PensionsEurope's response to ESMA's Consultation and Discussion Papers on MiFID II / MiFIR

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About PensionsEurope

PensionsEurope represents national associations of pension funds and similar institutions for workplace pensions. Some members operate purely individual pension schemes.

PensionsEurope has **23 member associations** in EU Member States and other European countries with significant – in size and relevance – workplace pension systems[1].

PensionsEurope has established a **Central & Eastern European Countries Forum (CEEC Forum)** to discuss issues common to pension systems in that region.

PensionsEurope member organisations cover the workplace pensions of about **80 million European citizens**. Through its Member Associations PensionsEurope represents approximately € **3.5 trillion of assets** managed for future pension payments.

PensionsEurope Members are large institutional investors representing the **buy-side** on the financial markets.

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[1] EU Member States: Austria, Belgium, Croatia, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Romania, Spain, Sweden, UK. Non-EU Member States: Guernsey, Iceland, Norway, Switzerland.

Preliminary Remarks

PensionsEurope welcomes the opportunity to comment on ESMA's Consultation and Discussion Papers. MiFID II and MiFIR are of great importance to the definition and correct functioning of the financial markets in Europe, and consequently they have a direct impact on the activities of pension funds and financial institutions managing assets on their behalf.

Pre-trade and post-trade transparency provisions, both for equity and for non-equity instruments, are of particular importance for pension funds and their asset managers. Due to the long duration of their liabilities, pension funds and their asset manager are long-term investors that typically engage in large transactions in the financial markets. We are concerned that excessive disclosure of information could be used by short-term speculative investors to advantageously price against these large orders and dramatically increase the prices/costs.

For this reason we are concerned that measures such as determining excessively restrictive requirements for large-in scale or reference price waivers or without the required granularity could be very harmful for pension funds and their beneficiaries. We also don't support the introduction of flags for trades that benefit from large-in-scale deferrals. Indeed, these flags would be against the rationale of providing a protection to large orders and would prove to be very damaging. Moreover, we consider that when large transactions are cut into a number of smaller, but interrelated transactions with the aim of avoiding 'market imp act' and adapt to liquidity constraints in the markets, such correlated transactions should be treated aggregately and protected from harmful disclosure requirements.

Our submission also focuses on investor protection provisions. Although some pension funds invest directly through in-house departments, a majority of pension funds make use of the services provided by investment firms to manage their assets. In this sense PensionsEurope broadly welcomes the measures enhancing investor protection. However, we believe that a ban on inducements, in combination with strict requirements for the provision of independent investment advice, will inevitably make investment firms increase their fees charged to pension funds in order to compensate the loss of income they used to obtain through inducements. Hence, we ask ESMA to carefully review these provisions and ease where possible the requirements for the provision of independent investment advice as well as the legitimacy of inducements to be paid to/by a third person.

Below are our answers to those questions that we have deemed more relevant to our activities. We would have liked to address other important issues for pension funds and their asset managers such as organisational requirements for trading venues or high-frequency trading strategies. However, given the short consultation period we have had to prioritise. We would like to thank ESMA in advance for taking into consideration our concerns.

Responses to specific questions

I. Consultation Paper

2.15 The legitimacy of inducements to be paid to/by a third person

Q79. Do you agree with the proposed exhaustive list of minor non-monetary benefits that are acceptable? Should any other benefits be included on the list? If so, please explain.

Yes, we agree with the proposed list of non-monetary benefits, and we agree that these benefits should be timely and accurately disclosed to the client as the consultation paper proposes.

We only have one remark: although pension funds would normally welcome the inclusion of financial research on this list because investment firms would not be able to charge it to pension funds as transaction costs, we are concerned that this could have un-intended consequences such as an increase in management fees, a concentration of research providers due to the increase in costs and also it could compromise sound investment decision processes due to the absence of research on a rapidly evolving market such as the financial markets. Moreover, bearing in mind that research is not the remit of ESMA; we consider that it would be appropriate that ESMA undertakes an impact assessment on this issue before adopting new rules.

Q80. Do you agree with the proposed approach for the disclosure of monetary and non-monetary benefits, in relation to investment services other than portfolio management and advice on an independent basis?

Yes, it is PensionsEurope view that the best way of approaching the provision of investment advice is by increasing the quality of information that investment firms provide to their clients. This will allow pension funds to assess the quality of the investment advice provided, and, also, to assess whether the advice is effectively independent or not. For this reason we support the disclosure of monetary and non-monetary benefits in relation to investment services other than portfolio management and advice on an independent basis.

