MiFID Review Questionnaire

Section 1. General questions on the overall functioning of the regulatory framework

Question 1. To what extent are you satisfied with your overall experience with the implementation of the MiFID II/MiFIR framework?

☐ 1 - Very unsatisfied
☐ 2 - Unsatisfied
☒ 3 - Neutral
☐ 4 - Satisfied
☐ 5 - Very satisfied
☐ 6 - Don’t know / no opinion / not relevant

Question 1.1 Please explain your answer to question 1 and specify in which areas would you consider the opportunity (or need) for improvements:

Overall, the Associations’ members seem neutral with the current operational MiFID regime considering the magnitude of the legislative change, noting that much of the significant cost to implement changes has already been incurred.

The complexity of MIFID II/ MIFIR and the fact that it covers many different areas (from market structure to transparency, from investor protection to conduct of business rules and licensing regime) makes it difficult to ‘rate’ the framework as a whole. There are certainly areas in which ISDA and FIA members are satisfied and areas where they are unsatisfied.
The MiFID II implementation date was delayed by a year and we remain convinced that a phased-in approach would have helped the smoother implementation of the numerous changes required under MiFID II.

There are certain areas like the provisions around best execution reporting, where questions remain whether the MiFID II/MiFIR framework has achieved its objectives, and where members see opportunities for improvement. In particular, market participants have consistently reported outstanding problems associated with the implementation of complex data and reporting rules and the calibration of transparency since the full application date of the framework. In addition, members see a number of opportunities to streamline aspects of the investor protection rules, in particular where certain obligations are currently applied to wholesale market participants.

They also highlight that more fragmented markets have resulted from the lack of equivalence decisions on trading venues between the EU and other jurisdictions, and this is likely to be exacerbated in respect of the UK, in particular following the end of the transition period on 31 December 2020. In addition, the Associations’ members note a need to further harmonise supervisory practices across member states.

Question 2. Please specify to what extent you agree with the statements below regarding the overall experience with the implementation of the MiFID II/MiFIR framework?

	1 disagree	2 rather not agree	3 neutral	4 rather agree	5 fully agree	N. A.
The EU intervention has been successful in achieving or progressing towards its MiFID II /MiFIR objectives (fair, transparent, efficient and integrated markets).	☐	☐	☒	☐	☐	☐
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	☒	☐	☐	☐	☐	☐
The different components of the framework operate well together to achieve the MiFID II/MiFIR objectives.	☐	☐	☒	☐	☐	☐
The MiFID II/MiFIR objectives correspond with the needs and problems in EU financial markets.	☐	☐	☐	☒	☐	☐
The MiFID II/MiFIR has provided EU added value.	☐	☐	☒	☐	☐	☐

Question 2.1 Please provide qualitative elements to explain your answers to question 2:

From the perspective of derivatives markets participants, it appears that while the MiFID II/ MiFIR framework has meant that a significant amount of additional data is being made available to the market and to trading counterparties, the data is not in all cases providing meaningful transparency or adding benefit to end users that justify the costs. This is due to a range of factors, including uncertainties and inconsistencies in the areas of financial instruments scope (non-ToTV products, which notably affects the accuracy and effectiveness of the reference data system), a lack of harmonisation of post-trade transparency deferrals, and calibration of pre-trade transparency for certain asset classes.

In addition, the opportunity should be taken to clarify that the scope of transactions subject to the Derivatives Trading Obligation should be a subset of transactions subject to the Clearing Obligation under EMIR.

Question 3. Do you see impediments to the effective implementation of MiFID II/MiFIR arising from national legislation or existing market practices?

☐1 - Not at all

☐2 - Not really

☒3 - Neutral

☐4 - Partially

☐5 - Totally

☐6 - Don’t know / no opinion / not relevant

Question 3.1 Please explain your answer to question 3:

Further harmonisation of EU capital market rules should remain a key objective with levels of transparency remaining calibrated to ensure market participants are not exposed to undue risks. Divergence in implementation, i.e. related to inducements, fosters a non-level playing field and could lead to regulatory arbitrage including regulatory arbitrage between Member States.

Question 4. Do you believe that MiFID II/MiFIR has increased pre- and post- trade transparency for financial instruments in the EU?

☐1 - Not at all
☐2 - Not really
☐ 3 - Neutral
☒ 4 - Partially
☐ 5 - Totally
☐ Don't know / no opinion / not relevant

Question 4.1 Please explain your answer to question 4:

We believe that MiFID II has significantly increased transparency in the derivatives market as MiFID I did not cover derivatives on a pre- and post-trade transparency basis. However, at the moment, the information reported is not easily accessible to market participants for the following reasons:

- Post-trade information is reported by APAs and venues in a non-standardised format and it is difficult for market participants to access the information reported; data is therefore fragmented and not easily accessible.
- Data quality issues;
- Clients are not using pre-trade transparency as they use other data for streamed data;

Transparency has been designed based on concepts relevant for transferable securities but failed to achieve the same appropriate outcome for derivatives. Given the broad scope across instruments it has meant that there have been implementation issues trying to apply the same rule to different types of transactions, particularly in post-trade transparency. This has led to data quality issues and resulted in ineffective transparency. We would welcome tighter scope to ensure more effective delivery and meaningful transparency.

Question 5. Do you believe that MiFID II/MiFIR has levelled the playing field between different categories of execution venues such as, in particular, trading venues and investment firms operating as systematic internalisers?

☐1 - Not at all
☒2 - Not really
☐3 - Neutral
☐4 - Partially
☐5- Totally
☐6 - Don't know / no opinion / not relevant

Question 5.1 Please explain your answer to question 5:

SIs and multilateral trading venues play different roles.

SIs 'trade on own account' bilaterally with clients. Therefore, SIs have to disclose their identity and put their own capital at risk. Regulatory obligations for SIs in Article 18 exceed those for trading venues as SIs have to make the firm quotes "available to their other clients" and "enter into transactions under the published conditions with any other client to whom the quote is made available". This obligation of "actionality" by other clients should be removed. We

agree with ESMA's suggestions to delete these Article 18 SI obligations.
In addition, the SI regime needs more clarity to confirm that it applies to TOTV only. If not, SIs will be faced with an additional administrative burden compared to trading venues, which by nature only deal with ToTV products.

Question 6. Have you identified barriers that would prevent investors from accessing the widest possible range of financial instruments meeting their investment needs?

☐1 - Not at all
☐2 - Not really
☐3 - Neutral
☐4 - Partially
☐5 - Totally
☒6 - Don't know / no opinion / not relevant

Question 6.1 If you have identified such barriers, please explain what they would be:
N/A

Question 6.1 Please explain your answer to question 6:
N/A

Section 2. Specific questions on the existing regulatory framework

PART ONE: PRIORITY AREAS FOR REVIEW

The establishment of an EU consolidated tape

Question 7. What are in your view the reasons why an EU consolidated tape has not yet emerged?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N.A.
Lack of financial incentives for the running a CT	☐	☐	☐	☐	☒	☐
Overly strict regulatory requirements for providing a CT	☐	☐	☐	☐	☐	☒
Competition by non-regulated entities such as data vendors	☐	☐	☐	☐	☐	☒
Lack of sufficient data quality, in particular for OTC transactions and transactions on systematic internalisers	☐	☐	☐	☒	☐	☐
Other	☐	☐	☐	☐	☐	☐

Please specify what are the other reasons why an EU consolidated tape has not yet emerged?

Lacking use cases for derivatives. Clients and end-users of derivatives have never expressed the need to have a consolidated tape for derivatives instruments. Frequently traded derivatives, IRS and CDS, are predominantly used by sophisticated market participants for risk management purposes. Therefore, the use case for retail investors seeking to have a better view of the market or finding "pockets of liquidity" is, unlike for equity and bonds, rather limited. It is difficult to see how a CT for derivatives could benefit derivatives markets for the following reasons:

A significant barrier has been the high number of trading venues and APAs that a consolidated tape provider would need to connect to. As ESMA has noted in its Consultation Paper on non-equities transparency, 279 entities reported non-equity data to its reference data system in 2018.

Aggregate data streams are costly to obtain from providers, some of whom charge. We would welcome mandating the use of an open common industry standard such as FIX, so that the data is cheaper, of a better quality and more effective.

Question 7.1 Please explain your answers to question 7:

We agree with the approach that is set under the current consolidated tape framework whereby the consolidated tape is developed sequentially, starting first with equities. This could be potentially followed by non-equities post-trade (not pre-trade) at a later date, given the complexities involved with reporting non-equity information compared to equity information. However, we would suggest that it may be prudent to start with other non-equity asset classes, such as cash bonds, to give time to firstly test demand for a non-equity tape and then further explore whether there is demand for a derivatives tape.

Question 8. Should an EU consolidated tape be mandated under a new dedicated legal framework, what parts of the current consolidated tape framework (Article 65 of MiFID II and the relevant technical standards (Regulation (EU) 2017/571)) would you consider appropriate to incorporate in the future consolidated tape framework? Please explain your answer:

We do not support mandatory consumption.

Lack of financial incentives for running a CT: There does not appear to be a strong financial incentive for a derivatives consolidated tape provider to emerge as there does not seem to be a strong use-case or user demand for such a tape. In terms of the type of users that would consume such a tape, this appears to be limited. Frequently traded derivatives, such as IRS and CDS, are predominantly used by sophisticated market participants for the risk management purposes.

Broadly speaking, retail investors are less likely to trade in derivatives and therefore, the use case for retail investors seeking to have a better view of the market or finding "pockets of liquidity" is, unlike equity and bonds, rather limited.

Furthermore, exchange-traded derivatives do not suffer from the same fragmentation issue as an ETD will only trade on one venue where it was created. This contrasts with trading in other instruments such as equities, where the same instrument can be traded on multiple venues, thus leading to fragmentation. Therefore, it is not clear that a consolidated tape would provide a significant improvement on participants' current visibility of trading data in ETDs.

Many sophisticated market participants, such as large global dealers, also already have access to alternative sources of data, such as purchased proprietary feeds from trading venues. They therefore have limited appetite to also purchase a consolidated tape given that this would duplicate their market data costs. Even if a derivatives tape was developed, this would not be a substitute for consuming proprietary trading venue data feeds since these feeds are needed for latency-sensitive trading activity.

Lack of sufficient data quality, in particular for OTC transactions and transactions on systematic internalisers: Beyond the above-mentioned issue on data quality, the current MiFID II framework does not provide clarity on how trading venues and APAs could submit data to a CTP, hence further calibration in this regard would be helpful, e.g. on how to send data in a standardised format to a CTP. In addition, the MiFID II framework should be amended to require trading venues and APAs to submit the data to the CTP (mandatory contribution). The current MiFID II rules are not sufficiently clear in this area, as they place the onus on the CTP to 'collect' the data that is made public (Article 65 of MiFID II) without clearly placing an obligation on trading venues and APAs to comply and on what basis.

This data should be provided free of charge by trading venues and APAs to help minimise the input costs to the consolidated tape.

Furthermore, there is a lack of harmonisation of post-trade deferrals across EU member states. The post-trade transparency requirements for non-equity leave it to national competent authorities (NCAs) to choose between various options on extended deferrals for large trades in bonds and derivatives. As a result, NCAs have adopted different types of deferrals of varying publication requirements and duration. Harmonising the regime for waivers and deferrals (per asset class) so that all investment firms can benefit from the same extended deferrals across all EU countries would be helpful in the context of a consolidated tape.

