or below. I.e., if we are to implement the methodology proposed, we see an urgent need to increase the ADNT to 100 trades, and to not set a floor at 5 lots the determining pre-trade LIS. The Percentile approach works better than the ADVL (given the proposed methodology), but we would argue that the 95% percentile is not justified and can in several cases result in inappropriate high pre-trade LIS thresholds. With reference to the current RTS 2 Annex III, 70% would be more in line with our expectation when applying the percentile approach. However, we do believe ESMA should consider a phase in approach, starting of at 30% and gradually (YoY) move upwards to the 70% as a limit. Again, we urge ESMA to either solely look at the screen trades only, or actively create a methodology that differentiates between a market with a high screen percentage versus on with low.

To conclude, we believe ESMA should make use of the data provide by the market and not restrain the methodology by having rigid rounding rules to 5 lots. We disagree with imposing a floor, for the same fore-mentioned reasons, but we do support having a cap. The cap should though be flexible, dependent on the nature of the commodity product being assessed.

Proposal Commodity Derivatives 7: [Units or Lots] Set the liquidity framework in lots (STS_mode parameter set in lots, volumes reported to ESMA in lots, LIS and SSTI thresholds published in lots) accompanied by Level 3 measures to address the risk of downward revisions of the lot sizes

We agree to setting the liquidity framework in lots. The framework does however need to be adapted, as per our comments on the former proposals to function adequately. We recognize the need for measures to address the risk of downward revisions of the lot sizes, but we believe this will be limited if the framework is designed adequately.

One suggestion would be that ESMA decides on a standard for the different commodity contracts and that if you have listed a different type of contract, one would have to compute your LIS versus this standard.



E.g., 1 lot on a monthly electricity contract has a standard between 672 MWh and 745 MWh. If a trading venue lists a contract with a different “contract base” (e.g., not in MWh, but in KWh), the trading venue have to use the standard from the “main” setup to compute your LIS threshold, similar to how ESMA treats position limits when calculating mini or micro contracts into full size contracts. It should though be noted that downward revision of a lot size could be justified when trying to build a niche market, trading separately from a large benchmark contract, where there is a genuine need for trading in smaller increments/units.

Proposal Commodity Derivatives 8: [Reporting to FITRS] number of transactions shall be reported to FITRS per trade-size bins which are defined in the new Annex V of RTS 2. Total volumes in lots and total volumes in underlying units shall also be reported to FITRS as specified in the new Annex V of RTS 2.

ESMA suggests two new fields to the quantitative data, ‘Total volume in lots’ (where applicable) and ‘Total Volume’ to FITRS. As a general comment, reporting of LOTS as such are welcome. However, as Transparency Quantitative data reporting for Non-Equity are made using what is called ‘bins’ (i.e. reported values are assigned a bin size depending on value of transaction) additional guidelines would be needed on how to assign ‘bins’ when using LOT sizes instead of notional amount. Such a requirement on further technical reporting instructions not covered by the RTS would somewhat diverge from one of the key points from ESMA in the RTS 2 consultation which is that none of the reporting tables for quantitative data is regulated in the RTS today, but rather in separate ‘reporting instructions’ issued by ESMA. It is important that proper reporting guidelines are issued to complement the updated RTS to facilitate a harmonised understanding the updated requirements.

Proposal Commodity Derivatives 9: [data scope] The transparency calculations continue to be performed with all data (on-venue, SI and OTC).

Again, we would urge ESMA make use of the “screen” vs. “pre-arranged” to a much larger extent, preferably only look at the activity on screen, both for the liquidity and pre-trade LIS threshold assessment. As ESMA did not collect any SI nor OTC data, it is difficult for us to say for sure what the impact this would have, if collected, but we would argue that the SI and OTC data should not be used when performing the transparency calculations. The data would though be useful to collect in order to assess trends in trading behaviour, e.g., shift of volume to/from on-venue/cleared to SI/OTC, which unarguably a “not fit for purpose” transparency regime would heavily affect, and that in a negative way for cleared, transparent on-venue activity.

<ESMA_QUESTION_RVIEW_30>

Q31 : Do you agree with the changes proposed to Table 2 of Annex II of RTS 2 (List of details for the purpose of post-trade transparency) presented above? If not, please explain and provide any alternative proposal you might have. Are there other issues to be addressed and how?