Nevertheless, we would like to ask ESMA to carefully assess the viability of requiring investment firms to provide individualized information for collective investment products. While it is clear that this should be possible for dedicated products, we understand that this would be very difficult to implement in the case of collective products. Most investment firms will have to adapt deeply their IT to be able to present split fees individualized by client, and we fear that this could return in demanding higher fees to their clients/to pension funds.

Q81. Do you agree with the non-exhaustive list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met? If not, please explain and provide examples of circumstances and situations where you believe the enhancement test is met. Should any other circumstances and/or situations be included in the list? If so, please explain.

No. In first place, it should be noted that the proposed fees and commissions from third parties can only remunerate services which are not independent investment advice and portfolio management services. This is against the existing distribution model in continental Europe, in which the producer of investment products compensates investment firms for distributing their products amongst their clients. We fear that banking distribution networks will start to exclusively distribute banking products, since these operations are not affected by a ban on inducements. As a result, this would create vertical integration of the distribution system (i.e. the internalisation of distribution by producers) which is against the objective of promoting open architecture.

PensionsEurope believes that the proposed requirements to justify that the fees and commissions from third parties enhance the quality of the service provided to their client will be very difficult to implement in practice, even for non-independent advisors. As a consequence, asset managers of pension funds may end up not being able to access these sources of income. We fear that they will need to compensate this loss of income by demanding higher fees to pension funds.

In order to mitigate the impact of these measures, PensionsEurope does not consider that elaborating a list of situations which would be deemed as enhancing the quality of services is the best possible approach. Instead we believe that it will be a better approach to elaborate an indicative/non-exhaustive list of post-sale services that would be applicable to different types of financial products and which could be used as post-sale indicators that would allow the pension fund to assess if the service provided has indeed reported a benefit to them or not.

Q82. Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.

Please see response to question 81

2.16 - Investment advice on independent basis

Q83. Do you agree with the approach proposed in the technical advice above in order to ensure investment firm's compliance with the obligation to assess a sufficient range of financial instruments available on the market? If not, please explain your reasons and provide for alternative or additional criteria.

No. Pension funds make extensive use of services provided by investment firms. Indeed, although some pension funds directly participate in the financial markets through in-house investment departments, a majority of pension funds in Europe resort to external financial institutions to manage their assets.

For this reason PensionsEurope broadly welcomes MiFID II and MIFIR's new measures enhancing investor protection. However, we fear that ESMA's proposal regarding investment advice on an independent basis may go a little bit too far and may end up increasing the costs for pension funds or even denying them access to the external advice of investment firms. PensionsEurope fully agrees with the need to establish principles that allow determining when and investment advice is independent or not. However, we believe that these principles should be proportionate.

PensionsEurope believes that a ban on inducements, in combination with strict requirements for the provision of independent investment advice, will not lead to open architecture in the distribution system as intended by the European authorities. Instead, it will incentivise vertical integration (i.e. less options available) and will lead to increased fees charged by asset managers to pension funds in order to compensate their reduced income due to the prohibition to obtain commissions and fees from third parties (i.e. the ban on inducements). Indeed, several studies such as the one recently published by the CFA Institute[2] indicate that vertical integration in the distribution system would be the most probable outcome of the measures that ESMA is proposing in its Consultation Paper.

The proposed measures risks reducing access to independent investment advice only to those pension funds with sufficient resources to pay the increased/high fees. Pension funds will face the dilemma of paying increased fees (which entail more costs and consequently lower retirement benefits for their beneficiaries) or invest on their own (which often is not technically possible) using execution-only platforms and/or invest in Exchange Traded Funds (ETFs).

If investment firms had to comply with the burdensome diversification requirements proposed they will end up not being able to freely select the investment products which they better understand and where they have more expertise. This will lead to a loss of efficiencies and increased costs which would eventually revert into higher fees charged to pension funds. This is especially the case if we consider that investment firms are already penalised by the fact of not being able to obtain fees and commissions from third parties providing the financial products that they would now need to assess in order to be qualified as independent advisors. We consider that investment firms should be able to provide more easily financial products issued by the investment firm itself or by entities having close links with them, while in exchange they must compulsory and clearly inform the client (the pension fund) that this is being the case.