Availability and price of market data

In its report submitted on 5 December 2019 to the Commission, ESMA considers that so far MiFID II/MiFIR has not delivered on its objective to reduce the price of market data and the Reasonable Commercial Basis ('RCB') provisions have not delivered on their objectives to enable users to understand market data policies and how the price for market data is set.

ESMA recommends, in addition to working on supervisory guidance on how the RCB requirements should be complied with, a number of targeted changes to either the Level 1 or Level 2 texts to strengthen the overall concept that market data should be charged based on the costs of producing and disseminating the information:

- **add a mandate to the Level 1 text empowering ESMA to develop Level 2 measures specifying the content, format and terminology of the RCB information; and**
- **move the provision to provide market data on the basis of costs (Article 85 of CDR 2017/565 and Article 7 of CDR 2017/567) to the Level 1 text;**
- **add a requirement in the Level 1 text for trading venues, APAs, SIs and CTPs to share information on the actual costs of producing and disseminating market data as well as on the margins with CAs and ESMA together with an empowerment to develop Level 2 measures specifying the frequency, content and format of such information;**
- **delete Article 86(2) of CDR 2017/565 and Article 8(2) of CDR 2017/567 allowing trading venues, APAs, CTPs and SIs to charge for market data proportionate to the value the data represents to users.**

Question 9. Do you agree with the above targeted amendments recommended by ESMA to address market data concerns? Please explain your answer:

As mentioned in Answer 7.1., the Associations believe that standardisation of data submission (frequency, content and format) is essential as well as the reduction of market data costs and the administrative burden of reporting entities. Increasing data quality without further increasing associated costs of consuming data is a precondition to make the CTP economically viable.

[Note: The following response to Question 9 represents the views of clearing members and may not represent the views of the Associations' entire membership. The views expressed below are in relation to the cost of data as it applies to exchange-traded derivatives.]

1. **Market data consumption for regulatory compliance and risk controls/mitigation purposes**

MiFID II and MiFIR have increased the need to consume market data in real time to satisfy specific regulatory requirements.

For example, Commission Delegated Regulation (EU) No 2017/589 of 19 July 2016 supplementing MiFID with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading, providing direct electronic access and acting as general clearing members ('RTS 6') includes a number of requirements that demand real-time market data.

While Article 13 (automated surveillance) of RTS 6 does not explicitly demand real-time data, it does link through to the requirements in the Markets Abuse Regulation (MAR) and firms' internal audit and compliance teams are generally of the view that anything less than real-time monitoring for activities such as spoofing is not up to the expected compliance standard. Therefore, firms have had to implement real-time surveillance alerting systems to ensure that they meet MiFID II and MAR requirements. All those systems work on real-time data to spot patterns in trading too.

In other words, firms are unable to comply with these and other requirements if they do not have access to real-time market data, so they have no choice but to obtain the data if they wish to achieve regulatory compliance. On the other hand, trading venues are in a unique position of providing market data, as they are the only ones who have the requisite data and act as utilities in this regard. This could lead to unhealthy and uncompetitive pricing structures for market data because demand is inelastic and guaranteed (often driven by regulation), while supply is limited and concentrated in individual trading venues.

2. Cost and transparency of market data

a. *Cost of market data for regulatory compliance and risk mitigation purposes*

The Associations' clearing members are of the view that the cost of market data needs to be transparent and that trading venue members should not be charged for essential market data separately from or in addition to the cost of membership, as the cost of providing the market data service is integral to the trading venue membership and is therefore already priced in the cost of that membership. While members of trading venues and other data users consume market data, they first and foremost contribute their own data by e.g. submitting orders to trading venues, which then allows the trading venues to turn the data received into a data service that is made available to all market participants. If exchange members and their clients did not contribute their own data in the first place, then trading venues would not be able to offer data services at all.

To the extent that market participants require real-time market data for regulatory compliance purposes or for risk controls/risk mitigation purposes, clearing firms are of the view that consumption of such data should be free of charge, as they do not have a choice but to use the data from a specific trading venue. Moreover, the fact that clearing members use this data for risk management and risk mitigation purposes represents a significant benefit to the trading venues. The same firms also acknowledge that market data can also be used for purely commercial, investment and speculative purposes and that such data should be available to market participants on a reasonable commercial basis.

a. *Market data redistribution fees*

Since the primary European derivatives exchanges have only recently implemented market data fees (all in 2016), it is difficult to demonstrate significant increases in these fees, due to the short period in which they have been levied. However, exchange members and other firms have also been impacted by the extension of market data redistribution fees in order to provide this data to market participants, effectively paying to collect the user fees on behalf of the exchanges. These market data redistribution fees are not insignificant and are in addition to exchange, clearing and market data usage fees.

b. *Lack of transparency around cost of market data*

Furthermore, there is very little to no visibility on the transparency of costs for the market data. While most exchanges make market data fees publicly available, these are not easy to understand and there are material differences and inconsistencies among exchanges in the level of detail, format and structure of how the fees are presented. It would be desirable if there was at least some commonality introduced, for example a common template when it comes to making prices lists publicly available.

Use cases for a consolidated tape

Question 10. What do you consider to be the use cases for an EU consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Transaction cost analysis (TCA)	☒	☐	☐	☐	☐	☒
Ensuring best execution	☐	☐	☐	☐	☐	☒
Documenting best execution	☐	☐	☐	☒	☐	☐
Better control of order & execution management	☐	☐	☐	☐	☒	☐
Regulatory reporting requirements	☐	☐	☐	☐	☐	☒
Market surveillance	☐	☐	☐	☐	☐	☒
Liquidity risk management	☐	☐	☐	☐	☐	☒
Making market data accessible at a reasonable cost	☐	☐	☐	☐	☐	☐
Identify available liquidity	☐	☐	☐	☐	☐	☐
Portfolio valuation	☐	☐	☐	☒	☐	☐
Other	☐	☐	☐	☐	☐	☐

Please specify what are the other use cases for an EU consolidated tape that you identified?

An appropriately constructed CT could help to build deeper and more open capital markets in Europe. In line with the European Commission's vision for Capital Markets Union ("CMU"), a key aim should be to democratise access across European markets: to provide all investors regardless of resources or sophistication with a comprehensive and standardised view of European trading.

A CT could contribute to ensuring and monitoring Best Execution as it would provide retail investors with a much better and accurate picture of all liquidity sources rather than just trading venues and would thus contribute to higher standards of Best Execution. However, even though the CT could contribute to Best Execution by providing more price transparency, it should be borne in mind that price is not the sole factor for Best Execution.

Other use cases for an EU consolidated tape include regulatory monitoring and acting as a data source for retail and academia.

Question 10.1 Please explain your answers to question 10 and also indicate to what extent the use cases would benefit from a CT:

We do not support mandatory consumption. The delivery of a consolidated tape would not solve the problem of market data costs, and could in fact increase costs to market participants, in particular those who will still require low-latency data.

The CT would not be fully beneficial as an aid to evidencing best execution unless it provided a complete historical database, including accurate timestamping, as well as the location of the firm with regards to whether or not they were able to access a quote/order, or not. We would note that even if this was available, there are numerous factors other than price which need to be considered in order to achieve best execution.

We believe the focus should be on the development of a single data standard for EU markets, based on open formats, which would enhance data quality, accessibility and standardisation, enable greater competition and innovation in provision of data services, and ultimately reduce the cost of entry.

General features of the consolidated tape

This section discusses the general features of a future European CT. The specific scope of the CT in terms of financial instruments (shares, bonds, derivatives) and type of transparency (pre- and/or post-trade) are addressed in the following section.

During the EC workshop, the ESMA consultation, conferences and stakeholder meetings, it became clear that a majority of market participants believe that EU financial markets would benefit from the establishment of a CT. ESMA made the following recommendations which appear very important for the success of an EU consolidated tape:

- **ensuring a high level of data quality (supervisory guidance complemented with amendments of the Level 1 and 2 texts); mandatory contributions: trading venues and APAs should provide trading data to the CT free of charge;**
- **CT to share revenues with contributing entities (on the basis of an allocation key that rewards price forming trades);**
- **contribution of users to funding of the CT, e.g. via mandatory consumption of the CT by users to ensure user contributions to the funding of the CT**
- **full coverage: The CT should consolidate 100% of the transactions across all asset classes (with possible targeted exceptions);**
- **operation of the CT on an exclusive basis: ESMA recommends that a CT is appointed for a period of 5-7 years after a competitive appointment process;**
- **strong governance framework to ensure the neutrality of the CT provider, a high level of transparency and accountability and include provisions ensuring the continuity of service.**

The EC workshop, conferences and stakeholder meetings revealed that opinions remained divergent on a variety of issues, notably:

- **Whether pre-trade data should be included in CT: the argument has been made that the US model for a consolidated quotation tape comprises pre-trade quotes because of the order protection rule contained in Regulation National Market System (NMS). The order protection rule eliminated the possibility of orders being executed at a suboptimal price compared to orders advertised on exchanges and it established the National Best Bid and Offer (NBBO) requirement that mandates brokers to route orders to venues that offer the best displayed price. Although some stakeholders strongly support a quotation tape, others have expressed reservations, either because there is no order protection rule in the European Union or because they do not support the establishment of such a rule in the EU which could be encouraged by the establishment of a pre- trade tape. Stakeholders also argue that a quotation tape will be very expensive and that latency issues in collecting, consolidating and disseminating transaction data from multiple venues will always lead to a co- existence of the CT and proprietary exchange data feeds.**

- **What should be the latency of the tape: Many stakeholders argue that the tape should be "real-time", implying minimum standards on latency such as a dissemination speed of between 200 and 250 milliseconds ("fast as the eye can see"). Other stakeholders support an end of day tape.**
- **How to fund the tape and redistribute its revenues: stakeholders have mixed views on the optimal funding model. They also caution against some aspects of the US model, where the practice of redistribution of CT revenues has, in their view, provided market participants with an incentive to provide quotes to certain venues that rebate more tape revenue, without necessarily contributing to better execution quality.**

Question 11. Which of the following features, as described above, do you consider important for the creation of an EU consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
High level of data quality	☐	☐	☐	☐	☒	☐
Mandatory contributions	☐	☐	☐	☐	☐	☐
Mandatory consumption	☒	☐	☐	☐	☐	☐
Full coverage	☒	☐	☐	☐	☐	☐
Very high coverage (not lower than 90% of the market)	☐	☐	☐	☐	☐	☒
Real-time (minimum standards on latency)	☒	☐	☐	☐	☐	☐
The existence of an order protection rule	☐	☐	☐	☐	☐	☒
Single provider per asset class	☐	☐	☐	☐	☐	☒
Strong governance framework	☐	☐	☐	☐	☒	☐
Other	☐	☐	☐	☐	☐	☐

Please specify what other feature(s) you consider important for the creation of an EU consolidated tape?

We believe the development of an EU consolidated tape should focus in the first instance on equities and bonds, for which there is a clearer use case, than on derivatives.

Question 11.1 Please explain your answers to question 11 and provide if possible detailed suggestions on how the above success factors should be implemented (e.g. how data quality should be improved; what should be the optimal latency and coverage; what should the governance framework include the optimal number of providers):

The Associations' members do not support mandatory consumption of a consolidated tape. We believe the focus should be on the development of a single data standard for EU markets, based on open formats, which would enhance data quality, accessibility and standardisation, enable greater competition and innovation in provision of data services, and ultimately reduce the cost of entry. The industry would be well placed to own the data standards and knowledgeable in the nuances in different needs of different asset classes.