<ESMA_QUESTION_RVIEW_31>

Nasdaq disagrees with ESMA’s proposal to prescribe the format of post-trade transparency information. ESMA’s proposal is inflexible and unconventional in that it requires significant reference data to be included, as opposed to splitting reference and market data, and also data formats are not adapted for low latency streaming data.

<ESMA_QUESTION_RVIEW_31>

Q32 : Do you agree with the changes proposed to Table 4 of Annex II of RTS 2 (Measure of volume) presented above? Do you think that it now provides more clarity? If not, please explain and provide any alternative proposal you might have.

<ESMA_QUESTION_RVIEW_32>



With regard to commodity derivatives, we understand that ESMA proposes for the measure of volume no longer to refer to the notional amount of traded contracts but to the equivalent amount of commodity or emission allowance traded expressed in measurement unit. We agree and support this proposal.

<ESMA_QUESTION_RVIEW_32>

Q33 : Do you agree with ESMA's proposals on Table 1 (Symbol) and Table 2 of Annex IV of RTS 2? If not, please explain and provide any alternative proposal you might have.

<ESMA_QUESTION_RVIEW_33>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_RVIEW_33>

Q34 : Do you agree with ESMA's proposals on the segmentation criteria for bonds (Table 2.2), securitised derivatives (Table 4.1), interest rate derivatives (Table 5.1), equity derivatives (Table 6.1), credit derivatives (Table 9.2 and 9.3) and emission allowances (Table 12.1) of Annex III of RTS 2? If not, please explain and provide any alternative proposal you might have.

<ESMA_QUESTION_RVIEW_34>

This seems reasonable overall. However a few questions/comments:

What is being referred to by ESMA with reference to "warrants" in text below? Are these covered warrants or equity warrants?

"395. As far as securitised derivatives are concerned, there are no segmentation criteria. However, ESMA has considered the request to remove negotiable rights and add warrants to the definition of securitised derivatives in the Annex. In this context, ESMA has further clarified the definition of negotiable rights to avoid confusion with subscription rights or similar instruments whose underlying are commonly shares and added warrants to the definition of securitised derivatives."

We would suggest to provide more clarity on categorization of securitized derivatives. In Finland, equity warrants are considered as securitized derivatives, whereas in Sweden equity warrants are classified as shares.

<ESMA_QUESTION_RVIEW_34>

Q35 : Please provide your comments in relation to the proposals related to the segmentation criteria applicable to commodity derivatives summarised in Table 11. Please list the proposals with their ID for ease of reference. Do you have other proposals related to the segmentation criteria applicable to commodity derivatives and C10 derivatives?

<ESMA_QUESTION_RVIEW_35>

SC_Commo_1: Settlement location should be a segmentation criterion for gas (in addition to electricity), and reported with an EIC code.

Yes, Nasdaq agrees.

SC_Commo_2: Settlement location should not be a segmentation criterion for energy other than gas and electricity (unless a standard is provided by stakeholders).

Yes, Nasdaq agrees.

SC_Commo_3: Add the duration of the delivery period as a new segmentation criterion for electricity and natural gas contracts:



We strongly support adding the duration of the delivery period as a new segmentation criterion for the reasons laid down in the consultation paper.

SC_Commo_4: Align wording of the list of energy types with RTS 23 (in particular add renewable energy):

Yes, Nasdaq agrees.

SC_Commo_5: For energy sub-asset classes, delete the segmentation criterion “load type”:

Yes, Nasdaq agrees.

SC_Commo_6: For energy sub asset-classes, the segmentation criterion “underlying energy” should not apply to natural gas:

Nasdaq disagrees that “underlying energy” should not apply to natural gas. It is important that a distinction can be made between for example LNG, hydrogen and natural gas.

SC_Commo_7: For commodity swaps, align the segmentation criterion “settlement type” with RTS 23:

No comments.

SC_Commo_8: For agricultural sub asset- classes, split the segmentation criterion “underlying agricultural commodity” in two:

Nasdaq agrees with splitting segmentation criterion 1 in two.

SC_Commo 9: For freight derivatives, amend the values listed after segmentation criterion “contract type” and delete the contract type FFA from the reference data table:

No comments.