Question 12. If you support mandatory consumption of the tape, how would you recommend to structure such mandatory consumption?
Please explain your answer and provide if possible detailed suggestions on which users should be mandated to consume the tape and how this should be organised:

The Associations' members do not support mandatory consumption of a consolidated tape, given the cost implications. We would only support mandatory consumption if the cost of access was immaterial. Investors should have the freedom of choice, otherwise it raises complex questions around accountability of the CTP provider, governance and voting rights.

Question 13. In your view, what link should there be between the CT and best execution obligations?
Please explain your answer and provide if possible detailed suggestions (e.g. simplifying the best execution reporting through the use of an EBBO reference price benchmark):

The Associations' members do not support the creation of a CT for derivatives because of the reasons explained above. If policymakers were to decide to create a tape for derivatives, then we do not believe that the tape should be used for ensuring best execution. Best execution is a nuanced requirement which is based on a number of factors (such as speed of execution, likelihood of execution etc.) and not only on prices.

There should not be a link between the CT and best execution obligations. A CT could be helpful as a data source for normalising expected standard terms of TCA and liquidity access, which are component parts of the overall assessment of best execution. However, a CT could not be used in isolation for evidencing best execution as it cannot take into account the qualitative assessments that must be applied.

Question 14. Do you agree with the following features in relation to the provision, governance and funding of the consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The CT should be funded on the basis of user fees	☐	☐	☐	☐	☐	☒
Fees should be differentiated according to type of use	☐	☐	☐	☐	☐	☒
Revenue should be redistributed among contributing venues	☐	☐	☐	☐	☐	☒
In redistributing revenue, price- forming trades should be compensated at a higher rate than other trades	☐	☐	☐	☐	☐	☒
The position of CTP should be put up for tender every 5-7 years	☐	☐	☐	☐	☐	☒
Other	☐	☐	☐	☐	☐	☐

Please specify what other important feature(s) for the funding and governance of the CT you did identify?

The CT must exist by way of an open structure, which ensures that it is not subject to abuse. The structure should be set up in such a way that the data does not create commercial value for the provider based on the data contributions of industry participants. The operator should be compensated for the running cost.

Question 14.1 Please explain your answers to question 14 and provide if possible detailed suggestions on how the above features should be implemented (e.g. according to which methodology the CT revenues should be redistributed; how price forming trades should be rewarded, alternative funding models):
N/A

The scope of the consolidated tape

Pre- and post-trade transparency and asset classcoverage

This section discusses the scope of the CT: what asset classes should be covered and what trade transparency data it should include. This section also discusses how to delineate, within an asset class, the exact scope of financial instruments that should be included in the CT.

Question 15. For which asset classes do you consider that an EU consolidated tape should be created?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Shares pre-trade	☐	☐	☐	☐	☐	☐
Shares post-trad	☐	☐	☐	☐	☐	☐
ETFs pre-trade	☐	☐	☐	☐	☐	☐
ETFs post-trade	☐	☐	☐	☐	☐	☐
Corporate bonds pre- trade	☐	☐	☐	☐	☐	☐
Corporate bonds post- trade	☐	☐	☐	☐	☐	☐
Government bonds pre- trade	☐	☐	☐	☐	☐	☐
Government bonds post- trade	☐	☐	☐	☐	☐	☐
Interest rate swaps pre- trade	☒	☐	☐	☐	☐	☐
Interest rate swaps post- trade	☐	☐	☒	☐	☐	☐
Credit default swaps pre- trade	☒	☐	☐	☐	☐	☐
Credit default swaps post- trade	☐	☐	☒	☐	☐	☐
Other	☐	☐	☐	☐	☐	☐

Please specify for which other asset classes you consider that an EU consolidated tape should be created?

An EU consolidated tape could be created per product given the differences. It should be limited to materially liquid instruments. For example, pre-trade transparency is not relevant to the fixed income market and single name CDS should be excluded from the regime.

IRS and CDS post-trade:
It appears that the demand for a consolidated tape, even for frequently traded derivatives is low.
Unlike securities (equities as well as debt instruments), which correspond to investment objectives of investors, notably retail investors for equities, derivatives are risk management tools, mainly used by sophisticated market participants.

In order to effectively manage interest rate risks, market participants make use of bespoke arrangements even for highly standardised products and trade IRS on a bilateral basis. Furthermore, derivatives end-users do not find it difficult to access trading counterparties or to gain access to multiple trading venues. In conclusion, the Associations' members are not particularly in need of a CT for derivatives, especially if a CT for derivatives would exhibit additional market data costs.

Question 15.1 Please explain your answers to question 15:
N/A

Another important element in the design of the CT will be to determine the exact content of the information that a pre- and/or post-trade CT should consolidate in relation to the information already disseminated under the MiFIR pre- and post-trade transparency requirements. While Article 65 of MIFID II and the relevant regulatory technical standards specify the exact content of the post-trade information a CT should consolidate under the current framework, there is no such specification for pre-trade information.

Question 16. In your view, what information published under the MiFID II/MiFIR pre- and post-trade transparency should be consolidated in the tape (all information or a subset, any additional information)? Please explain your answer, distinguishing if necessary by asset class and pre- and post-trade. Please also explain, if relevant, how you would identify the relevant types of transactions or trading interests to be consolidated by a CT:
N/A

The Official List of financial instruments in scope of the CT

To provide market participants with legal clarity, a CT would benefit from a list setting out, within a given asset class, the exact scope of financial instruments that need to be reported to the CT. This section discusses, for each asset class, how to best create an "Official List" of financial instruments that would feature in the CT, having regard to the feasibility of producing such a list.

ETFs, Bonds, Derivatives and other financial instruments

Question 20. What do you consider to be the most appropriate way of determining the Official List of ETFs, bonds and derivatives defining the scope of the EU consolidated tape?
Please explain your answer and provide details by asset class:

As indicated above, the Associations' members do not deem a CT for derivatives beneficial. However, regardless of a CT, inconsistencies around reportable instruments, such as non-TOTV reporting for SIs, should be addressed.

Post-trade transparency regime for non-equities

For non-equity instruments, MiFID II/MiFIR currently allows a deferred publication of up to 2 days for post-trade information (including information on the transaction price), with the possibility of an extended period of deferral of 4 weeks for the disclosure of the volume of the transaction. In addition, national competent authorities have exercised their discretion available under Article 11(3) of MiFIR. This resulted in a fragmented post-trade transparency regime within the Union. Stakeholders raised concerns that the length of deferrals and the complexity of the regime would hamper the success of a CT.

Question 30. Which of the following measures could in your view be appropriate to ensure the availability of data of sufficient value and quality to create a consolidated tape for bonds and derivatives?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Abolition of post-trade transparency deferrals	☒	☐	☐	☐	☐	☐
Shortening of the 2-day deferral period for the price information	☒	☐	☐	☐	☐	☐
Shortening of the 4-week deferral period for the volume information	☒	☐	☐	☐	☐	☐
Harmonisation of national deferral regimes	☐	☐	☐	☐	☒	☐
Keeping the current regime	☐	☒	☐	☐	☐	☐
Other	☐	☐	☐	☐	☐	☐

Please specify what other measures could in your view be appropriate to ensure the availability of data of sufficient value and quality to create a consolidated tape for bonds and derivatives?

Aggregate data streams are costly to obtain from providers, some of whom charge. ISDA and FIA members would welcome mandating the use of an open common industry standard (such as FIX), in order that the data is cheaper, of a better quality and more effective. A lack of harmonisation of APA's post-trade data formats has been an issue and it is crucial that the information is reported in a consistent way.

In addition, data must be appropriate for the relevant asset class. It should not create any international inefficiencies with regards to international regulation. It should not create a situation whereby trading in certain instruments creates undue risk. There is a need to work on data quality of derivative instruments.

Question 30.1 Please explain your answer to question 30:

Post-trade deferrals have been introduced under MiFID II to protect transactions in more illiquid instruments and large in scale transactions and ensure markets in the derivatives space remains efficient.

However, discretions granted to NCAs regarding post-trade deferrals have led to a non-harmonised application of deferrals. It is important to remove the NCA's discretions and to set out a harmonised deferrals regime per asset class, so that all investment firms can benefit from the same extended deferrals across all EU countries. It is also important that deferrals must continue to ensure market participants are not exposed to undue risk. A comprehensive consultation of the industry should be undertaken.

A reduction or a deletion of the post-trade deferrals would lead to a decrease in market liquidity and higher costs to end-users. Although certain transactions (illiquid instruments and large in scale) benefit from deferrals, ultimately all derivatives transactions are fully reported and made transparent to the public. The post-trade transparency regime should remain carefully calibrated and no changes should be made without a robust cost and benefit analysis. We would question who would really benefit from a reduction of post-trade deferrals for illiquid and large transactions. Usually these transactions are undertaken by institutional investors and allow markets to function more efficiently by ensuring lower funding costs for European corporates, including SMEs and sovereigns, and higher liquidity for European investors.

Another aspect mentioned in the Commission consultation on the international role of the euro is a more finely calibrated system of pre-trade transparency applicable to commodity derivatives. Such a system would lead to a swifter transition of these markets from the currently prevalent OTC trading to electronic platforms.

Question 69. Please specify to what extent you agree with the statements below regarding the experience with the implementation of the position limit framework and pre-trade transparency?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The EU intervention been successful in achieving or progressing towards improving the functioning and transparency of commodity markets and address excessive commodity price volatility.	☐	☒	☐	☐	☐	☐
The MiFID II/MiFIR costs and benefits with regard to commodity markets are balanced (in particular regarding the regulatory burden).	☐	☒	☐	☐	☐	☐
The different components of the framework operate well together to achieve the improvement of the functioning and transparency of commodity markets and address excessive commodity price volatility.	☐	☒	☐	☐	☐	☐

The improvement of the functioning and transparency of commodity markets and address excessive commodity price volatility correspond with the needs and problems in EU financial markets.	☐	☒	☐	☐	☐	☐
The position limit framework and pre- trade transparency regime for commodity markets has provided EU added value.	☐	☒	☐	☐	☐	☐

Question 69.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR

Quantitative elements for question 69.1:

	Estimate (in €)
Benefits	
Costs	

Qualitative elements for question 69.1:

The Associations support the overall objective of MiFID II/MiFIR to "improve the functioning and transparency of commodity markets and address excessive commodity price volatility". However, we feel these objectives have not been fully met by the implementation of the position limits and pre-trade transparency regimes. The implementation of MiFID II has proven to be a burdensome and costly process for both commodity derivatives exchanges and market participants.

The position limits regime was unprecedented in the EU and has no equivalent in other jurisdictions. Market participants have identified three areas where implementation generated unnecessary burden:

a) Treatment of new and illiquid contracts
b) Scope of application because of the ambiguity of the definition of commodity derivatives under MiFIR
c) Hedging exemption

a) While the regime worked well for mature contracts, it introduced adverse effects on the development of new and nascent contracts. These include limiting the potential future growth of a contract and its wider economic purpose, and benefits to the real economy. Restrictive (de-minimis) limits and a lack of flexibility have discouraged market participants from on-venue trading, thus limiting the execution of trades, which could have a negative impact on the orderly pricing of contracts and the general transparency in the market.

To effectively overcome the negative impact of the current regime on new and illiquid commodity derivatives a more fundamental review is needed, i.e. a more proportionate and efficient position limit regime by focusing its application on important, '"critical'" commodity derivative contracts combined with a hedging exemption for financial counterparties. This would allow new and nascent products to develop and better fulfil the overall objectives of MiFID II. New, illiquid and less liquid products are unlikely to influence price movements in the underlying physical commodity markets that could negatively affect consumers. Thus, removing ESMA/NCA-set position limits for such contracts would not pose any risk to the transparency and functioning thereof. Rather, attracting more volume to regulated venues would contribute to a more transparent trading environment. We understand the intention of policymakers to avoid excessive speculation adversely affecting prices. To achieve this objective – which is identical to the objective of the US position limits regime – it is sufficient to consider only those contracts in scope, that are relevant for the price formation in underlying commodity markets.

b) The definition of commodity derivatives under Article 2.1(30) of MiFIR covers transferable securities and some derivatives with no physical underlying commodities. ESMA provided some Q&As to address the unintended consequences generated by this definition (e.g. for inflation derivatives) but uncertainties remain.

Position limits were intended to prevent market abuse and to support orderly pricing and settlement conditions. However, we note that in relation to securitised commodity derivatives, these instruments are already subject to the market abuse regime under Regulation (EU) No 596/2014 (MAR) and can only be admitted to trading on a regulated market in the EU if it is possible to have an orderly market in trading in these instruments (Art. 51.1 MiFID II). In addition, since there is no possibility of physical delivery or physical settlement in relation to these instruments, they are not capable of having the same impact on physical commodity markets as derivatives falling within sections C.5, C.6, C.7 and C.10, Annex I of MiFID II.

As a result, it should not be necessary to apply commodity derivative position limits to these instruments as appropriate controls are already in place. Moreover, if additional controls were required, both ESMA and competent authorities have the power to implement such controls (e.g. ESMA's temporary intervention powers under article 40 MiFIR).

c) We support a position limit exemption based on mandatory liquidity provision obligations, similar to the one outlined in Art. 2(4) of MiFID II, particularly if the position limits regime continues to include the de-minimis limit of 2,500 lots for new and illiquid contracts. We elaborate further on this in our response to Q74.

Finally, we believe a more tailored pre-trade transparency regime would better promote liquidity and competitiveness in European commodity markets. Therefore, it is important to understand that commodity markets have specific characteristics and often suffer within a one-size-fits-all regulatory approach to financial instruments. As currently tailored, the pre-trade transparency regime limits pre-arranged trades from being submitted to exchanges for central clearing, constraining the ability of market participants to hedge their commercial exposures on exchanges.

1. **Position limits for illiquid and nascent commodity markets**

The lack of flexibility of the position limit framework for commodity hedging contracts (notably for new contracts covering natural gas and oil) is a constraint on the emergence euro-denominated commodity markets that allow hedging the increasing risk resulting from climate change. The current de minimis threshold of 2,500 lots for those contracts with a total combined open interest not exceeding 10,000 lots, is seen as too restrictive especially when the open interest in such contracts approaches the threshold of 10,000 lots.

Question 70. Can you provide examples of the materiality of the above mentioned problem?

☒ Yes, I can provide 1 or more example(s)

☐ No, I cannot provide any example

Please provide example(s) of (nascent) contracts where the position limit regime has constrained the growth of the contract:

Underlying cause of the constraint (A/B/C)*:
*Note: 1 The underlying cause of the constraint is due to (A) the position limit becoming too restrictive as open interest increases, (B) an incorrect categorisation under the position limits framework or (C) the underlying physical markets are not efficiently reflected.
Article 15 of RTS 21 states that a limit of 2,500 lots shall be set for new contracts traded on a trading venue with a total combined interest in spot and other months not exceeding 10,000 lots over a consecutive three-month period. NCAs have interpreted this requirement to mean that on day 1 of a new commodity derivative, a limit of 2,500 lots would apply. This limit is too restrictive to allow a new contract to develop into a liquid instrument. In line with ESMA Q&As, NCAs can use different derogations for illiquid markets which have an open interest between 5.000 and 10.000 lots. These remain difficult to apply in practice in a meaningful manner and are often not sufficient to mitigate the negative impact of disproportionately low position limits.

Once the position limit is nearly reached, market participants will withdraw from the market, often switching to another trading venue outside of the MiFID II regime, leaving the NCA no time to adjust the limit upwards. Furthermore, in relation to newly launched contracts, it is not unusual that only one participant sits on the buy or sell side of the market. In such cases, even a fifty percent limit is not sufficient to allow the market to further develop.

Any increase of the limit under the available derogation will need to be substantial in order to provide sufficient relief to market participants close to the limits and prevent unreasonable restrictions on trading activity in fast growing markets. An increase of a given position limit with, for example 500 lots, will only have a very limited impact, effectively allowing market participants close to the limit to trade an additional lots equivalent of four calendar or eight season contracts.

Figure 1 and 2 illustrate the negative impact of the 2,500 lots limit in combination with the lack of a hedging exemption for financial counterparties on the EEX Gas Czech Virtual Trading Point, CZ VTP, and the Zeebrugge trading point (ZTP) gas futures markets. Both markets took off in the course of 2018, but then declined when the 2,500 lots limit became too restrictive. With only 10 to 12 market participants registered to trade and only 1 or 2 very active market participants being responsible for most of the volumes – an absolutely normal situation for a new contract -, the position limit put a halt to further development. While some participants are eligible for the hedging exemption, other important participants are investment firms and cannot benefit from this exemption, meaning that they have to stop trading and look for other contract alternatives.

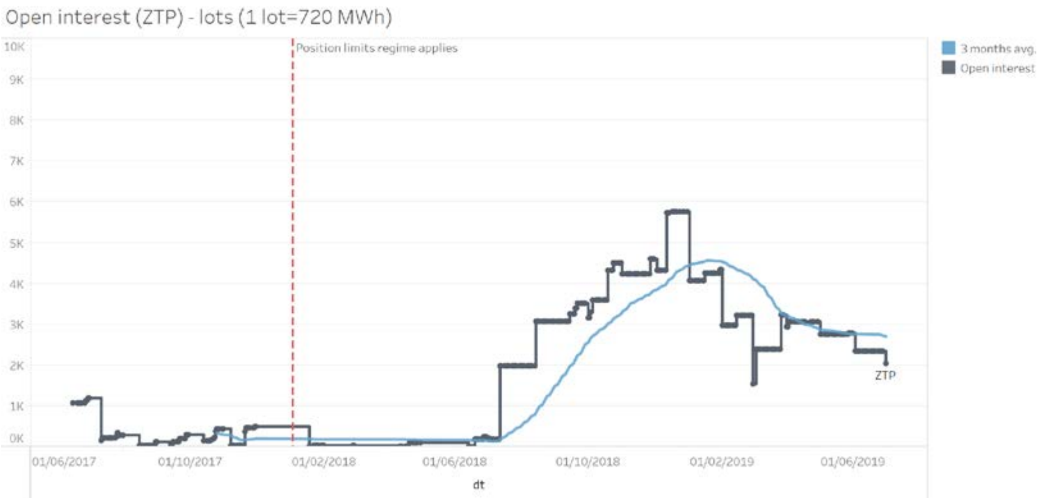

Figure 1 Impact of position limit regime on EEX ZTP gas futures market

Figure 2 Impact of position limit regime on EEX Czech VTP gas futures market

In the dry bulk freight asset class, the inflexible 2,500 lots limit has proved too restrictive for critical market participants, on which the growth of the contract is fundamentally dependent. Figure 3 gives the example of Capesize 5TC, where the limit of 2,500 lots hampered the development of the contract as soon as the open interest approached 100,000 lots.

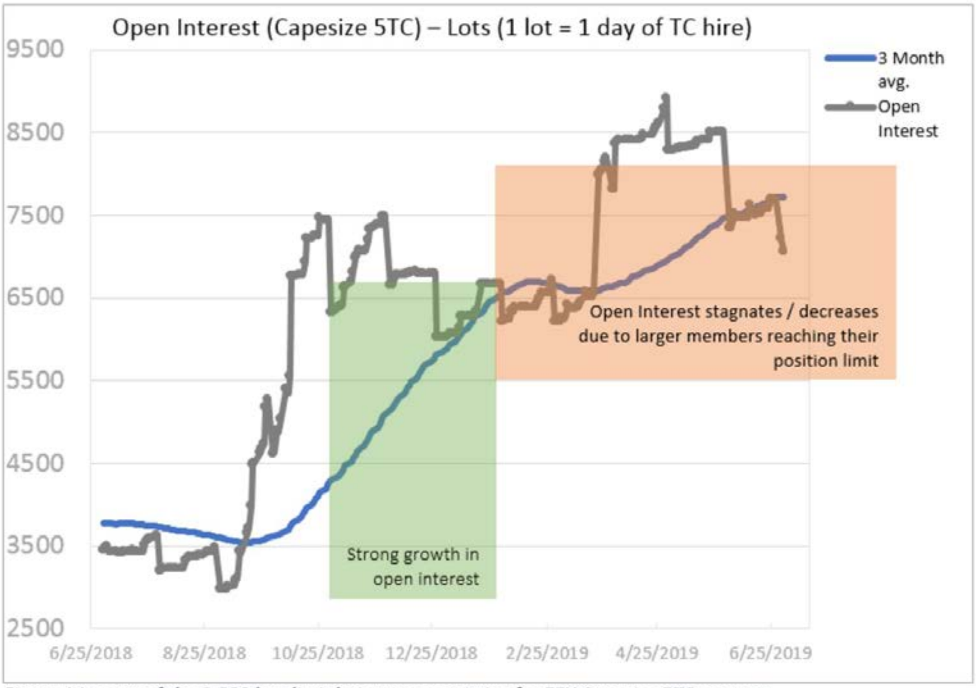

Figure 1 Impact of the 2.500 lots limit being too restrictive for EEX Capesize 5TC contract

Figure 3 Impact of the 2.500 lots limit on the EEX Capesize 5TC contract

Size of the OTC space the contract(s) is/are trying to enter (in €):

Market share the nascent contract(s) is/are expected to gain (in %):

Contract(s) is/are euro denominated?

Question 71. Please indicate the scope you consider most appropriate for the position limit regime:

	1 (most appropriate)	2 (neutral)	3 (least appropriate)	N. A.
Current scope	☐	☐	☒	☐
A designated list of 'critical' contracts similar to the US regime	☒	☐	☐	☐
Other	☒	☐	☐	☐

Please specify what other scope you consider most appropriate for the position limit regime:

The Associations support, first and foremost, to apply position limits to a list of critical contracts only. ESMA, in their Final Report on position limits note that a policy process involving a fundamental Level 1 change, which a move to critical contracts would require, could take some time to become effective.

If a Level 1 change cannot be implemented within a reasonable timeframe, we propose a temporary "other scope" and we welcome ESMA's statement that some amendments to the Level 2 measures on position limits, notably Art. 15 of RTS 21, may be appropriate in the meantime.