SC_Commo_10: Define reporting standards for RTS2#12 “specification of the size related to the freight sub- type” and RTS2#13 “specific route or time charter average”:

No comments.

<ESMA_QUESTION_RVIEW_35>

Q36 : Do you agree with ESMA’s proposal on the new Table of Annex V of RTS 2 (Details of the data to be provided for the purpose of determining a liquid market, the LIS and SSTI thresholds for non-equity financial instruments)? If not, please explain and provide any alternative proposal you might have.

<ESMA_QUESTION_RVIEW_36>

In principle we welcome standardisation and clarification on what exactly to report, so we agree with most of ESMA’s proposals. However there may still be room for further improvements. For instance, when it is stated ‘NPFT’, it would be even better to specify which types of NPFT are intended, to prevent misalignment between reporting parties. Also, we note the cross-references for tables, and we are wondering if there is room for clarification as to what tables are actually intended, for instance by the reference in para 442?

<ESMA_QUESTION_RVIEW_36>

Q37 : Do you agree with ESMA’s proposal to delete the ACTX flag? Please explain.

<ESMA_QUESTION_RVIEW_37>

We do not have a comment to this question. However, we are wondering if there may be a mistake in the para 445 text: ALGO flag does not exist for non-equity under RTS2 currently.

“445. Broadly speaking, RTS 2 currently provides for 5 types of flags:



Other flags introduced either due to regulatory requirements ('ALGO')"
<ESMA_QUESTION_RVIEW_37>

Q38 : Do you agree with ESMA's proposal to merge the current non-equity deferral flags into one general flag?

<ESMA_QUESTION_RVIEW_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_RVIEW_38>

Q39 : Do you agree with ESMA's proposal not to change the existing flags regarding non-price forming transactions in non-equity financial instruments? If not, please explain.

<ESMA_QUESTION_RVIEW_39>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_RVIEW_39>

Q40 : Do stakeholders agree with ESMA's proposal to introduce a general waiver flag for non-equity transactions benefitting from a waiver? For LIS, should it be limited to completely filled LIS orders?

<ESMA_QUESTION_RVIEW_40>
We are not in favour of introducing such pre-trade waiver flag due to the concern of leakage of information. Also, the current implementation of post-trade flag LRGS for LIS deferrals has not been problematic for us. The proposal to limit the flag to only completely filled LIS orders may mitigate this risk, but we consider the benefits to be limited and not worth the effort to implement system changes needed.
<ESMA_QUESTION_RVIEW_40>

Q41 : Do you agree with ESMA's proposal to introduce a flag for pre-arranged non-equity transactions?

<ESMA_QUESTION_RVIEW_41>
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<ESMA_QUESTION_RVIEW_41>

Q42 : Do you agree with the proposal on the delayed implementation of certain provisions of the amended RTS 1 & 2 ? Do you have proposals to minimize the delay?

<ESMA_QUESTION_RVIEW_42>
We underline the need for sufficient lead time of implementation of changes. Changes can well apply from the start of a year, but 6 months is too short, especially depending on how big the changes will be, and also considering other initiatives that may be ongoing at the same time, for exchanges as well as for the rest of the industry that will be affected by changes. Technical implementation and possible phased introduction of the changes raises questions and potential concerns.

Specifically regarding commodity derivatives we have additional comments:
On the amendments concerning the liquidity assessment, LIS and SSTI thresholds for commodity derivatives, C10 derivatives, EA and DEA: The relevant sections of amended Article 13 of RTS 2, and the relevant amended tables in Annex III of RTS 2, should be processed sooner than the timeline suggested. The current methodology is failing the market, and we need an interim solution to fix the problems urgently. While we may not agree with all proposals/methodology (see Q 30), the proposal is an improvement to the current regime. We would like to see new calculations for liquidity assessment and PTT LIS thresholds become effective as soon as possible, and no later than June 1st 2022. The streamlined and automated



solutions, the legislative text etc. could follow the timeline as suggested, as long as there is room for an interim solution.

<ESMA_QUESTION_RVIEW_42>

Q43 (CBA) : Can you identify any other costs and benefits not covered in the CBA below? Please elaborate.

<ESMA_QUESTION_RVIEW_43>

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<ESMA_QUESTION_RVIEW_43>