In order to prevent more negative consequences for new and illiquid markets during the course of the more thorough Level 1 policy process, FIA and ISDA recommend suspending the limits for new contracts for a certain period while work on a Level 1 change and a move to critical contracts is under way. However, a 12-month period suggested by ESMA is too short to develop a contract and we therefore recommend extending this period to 24 months. We note that that a maximum position limit of up to 50% of the reference amount for contracts below 20,000 lots open interest might not be sufficient, especially for contracts with a very low open interest and typically a one-digit figure of market participants. For example, should a contract only have 4,000 lots open interest and the position limits is subsequently set at 2,000 lots, the proposal would result in more restrictive limits than the current regime. If, after 12 months, the combined open interest has still not exceeded 20,000 lots, ideally a 10,000 lots de-minimis limit should apply. Only such an approach can facilitate rapid growth as well as provide sufficient time for NCAs to set a bespoke position limit.

Question 71.1 Please explain your answer to question 71:

The Associations believe that to effectively overcome the negative impact of the current regime on new and nascent contracts, a more fundamental review is indeed needed. We believe that to solve the issues we have addressed in our response to ESMA's recent call for evidence and subsequent consultation on this matter and in our response to Q70 above, a move towards a more proportionate and efficient position limits regime is required. This can be achieved by refocusing on a more limited set of mature, critical, derivative contracts.

This view is also shared by ESMA which, in its recent report, cites '*the scope of position limits should be limited to commodity derivatives where position limits can play of valuable role, i.e. to well-developed critical contracts where price formation takes place and that have a role in the pricing of the underlying commodity and other related commodity derivatives*.'

By considering only those contracts relevant for the price formation in the underlying commodity, excessive speculation, which might adversely affect prices, will be avoided (this is also the objective of the US regime). In this regard, it should be noted that the MiFID II position limits regime is not fundamental to the prevention of market abuse, nor to the improvement of orderly pricing and settlement.

A more limited scope would allow new and nascent products to develop in line with the objectives of MiFID II as expressed in its implementing RTS 21: "Position limits should not create barriers to the development of new commodity derivatives and should not prevent less liquid sections of the commodity derivative markets from working adequately". New and nascent products constitute a minor share of commodity markets and are unlikely to influence price movements in the underlying physical commodity market. Moreover, these contracts would remain subject to dedicated REMIT, MAR and MiFID II principles, and exchanges' market supervision and market surveillance departments. Therefore, removing position limits for such contracts would not pose any risk to the transparency and functioning of the respective markets. On the contrary, attracting more volume to regulated venues would contribute to a more transparent trading environment.

In sum, a refocusing of the position limits regime on highly liquid benchmark contracts would make it more efficient, mitigate the unintended consequences on new and illiquid contracts, and reduce the compliance burden for all concerned parties (market participants, trading venues, NCAs/ESMA). Last but not least, a more proportionate and efficient regime would contribute to the European Commission's objective to strengthen the competitiveness of European commodity derivatives markets in the context of the international role of the Euro.

Question 72. If you believe there is a need to change the scope along a designated list of 'critical' contracts similar to the US regime, please specify which of the following criteria could be used.

For each of these criteria, please specify the appropriate threshold and how many contracts would be designated 'critical'.

- ☒ Open interest
- ☐ Type and variety of participants
- ☐ Other criterion:
- ☐ There is no need to change the scope

Open interest:

Threshold for open interest:

Some of our members consider a threshold of 300,000 lots of open interest over one year to be a meaningful threshold to qualify a contract as critical.

Number of affected contracts in the EU for open interest:

Based on 2019 (pre-Brexit) figures, more than twenty commodity derivative contracts (electricity, oil and natural gas) were affected.

Type and variety of participants:

Threshold for the type and variety of participants:

Number of affected contracts in the EU for the type and variety of participants:

Other criterion:

Please specify what other criterion could be used and explain your answer:

Threshold for this other criterion:

Number of affected contracts in the EU for this other criterion:

Please explain why you consider that the open interest is a criterion that could be used:

Exchanges use various criteria to assess the liquidity of a market. They include, inter alia, open interest, share of open interest versus deliverable supply, number of active trading participants, churn ratio (for physically-settled contracts), share of screen execution and average trading horizon. However, these parameters are highly correlated and therefore open interest is sufficient to determine whether a contract qualifies as a 'critical' contract or not.

The Associations consider commodity derivative contracts to be 'critical' once they have developed into a highly liquid instrument with open interest levels that imply that all the various more detailed liquidity criteria have been met. Based on these criteria, which exchanges use to determine which markets should be considered mature and developed, we recommend a contract should have at least 300,000 lots of open interest on average over a year to qualify as 'critical'. Importantly, this numerical value classifying contracts as (non)-critical should nevertheless always be in function of market reality and therefore be used as a minimum threshold to qualify a contract to fall under the position limits regime.

In addition, open interest is a dynamic criterion as it reflects the 'liquidity' and activity in the market. It also reflects the lifecycle of the underlying commodity market whereas the measure of the deliverable supply is more static and cannot reflect long-term anticipation or needs.

This approach would produce an outcome broadly comparable with the US regime for position limits, whereby we expect more than 20 commodity derivative contracts offered for trading in Europe to be classed as critical.

It is particularly important to consider the existence of non-EU commodity derivatives markets for the same underlying commodity. To date the EU is the only jurisdiction to have implemented mandatory position limits across all commodity derivatives. If a market has developed elsewhere on the same commodity markets, there is a risk that the non-EU market attracts the liquidity that exists in the EU markets. This risk would be exacerbated if the physical delivery processes for both EU and non-EU contracts are similar.

Please explain why you consider that the type and variety of participants is a criterion that could be used:

We do not recommend that this criterion is used as the only qualifying criterion. We consider this indicator to be highly correlated with open interest.

On some of the most illiquid commodity derivatives markets there are very few dealers that offer hedges to end-users, which limits the growth capacity of these markets and forces these few dealers to stop trading when they approach limits. This can happen rapidly if only a handful of dealers are present in these markets. It is important to have a broad set of market participants able to bring sufficient liquidity and to assure that the commodity derivatives markets reflect the dynamics of physical markets.

Should the European Commission wish to take this criterion into account, we recommend that there should be at least 50 actively trading market participants in a contract on average over a one-year period. This number of market participants is also a factor to be considered by NCAs when setting position limits under the implementing legislation of MiFID II Article 57. To qualify as 'critical', a contract would have to breach the thresholds for open interest and active trading participants.

Question 72.1 Please explain your answer to question 72:

As specified above, open interest serves as the most important indicator to determine whether an instrument is highly liquid and mature. When assessed in function of the market reality, it shows the potential of instruments to serve as a benchmark contract for the underlying commodity.

ESMA rightly points out in the Final Review Report that, in a post-Brexit environment, a more limited amount of benchmark commodity derivatives contracts resides in the Union. However, we want to urge the Commission to refrain from artificially classifying contracts as critical. This would hinder the development of non-critical contracts in the European Union and thereby undermine the Commission's ambitions in context of the international role of the Euro to establish competitive EU commodity derivatives markets. A reduced scope to genuine 'critical' mature contracts, identified by using 300,000 lots open interest as a reference, would allow Euro-denominated commodity derivatives contracts to develop into European, and global, benchmark contracts.

In case the Commission intends to further specify and/or include additional criteria, this should follow the logic of the overarching purpose for the review, i.e. coming to a more efficient and workable regime by refocusing the scope to critical contracts only and to allow euro-denominated energy derivatives to develop into global benchmark contracts. We believe taking a two-tier approach would be most appropriate. The open interest figure on average over one year should hereby serve as a strict minimum threshold to qualify contracts to the regime. This gives NCAs and ESMA the opportunity to, as a second step, assess the 'critical nature' of these highly liquid contracts and set bespoke limits based on a deeper market understanding. This was previously impossible due to the enormous number of contracts for which limits need to be defined. Such approach ensures that only the mature products that are able to function well under the position limits regime receive an appropriate limit and 'critical' status, while nascent contracts are given the opportunity to further develop.

This second determination should take into account whether the price signal of a 'critical' contract is broadly recognised in the wider market as a relevant benchmark price for its underlying commodity, the nature of the underlying commodity and the size of the markets. Thereby, it is particularly important to consider the existence of non-EU commodity derivatives markets with the same underlying commodity. If a market has developed elsewhere on the same commodity markets, there is a risk that the non-EU market attracts the liquidity that exists in the EU markets.

In addition to open interest, the following additional elements could help determine the scope of 'critical contracts':

- Given that the regime is focused on convergence between the derivative pricing and that of the underlying commodity, it would be sensible to remove limits from any contracts where there is no associated deliverable supply;
- The nature of the underlying commodity;

- The size of the markets;
- The importance for the supply of the underlying commodity across the EU; and
- The existence of non-EU markets for the same commodity, with EU competitiveness in mind.

We appreciate ESMA's recommendation in the Final Review Report that further work and consultation will need to be undertaken. This will allow for more timely adjustments as required by market developments. For this, it is of the utmost importance that ESMA consults all relevant actors in the identified commodities' value chain.

ESMA has questioned stakeholders on the actual impact of position management controls. Stakeholder views expressed to the ESMA consultation appear diverse, if not diverging. This may reflect significant dissimilarities in the way position management systems are understood and executed by trading venues. This suggests that further clarification on the roles and responsibilities by trading venues is needed.

Question 73. Do you agree that there is a need to foster convergence in how position management controls are implemented?

☐ 1 - Disagree
☐ 2 - Rather not agree
☐ 3 - Neutral
☐ 4 - Rather agree
☐ 5 - Fully agree
☒ Don't know / no opinion / not relevant

Question 73.1 Please explain your answer to question 73:
N/A

Question 74. For which contracts would you consider a position limit exemption for a financial counterparty under mandatory liquidity provision obligations?

This exemption would mirror the exclusion of the related transactions from the ancillary activity test.

	Yes	No	N.A.
Nascent	☒	☐	☐
Illiquid	☒	☐	☐
Other	☐	☐	☐

Please specify for which other contracts you would consider a position limit exemption for a financial counterparty under mandatory liquidity provision obligations:
N/A

Question 74.1. Please explain your answer to question 74:

We support a position limit exemption based on mandatory liquidity provision obligations, similar to the one outlined in Art. 2(4) of MiFID II, particularly if the position limits regime continues to include the de-minimis limit of 2,500 lots for new and illiquid contracts. The lack of a liquidity provision exemption, in combination with the overly restrictive de-minimis limit, has been a substantial barrier to the development of new contracts, such as agriculture and dry bulk freight contracts. However, in case such exemption is considered, it should not be limited to financial counterparties only, but expanded to non-financial counterparties too, as in many cases, if not in most cases, non-financial counterparties fulfil mandatory liquidity obligations as well.

The exemption is in particular necessary for new contracts that need financial or non-financial entities to incentivise trading in the contract. If no such exemption is available and the 2,500 lots de-minimis limit continues to apply, exchanges have to contract a “panel” of liquidity providers to ensure that none of these firms exceed the 2,500 lots limit. In nascent markets it is highly possible that there may not be the required number of counterparties to build such a “panel” and even where this is the case, it adds significant costs for the exchange.

In order to avoid such a situation, we recommend that the position limit regime should include such an exemption based on the same conditions as the liquidity provision exemption outlined in Art. 2(4) MiFID II and the ESMA Q&A on MiFID II/MiFIR commodity derivative topics. This exemption should be implemented similarly to the hedging exemption under the position limit regime.

Question 75. For which counterparty do you consider a hedging exemption appropriate in relation to positions which are objectively measurable as reducing risks?

	Yes	No	N. A.
A financial counterparty belonging to a predominantly commercial group that hedges positions held by a non-financial entity belonging to the same group	☒	☐	☐
A financial counterparty	☒	☐	☐
Other	☐	☐	☐

Please specify for other which counterparties you consider a hedging exemption appropriate:
N/A

Question 75.1 Please explain your answer to question 75:

While the position limits regime includes exemptions for market participants pursuing hedging activity, the MiFID 2 definition of *hedging* as set out in RTS 21 is clear that only non-financial entities can engage in such activity. Because the exemption is unavailable to investment banks or commodity trading houses that are MiFID 2 authorised, both of which play a vital role in providing smaller commercial players with access to commodity derivatives markets, end-users may struggle to find hedgers.

2. Pre-trade transparency

MiFIR RTS 2 (Commission Delegated Regulation (EU) No 2017/583) sets out the large-in-scale (LIS) levels are based on notional values. In order to translate the notional value into a block threshold, exchanges have to convert the notional value to lots by dividing it by the price of a futures or options contract in a certain historical period. Some stakeholders argue that the current provisions of RTS2 lead to low LIS thresholds for highly liquid instruments and high LIS thresholds for illiquid contracts. This situation makes it allegedly hard for trading venues to accommodate markets with significant price volatility. This hinders their potential to offer niche instruments or develop new and/or fast-moving markets.

Question 76. Do you consider that pre-trade transparency for commodity derivatives functions well?
☐ 1 - Disagree
☒ 2 - Rather not agree
☐ 3 - Neutral
☐ 4 - Rather agree
☐ 5 - Fully agree
☐ Don’t know / no opinion / not relevant

If you do not consider that pre-trade transparency for commodity derivatives functions well, please (1) provide examples of markets where the pre-trade transparency regime has constrained the offering of niche instruments or the development of new and/or fast moving markets, and (2) present possible solutions including, where possible, quantitative elements:

We recommend revising both Level 1 and Level 2. Please see our response to Q76.1 for an elaborate context of commodity markets and the implementation of the pre-trade transparency regime.

Level 1: We recommend extending the hedging exemption in MiFIR Article 8(1) to cover all market participants managing risks arising from activity in the physical market, including financial counterparties, to allow the building of liquidity in the order book to continue, without jeopardising the ability of commodity derivatives markets to fulfil their function. We further propose to extend the so-called “negotiated transaction waiver” for equity instruments (Art. 4 (1) (b) MiFIR) to bilaterally negotiated commodity derivative transactions. This waiver allows trading participants to agree on the price and volume of the trade before transmitting it to the trading platform for clearing. The conditions of the present negotiated transaction waiver need to be adapted to the specifics of the commodity (derivatives) markets and their participants, in particular to allow a sufficient volume of pre-arranged trades to be registered at exchanges for voluntary clearing.

Level 2: Such changes should be combined with amendments in RTS 2, removing factors leading to inappropriate thresholds. The current methodology (such as liquidity accumulation across venues) has led to a significant number of niche and nascent products being inappropriately (re-) classified as liquid, thus becoming subject to significantly broader transparency requirements, which were previously reserved for developed markets. We recommend the following amendment:

1) Exclusion of price factor from the calculation of IL and LIS thresholds

Including price in the calculation of LIS and IL threshold values can lead to misinterpretations and indeed confusion when measuring liquidity in instruments that are not natively defined in notional value and result in: price movements occurring in the same direction as changes in liquidity exaggerate the liquidity changes; price movements which occur in the opposite direction mute the change in liquidity; and price movements without a change in liquidity make liquidity appear more volatile than it is. Liquidity should not be measured by using the notional value of transactions. Instead, we recommend that any liquidity analysis is normalised to a base quantity unit that is native to the asset class. For commodities, this will typically be a specific unit of measure (e.g. barrels, tons, MW, etc.).

2) Sufficiently high daily number of trades for a market to be liquid

For a market to be considered liquid, a sufficiently high number of trades should be executed on each trading day. We recommend setting the threshold should be set at the median of 100 transactions per day instead of the current average of 10. Considering that liquidity is the ability to find a counterparty in a relatively short period of time within a given trading day, a threshold of 100 trades per day represents an average of ca. 1 trade every 5 minutes on an 8-hour trading day. In contrast, a threshold of 10 trades represents just 1.25 trades per hour. For the same reason, a median is proposed as the minimum instead of a mean. The mean is an alternate view of the sum count of trades per year.

3) Trade frequency and standard size rather than volume as liquidity indicators

Consider two instruments: Instrument 1 is traded once per day for 100,000 units and Instrument 2 is traded 10,000 times per day for 10 units. In both cases, the average volume will be 100,000 units per day. However, it would be very difficult to categorise Instrument 1 as liquid, whereas Instrument 2 is very liquid for trade volumes of approximately 10 units. We recommend measuring both trade frequency and standard size, excluding unrelated vectors such as price and currency, to determine liquidity.

4) Counterintuitive effects of a percentile-based approach

A percentile-based approach can lead to significant counterintuitive effects. Any approach using a central or percentile-based measure will result in:

- A low standard size for the high liquidity instrument;
- A high standard size for the low liquidity instrument;
- A low LIS for the high liquidity instrument;
- A high LIS for the low liquidity instrument.

The above results are counterintuitive and imply that the instrument with lower liquidity can support higher LIS levels than the high-liquidity instrument – when in fact the opposite is true. While the low liquidity instrument does typically trade in a higher size, the overall size of this market and trade frequency is dwarfed by the higher liquidity of the market. Therefore, setting a low LIS for high liquidity markets and a high LIS for low liquidity markets based on the standard trade size in either mean, median or mode terms is detrimental for the development of low liquidity markets. There is a clear need for a more tailored approach, or a scaled approach based on variations in distribution.

Question 76.1 Please explain your answer to question 76:

We fully agree with the objectives of MiFID II/MiFIR and the G20 Pittsburg commitments to 'improve the functioning and transparency of financial and commodity markets and address excessive commodity price volatility'. While we support the aim and implementation of the pre-trade transparency regime, we believe the current calibration might hamper a substantial increase in commodity contracts traded on exchanges and cleared through central counterparties, hence being subject to a sufficient level of security and transparency.
MiFIR rightly recognises that certain exemptions can be granted to trading venues from the general requirement to publish pre-trade transparency data to preserve orderly price discovery processes and allow illiquid and nascent markets to develop, but the current shortcomings of the regime have sometimes prevented market participants from moving to transparent and regulated venues and central clearing. However, the current methodology has led to illiquid niche and nascent products being incorrectly classified as liquid, and thus becoming subject to significantly broader transparency requirements which were previously reserved for developed markets. The current calculation methods of the LIS and IL markets waiver are based on insufficiently granular sub-asset classes as well as arbitrarily selected parameters, which has resulted in disproportionately low LIS thresholds for highly liquid products and overly high thresholds for illiquid ones.

In summary, the pre-trade transparency regime could better take into account the fact that non-equity markets are fundamentally different from equity markets, and that there are significant differences across the underlying non-equity markets themselves. It is, for example, important to understand that commodity markets have specific characteristics and hence often suffer from a one-size fits all regulatory approach to financial instruments.

Compared to other financial instruments, commodity instruments are often less liquid. In order to achieve execution, trades are concluded outside the regulated venues according to the rules of a specific exchange with immediate clearing at the exchanges' respective central counterpart (CCP), rather than in a central order book where a satisfactory execution would be less likely. This ensures maximum transparency for these nascent markets.

Additionally, commodity markets are – by nature – characterised by a wide range of different contract types, including former swaps, forwards, futures and options with various combinations of quality, location, delivery type, duration and size. These markets are used by professional investors to hedge risk connected to the production or consumption of an actual commodity, and thus often requires liaison to find a counter party, without incurring undue risk. Trade registration has been and still is a driver behind shifting volumes from OTC to on-venue trading in these markets.

Therefore, against the background of this targeted MiFID II/MiFIR review, we believe that transparency requirements need to be balanced and could benefit from a more tailored approach to commodity markets. In this way, the regime would allow for pre-negotiated trades of the most illiquid and new contracts to be brought to an exchange and provide commodity traders with the benefits of increased transparency and security of on-venue trading.

PART TWO: AREAS IDENTIFIED AS NON-PRIORITY FOR THE REVIEW

This section seeks to gather evidence from market participants on areas for which the Commission does not identify at this stage any need to review the legislation currently in place. Therefore, PART TWO does not contain policy options. However, should sufficient evidence demonstrate the need to introduce certain adjustments, the Commission may decide to put forward proposals also on the topics listed below. As in the first section, certain questions are directly linked to the review clauses in MiFID II/MiFIR while others are questions raised independently of the mandatory review clause.

Derivatives Trading Obligation

Based on the G20 commitment, MiFIR article 28 introduced the move of trading in standardised OTC derivative contracts to be traded on exchanges or electronic trading platforms. The trading obligation established for those derivatives (DTO) should allow for efficient competition between eligible trading venues. ESMA has determined two classes of derivatives (IRS and CDS) subject to the DTO. These classes are a subset of the EMIR

clearing obligation.
The Commission invites market participants to share any issues relevant with regard to the functioning of the DTO regime, the scope of the obligation and the access to the relevant trading venues for DTO products.

Question 77. To what extent do you agree with the statements below regarding the experience with the implementation of the derivatives trading obligation?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The EU intervention been successful in achieving or progressing towards more transparency and competition in trading of instruments subject to the DTO.	☐	☐	☒	☐	☐	☐
The MiFID II/MiFIR costs and benefits with regard to the DTO are balanced (in particular regarding the regulatory burden).	☐	☒	☐	☐	☐	☐
The different components of the framework operate well together to achieve more transparency and competition in trading of instruments subject to the DTO.	☐	☒	☐	☐	☐	☐
More transparency and competition in trading of instruments subject to the DTO corresponds with the needs and problems in EU financial markets.	☐	☐	☒	☐	☐	☐
The DTO has provided EU added value.	☐	☐	☒	☐	☐	☐

Question 77.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

Quantitative elements for question 77.1:

Qualitative elements for question 77.1:
N/A

Question 78. Do you believe that some adjustments to the DTO regime should be introduced, in particular having regards to EU and non-EU market making activities of investment firms?

	Estimate (in €)
Benefits	
Costs	

☐ 1 - Disagree
☐ 2 - Rather not agree
☐ 3 - Neutral

☒ 4 - Rather agree
☐ 5 - Fully agree
☐ Don't know / no opinion / not relevant

If you do believe that some adjustments to the DTO regime should be introduced, please explain which adjustments would be needed and with which degree of urgency:

Four series of adjustments are necessary to make the derivatives trading obligation more meaningful with respect to the functioning of markets and for consistency with other EU legislation

- Amend article 28 of MIFIR to clarify that the scope of transactions subject to the DTO under MiFIR should be a subset of transactions subject to the Clearing Obligation (CO) under EMIR. This approach would generate greater legal clarity with respect to whether contracts could be subject to the DTO while also providing alignment on a more dynamic basis, i.e. amendments to the scope of the CO or relevant Level 2 legislation would be reflected in the scope of the DTO.
- Establish a Derivatives Trading Obligation suspension power, under a pre-defined mechanism and pre-defined criteria, to allow ESMA and the European Commission to swiftly react to unforeseeable market disruptions.
- Clarify that the introduction of benchmarks fallback clauses (under article 28(2) of the EU Benchmarks regulation) in legacy contracts do not trigger application of the Derivatives Trading Obligation.
- Provide equivalence decisions for trading venues in jurisdictions that already apply derivatives trading obligations.

Question 78.1 Please explain your answer to question 78:
N/A

Question 79. Do you agree that the current scope of the DTO is appropriate?
☐ 1 - Disagree
☐ 2 - Rather not agree
☒ 3 - Neutral
☐ 4 - Rather agree
☐ 5 - Fully agree
☐ Don't know / no opinion / not relevant

Question 79.1 Please explain your answer to question 79:
ISDA and FIA members highlight that the extra-territorial application of the Derivatives Trading Obligation is creating conflicts of rules for firms operating on a cross border basis (i.e. between the EU and other jurisdictions applying a DTO). In order to avoid such conflicts of rules, it is critical that the European Commission produces equivalence decisions under MiFIR art 28(4) in favour of third country trading venues with equivalent legal and supervisory frameworks with regard to the trading obligation. Equivalence decisions would mitigate the conflict of rules that could otherwise prevent clients accessing the services of investment firms on a cross border basis (e.g. non-EU clients using the services of an EU based firm).

If such equivalence decisions were not published, the European Commission would have to find another legal path to address the conflict of rules or to re-scope the EU DTO so that it avoids preventing the provision of services to clients across jurisdictions.

Regarding alignment between the clearing obligation (EMIR) and derivatives trading obligation (MiFIR), all financial counterparties can be interpreted as remaining subject to the DTO, despite the introduction of the small financial counterparty (SFC) regime under EMIR Refit. SFCs, which are exempted from the CO, still need to comply with the DTO. This effectively forces them back into clearing, as trading venues in the EU do not typically offer the trading of non-cleared products, i.e. there are no means of counterparty risk mitigation via bilateral exchange of margin, for products traded on trading venues. This would undermine the co-legislators' objective in the small financial counterparty regime of aiming to make compliance with EMIR more proportionate and less onerous for smaller counterparties.

Regarding a mechanism to temporarily suspend the derivatives trades obligation, to allow ESMA and the European Commission to react to unforeseeable market disruption, it is worth recalling that the current MiFIR DTO suspension mechanism requires amending RTS and is therefore characterised by a lengthy process which is not fit for purpose. Therefore, the Associations support that ESMA should have a standalone power to request the Commission to suspend the DTO. However, in order to give market participants sufficient guidance in relation to the suspension power, the suspension of the DTO should be based on a pre-defined mechanism and pre-defined criteria, which could relate, for example, to a lack of liquidity in the market. There should not be an assumption that only when the CO is suspended should suspension of the DTO be considered. In this regard, it is worth recalling that while application of the CO to classes of derivatives is a precondition to these being made subject to the DTO, in other respects, the criteria for application of the DTO differ from criteria for application of the CO.

Regarding the introduction of benchmarks fallback clauses under the EU Benchmarks Regulation, Article 28(2) of the EU Benchmark Regulation requires EU supervised entities to have in place written plans setting out robust fallbacks relating to the discontinuance or material modification of a benchmark, including the nomination of a substitute index where feasible and appropriate. ISDA has published supplements to the relevant ISDA definitional booklets to address this requirement. On 5 December 2019, the ESAs published a statement on the introduction of fallbacks in OTC derivative contracts and the requirement to exchange collateral. The ESAs notably clarify that "*Fall-backs introduced in OTC derivative contracts, reflect written plans which set out the actions that counterparties would take in the event that the benchmark used in these contracts materially changes or ceases to be provided. The ESAs are of the view that amendments made to outstanding uncleared OTC derivative contracts (legacy contracts) for the sole purpose of introducing such fall-backs should not create new obligations on these legacy contracts."*
The introduction of fallback clauses in legacy contracts should not, furthermore, trigger the derivatives trading obligation where these contracts are in classes subject to the derivatives trading obligation. *In light of the above, the Associations supports amendments to MiFIR Article 33, to clarify that the the a) replacement of interest rate benchmarks and b) the introduction of fallbacks in accordance with BMR Article 28(2) should not, for that reason, become subject to the derivatives trading obligation.*

The introduction of EMIR Refit has not been accompanied by direct amendments to MiFIR, which leads to a misalignment between the scope of counterparties subject to the clearing obligation (CO) under EMIR and the derivatives trading obligation (DTO) under MiFIR. ESMA consulted in Q4 2019 on the need for an adjustment of MiFIR, receiving broad support for such an amendment and ESMA published their report on 7 February 2020.

Question 80. Do you agree that there is a need to adjust the DTO regime to align it with the EMIR Refit changes with regard to the clearing obligation for small financial counterparties and non-financial counterparties?

☐ 1 - Disagree
☐ 2 - Rather not agree
☐ 3 - Neutral
☐ 4 - Rather agree
☒ 5 - Fully agree
☐ Don't know / no opinion / not relevant

Question 80.1 Please explain your answer to question 80:

As stated in response to question 79.1, regarding alignment between clearing obligation (EMIR) and derivatives trading obligation (MiFIR), it can be interpreted that all financial counterparties remain subject to the DTO, despite the introduction of the small financial counterparty (SFC) regime.

SFCs, which are exempted from the CO, still need to comply with the DTO. This effectively forces them back into clearing, as trading venues in the EU do not typically offer the trading of non-cleared products, i.e. there are no means of counterparty risk mitigation via bilateral exchange of margin, for products traded on trading venues. This would undermine the co-legislators' objective in the small financial counterparty regime of aiming to make compliance with EMIR more proportionate and less onerous for smaller counterparties.

Non-discriminatory access

Question 83. Do you see any particular operational or technical issues in applying open access requirements which should be addressed?

☐ Yes
☐ No
☐ Don't know / no opinion / not relevant

The debate around open access generally provokes debate on two different topics:

- The ability for multiple trading venues to use the services of one CCP for the clearing of their products. This is the 'non-discriminatory access to a CCP addressed by article 35 of MiFIR. ISDA and FIA members consider that this kind of 'open access' under Article 35 of MiFIR already exists in practice (although not for exchange traded derivatives), has proved effective and does not pose specific financial stability risks.
- And vice versa, the ability for multiple CCPs to clear products traded on one specific trading venue. This is the 'non-discriminatory access to a trading venue' addressed by Article 36 of MiFIR. Some ISDA and FIA members note that this kind of open access permitted under both Article 35 and 36 could in certain cases be associated with operational challenges and complexities for open access solutions for exchange-traded derivatives. These types of access are more difficult to assess and may pose specific difficulties such as increase of clearing costs and margins. However, the majority of members believe that MIFID II/R already offers the necessary tools for national competent authorities, venues and CCPs to address such challenges
- Applying non-discriminatory access in MiFIR to **transferable securities and money market instruments** is non-contentious. This is because these instruments are fungible by design. Secondly, non-discriminatory access already applies to **OTC derivatives** through EMIR. This causes no policy concerns since OTC derivatives have third-party terms (typically ISDA). They are therefore identical, and fungible.

There are operational "unknowns" when it comes to open access for exchange-traded derivatives (ETD)
Members are unable to comment in general terms ex ante on whether specific operational or technological questions arise in respect of all possible access models that might be proposed by venues and CCPs, but in order to avoid or mitigate such issues, members highlight that, as with any market infrastructure development, it is vital for venues and CCPs to engage clearing members at an early stage in any plans to ensure that proposals do not place undue operational, technological or cost burdens on clearing members. In particular, it would be expected that CCPs would factor such considerations into their assessment of technical aspects of access requests from venues and in their responses to venues but recognize that under MiFIR, the ability to deny access is predicated on significant and undue risks arising.

FIA and ISDA members who mainly represent clearing members and end-users and some trading venues would support the implementation of both open access to CCPs and trading venues. They highlight that MiFIR Articles 35 and 36, further specified in Delegated Regulation 2016/3807, contain a carefully calibrated regime of checks and balances to safeguard against risks by giving both CCPs and NCAs broadly defined powers to refuse Open Access if this is deemed a threat to smooth and orderly market functioning' or it may 'adversely affect systemic risk' or lead to 'market fragmentation'. Furthermore, they highlight that MiFID mandated various reviews, aiming to identify risk which could have been potentially overlooked or emerged in recent years and that the ESRB, ESMA and the European Commission concluded – in these reviews – that there was no reason to exclude exchange-traded derivatives from open access. This is in line with various industry consultations, leading the Associations to conclude that MiFID/MiFIR appropriately balances the risk and benefits of open access. Members believe that open access will foster competitiveness on European markets, improve risk management and make central clearing more attractive. Having open access would increase competition as it would open up the existing vertical silos, to enable products from trading venues outside the siloed group to be cleared by the CCP and vice versa. This would improve client choice and enable entities to pool more contracts from multiple venues at the same CCP, which in turn may result in benefits for netting and cross-margining. Therefore, the general majority view of ISDA and FIA is that non-discriminatory access to CCPs should be implemented and that non-discriminatory access to trading venues should be subject to holistic analysis in terms of costs and benefits and challenges posed by the current Covid-19 situation.

Some other FIA and ISDA members (in particular Exchange groups/CCPs) would opine that while open access in exchange-traded derivatives might in theory be able to work, it carries significant potential risks for clearing members, CCPs and consequently for financial stability due to the view taken that some of the open access provisions in MIFIR may create conflict with the risk management provisions embedded in EMIR. Examples of these conflicts include the potential for forced product clearing and margin offsets undermining the risk management best practices of CCPs. In addition, These risks need to be carefully weighed against the possible benefits.

In addition to potential financial stability risks, these members also highlight that open access would result in fragmentation of execution, disrupting price discovery processes. On the clearing layer, inefficiencies and more material concerns stemming from interoperability aspects, which are not proven for derivatives, and lack of concepts especially from the point of view of CCP recovery and resolution, which are not envisaged by the open access regime. Operationally it would introduce considerable complexity into the market, for example in an increased number of accounts that CMs and CCPs must support for risk management and collateral transactions. The set up for each account would require increased time and effort for operational staff and increased complexity for reconciliation. These members highlight the implementation periods prescribed in MiFIR are too short to guarantee CMs and CCPs enough time for appropriate risk assessment, noting that policymakers should not underestimate the amount of additional IT, operational, risk and legal work involved in clearing a new product. These members also highlight that MiFIR requires the netting of contracts under open access even where CMs and CCPs do not have a high level of certainty that the loss on one will be partially offset by the gain on the other. These members are concerned that without a sound and transparent legal basis, net obligations may be challenged in insolvency proceedings and, if such challenges were to be successful, the CMs and CCPs could be liable for gross settlement amounts many multiples of their net obligations.

In summary

- Applying non-discriminatory access in MiFIR to **transferable securities and money market instruments** is non-contentious. This is because these instruments are fungible by design. Secondly, non-discriminatory access already applies to **OTC derivatives** through EMIR. This causes no policy concerns since OTC derivatives have third-party terms (typically ISDA). They are therefore identical, and fungible. **There are differing views when it comes to open access for ETD**.
- Overall, there are numerous potential benefits that arise for market participants and on the proviso that any risks are duly considered by regulators when granting open access
- There are technical issues to be taken into consideration, but we believe there are safeguards in place that must be closely considered to ensure they mitigate these, both in regulation (Arts 35 & 36) but also through the participation and input from members of CCPs in risk committees which can serve to provide feedback on potential issues and desired resolutions.

Ultimately, the majority of members are in favour of retaining the open access provisions as these member consider that the risks noted are already adequately provided for in the regulation on the basis that financial stability concerns will clearly be taken into account when determining the equivalence mechanics under Article 38, and also when determining whether a particular set up should be permitted under Articles 35 and 36. However, the Associations' members would be opposed to relaxing the rules and protections to facilitate open access. Even once open access is fully implemented in regulation, it will likely take some time for venues and CCPs to put in place the relevant arrangements that are expected to provide market participants ultimately with benefits in terms of choice, competition, product innovation, netting, and cross-margining.

Question 83.1 If you do see any particular operational or technical issues in applying open access requirements which should be addressed, please specify for which financial instrument(s) this would apply and explain your reasoning:

Question 83.1 Please explain your answer to question 83:

The Associations' members would like to point out that there are operational "unknowns", however, members are unable to comment in general terms ex ante on whether specific operational or technological questions arise in respect of all possible access models that might be proposed by venues and CCPs. However, in order to avoid or mitigate such issues, members highlight that, as with any market infrastructure development, it is vital for venues and CCPs to engage clearing members at an early stage in any plans to ensure that proposals do not place undue operational, technological or cost burdens on clearing members. In particular, it would be expected that CCPs would factor such considerations into their assessment of technical aspects of access requests from venues and in their responses to venues.

Question 84. Do you think that the open access regime will effectively introduce cost efficiencies or other benefits in the trading and clearing areas?

☐ 1 - Disagree
☐ 2 - Rather not agree
☒ 3 - Neutral
☐ 4 - Rather agree
☐ 5 - Fully agree
☐ Don’t know / no opinion / not relevant

Question 84.1 If you do think that the open access regime will effectively introduce cost efficiencies or other benefits in the trading and clearing areas, please indicate the specific areas (such as type of specific financial instruments) where, in your opinion, open access could afford most cost efficiencies or other benefits when compared to the current situation:

Regarding non-discriminatory access to CCPs, the majority of members suggest that such open access could lead to lower execution costs and more innovation.

Trading and clearing costs are closely interlinked. The cost of trading on a trading venue is assessed by market participants together with the associated clearing costs. A trading venue cannot be competitive if it cannot give access to attractive clearing costs. Without these provisions, new and non-vertically integrated trading venues would be prevented from entering the market and thus unable to promote a more competitive and a less concentrated market. Competition has the benefits of exercising pressure on all service providers to improve service levels and to innovate.

In addition, some members would like to point out important advantages from a financial stability perspective. A multiple CCP environment may contribute to reducing systemic risk by strengthening CCP substitutability in case of failure. If one CCP connected to a trading venue is in distress, the other CCPs connected to that trading venue would be able to continue clearing its trades. What is more, market participants will be able to steer their business to the CCP with the best risk management requirements where their margins are the safest, rather than being forced to clear at a vertically integrated CCP. Also, the ability to improve netting efficiencies in the system will also decrease the size of the accumulated risk across CCPs.

The opposing member views consider that open access will make EU markets less efficient, particularly for exchange-traded derivatives, by introducing additional costs and risks, counter to the objectives of the EU Capital Markets Union. They note that open access would lead to additional operational complexity and risk management processes which at best may result in increased costs for market participants but at worst carry significant potential risks for clearing members, CCPs and consequently for financial stability that are disproportionate to any benefit. These costs and risks may be exacerbated during times of market stress where deep liquidity pools and risk management best practices consistent with EMIR and the Principles for Financial Market Infrastructures become even more critical

Question 84.1 Please explain your answer to question 84:

With competition as its key objective, open access may potentially lead to lower costs in the long-term, better service levels, greater collateral efficiency, more innovation and financial stability
Clearing instruments from multiple venues at a single CCP of choice could lead to substantial netting efficiencies, compared to clearing these at two different CCPs. This not only saves costs, it also frees up collateral, potentially leading to more liquid capital markets in the EU.

Open Access may lead to closer integration of Europe’s capital markets and is therefore highly relevant for the Capital Markets Union. This idea of open access as a key element of an integrated EU post trading landscape is not new and was first identified by the Giovannini Group in 2001.

However, members that consider that open access may make EU markets less efficient, particularly for exchange-traded derivatives, by introducing additional costs and risks, believe that such risks and costs could arise due to open access potentially fragmenting market liquidity, particularly for exchange-traded derivatives. Fragmented markets result in wider bid-ask spreads and reduced netting benefits, which can undermine the efficiency of market participants hedging their business risks.

Question 85. Are you aware of any market trends or developments (at EU level or at national level) which are a good or bad example of open access among financial market infrastructures?

There are examples of CCPs that have open access as a business model.
For OTC swaps, we note that one CCP has established connectivity with around 40 execution venues.
We also note that another CCP provides clearing services for 37 venues.

We think that across swaps, equities, bonds, commodities and repo, there are numerous cases where Open Access has led to successful outcomes for the markets.

The Associations do not see why open access rules in relation to Exchange Traded Derivatives should be amended. The majority views that implementation should proceed in accordance with the current framework, on the strong proviso that any risks are duly considered by regulators when considering whether to grant open access. However, members would be opposed to relaxing the rules and protections to facilitate open access.

Please explain your reasoning and specify which countries:
N/A

Digitalisation and new technologies

Question 86. Where do you see the main developments in your sector: use of new technologies to provide or deliver services, emergence of new business models, more decentralised value chain services delivery involving more cooperation between traditional regulated entities and new entrants or other? Please explain your answer:
N/A

Question 87. Do you think there are particular elements in the existing framework which are not in accordance with the principle of technology neutrality and which should be addressed?
Please explain your answer:
N/A

Question 88. Where do you think digitalisation and new technologies would bring most benefits in the trading lifecycle (ranging from the issuance to secondary trading)?
Please explain your answer:
N/A

Question 89. Do you consider that digitalisation and new technologies will significantly impact the role of EU trading venues in the future (5/10 years time)?
☐ 1 - Disagree
☐ 2 - Rather not agree
☐ 3 - Neutral
☐ 4 - Rather agree
☐ 5 - Fully agree
☐ Don’t know / no opinion / not relevant

Question 89.1 Please explain your answer to question 89:
N/A

Question 90. Do you believe that certain product governance and distribution provisions of the MiFID II/MiFIR framework should be adapted to better suit digital and online offers of investment services and products?
☐ 1 - Disagree
☐ 2 - Rather not agree
☐ 3 - Neutral
☐ 4 - Rather agree
☐ 5 - Fully agree
☐ Don’t know / no opinion / not relevant

Question 90.1 Please explain your answer to question 90:
N/A
Question 91. Do you believe that certain provisions on investment services (such as investment advice) should be adapted to better suit delivering of services through robo-advice or other digital technologies?

☐ 1 - Disagree
☐ 2 - Rather not agree
☐ 3 - Neutral
☐ 4 - Rather agree
☐ 5 - Fully agree
☐ Don't know / no opinion / not relevant

Question 91.1 Please explain your answer to question 91:
N/A

X. Foreign exchange (FX)

Spot FX contract are not financial instruments under MiFID II/MiFIR. Some stakeholders and competent authorities raised concerns as regards the regulatory gap and requested the Commission to analyse if policy action would be needed.

Question 92. Do you believe that the current regulatory framework is adequately calibrated to prevent misbehaviours in the area of spot foreign exchange (FX) transactions?
Disagree / rather not agree / neutral / rather agree / fully agree / don't know

[Question 92.1 If you do not believe that the current regulatory framework is adequately calibrated to prevent misbehaviours in the area of spot foreign exchange (FX) transactions, which recommendations would you make to improve the robustness of the regulatory framework?
Response is only available if Q92 is answered with 'disagree' or 'rather not agree']
Question 92.1 Please explain your answer to question 92:

In the response to ESMA's consultation on the Market Abuse Regulation review submitted in November 2019, ISDA and FIA had expressed their support to GFXD's response, i.e. the scope of MAR should not be extended to cover spot FX.

We similarly think it would not be appropriate to apply the MiFID II/ MIFIR framework to spot FX instruments.

The FX Global Code addresses prevention of misbehaviours in FX spot markets (fx_global_code.htm). ESMA expressed that it is important to wait for this code to be embedded into the market and for any developments flowing from the 2020 review to be adopted across the EU. We support ESMA' view in this respect. We highlight that this code was developed by public sector authorities (Central banks, NCAs) and the industry to promote a "robust, fair, liquid, open and appropriately transparent market in which a diverse set of market participants, supported by resilient infrastructure, are able to confidently and effectively transact at competitive prices that reflect available market information and in a manner that conforms to acceptable standards of behaviour."

We consider that the inclusion of Spot FX instruments in the scope of MiFID II/ MiFIR framework would significantly and negatively affect this market.

Question 93. Which supervisory powers do you think national competent authorities should be granted in the area of spot FX trading to address improper business and trading conduct on that market?
Please explain your answer: [5000char]

ISDA and FIA would support that Regulators are empowered to recognise and enforce the FX Global Code and use the comprehensive Spot FX data that is already available, such as that from EU trading venues. A number of central banks and regulators have already endorsed this code and expressed support for its adoption by market participants (in Australia, EU, Hong Kong, Singapore and the US). We therefore do not support that MiFID 2/ MIFIR framework is extended to Spot FX.

Section 3. Additional comments

You are kindly invited to make additional comments on this consultation if you consider that some areas have not been covered above.
Please, where possible, include examples and evidence.
N/A

Question 94. Have you detected any issues beyond those raised in previous sections that would merit further consideration in the context of the review of MiFID II/MiFIR framework, in particular as regards to the objective of investor protection, financial stability and market integrity?
Please explain your answer:

Scope of the mandatory SI regime for derivatives.

MiFID II/ MIFIR aimed to apply a level playing field between trading venues and Systematic Internalisers (SIs) by requiring greater price transparency in relation to OTC trading of venue-traded instruments. SIs are therefore subject to the post-trade transparency regime, which applies only to instruments that are traded on a trading venue (ToTV).
But there has always been an ambiguity as to whether and how the mandatory SI regime could apply to non-ToTV products.

This is not only causing compliance uncertainties but also forcing supply of inaccurate information into FIRDS because non-ToTV instruments trade on SIs are included in FIRDS (under ESMA RTS 23) whereas the same instruments, where not traded on SIs, are not.

We therefore would support amendments to article 4.1(20) of MiFID 2 and of article 27 of MiFIR to clarify that the mandatory SI regime as well as the optional SI regime apply to ToTV instruments only, notably to avoid the supply of misleading information into FIRDS.

Additionally, the requirement for SIs to report certain non-TOTV instruments to FIRDS under their own name can lead to other market participants exploiting this early transparency which contradicts the otherwise established balancing regime between transparency and the need to protect market participants for certain instruments by granting deferrals. The same day reporting requirement to FIRDs enables other market participants to identify and observe the trading activity of SIs, and theoretically extends the obligations not just for traded deals but into the pre-trade space as well. The possible identification of an SI as counterparty allows market participants to extrapolate and anticipate the hedging position of an SI, thereby inhibiting SIs to trade on normal market terms.

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, please attach when returning your questionnaire.

Thank you.