Moreover, we believe that under the proposed regime national competent authorities would have a lot of flexibility to decide when an advice is independent. In our opinion the responsibility for deciding if their investment advice is independent or not should rely on the investment firm. The latter should then have the obligation to communicate and explain to the pension fund why their advice is independent (or not), which will in the end finally assess if the advice is effectively independent or not.

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[2] CFA Institute report: Restricting Sales Inducements, December 2013 [Link]

Q85. Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.

Please see response to question 83

2.21 - Best Execution

Q101. Do you have any additional suggestions to provide clarity of the best execution obligations in MiFID II captured in this section or to further ESMA's objective of facilitating clear disclosures to clients?

Yes, PensionsEurope broadly welcomes ESMA's best execution provisions. However, we consider that although they are suitable for equity instruments, this might not always be the case for non-equity instruments. For instance, it will not be feasible to compare the prices on execution venues for OTC derivative transactions. This obligation would reduce liquidity (and subsequently increase the price/costs) on a key market for pension funds such as the OTC derivatives market. Therefore we propose easing the best execution requirements in this field.

Moreover, we do not see the need for requiring investment firms to disclose to their clients the fees they pay to trading venues and/or brokers, as this information does not have any real added value. Instead of requiring this kind of disclosures, we believe it would be more useful to ask investment firms to provide to their clients (upon request) a reasoned report explaining how they comply with the best execution obligation under MIFID II.

3.1. Liquid market for equity and equity-like instruments

Q109. Do you agree with the liquidity thresholds ESMA proposes for equities? Would you calibrate the thresholds differently? Please provide reasons for your answers.

PensionsEurope welcomes the liquidity thresholds established by ESMA for equities, depositary receipt and certificates.

However, although we believe the ADT continues to be valid for equity instruments traded in regulated markets and MTFs, some of our Members also propose a different approach: to use the ADT combined with free float as well as the price of the equity instrument.

Moreover, we do not support the proposed definition of a liquid market for ETFs. We believe it would be advisable to use instead the liquidity of the underlying assets of the ETF.

5.1. Algorithmic and high frequency trading (HFT)

Q167. Which would be your preferred option? Why?

PensionsEurope strongly supports option 2, since the number of daily transactions (75.000) previewed in option 1 could be easily manipulated by High Frequency Traders (HFTs).

As far as high frequency trading strategies are concerned, PensionsEurope's strong view is that productive HFT strategies (for instance when they act as market makers) should remain possible, while more harmful strategies such as latency arbitrage and flash orders should be limited as much as possible.

II. Discussion Paper

2.4 Best execution - publication of data by investment firms

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

Yes, pension funds, as clients of investment firms, in general welcome any kind of increased transparency as regards the way investment firms manage their assets on their behalf. Nevertheless, the effectiveness of this disclosure requirement will depend to a large extent on the data published by the trading venues, so as to allow pension funds compare the different data and extract conclusions.

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

Yes, as stated in the previous question, we would agree on this requirement but provided that the trading venues themselves publish similar data. If pension funds cannot compare the data, this disclosure requirement will not be very useful.

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

Yes, we support this approach. Useful information will only come from data about the execution of orders at the end of the execution chain. This would allow comparing this data with the ones published by the trading venues themselves.

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

information on market orders versus limit orders? Do you think that another categorisation of client orders could be useful?

It is still early to determine if this kind of information will be useful / have an added value or not.

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

Yes, we believe that since different clients have different investment preferences and needs, separation between different clients would be useful.

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

Yes, we would agree to require investment firms to publish on an annual basis this kind of information, but only provided that it has been demonstrated that this kind of information will allow pension funds to better assess the quality of the services provided by their asset managers. This would require, for instance, that trading venues disclose similar relevant information to allow the comparison of data. Otherwise the measure could be disproportionate compared to its potential benefits.

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

Yes, in the same line of our response to the previous question, we would agree with this kind of disclosure requirement but only if it has been proved that this kind of information could be useful. At this stage we are not in a position to provide a meaningful advice as to whether this information will provide added value to pension funds.

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

Yes, we believe that in order to not overwhelm clients (pension funds) with excessive information it is important to keep the information provided by investment firms simple and comparable. In this sense a qualitative reporting standard, broadly describing the execution techniques used, should be simple and easy to understand. We support that this standard should be implemented in a harmonized way across Europe and allow for comparison.

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

One possible alternative would be to establish the requirement to undertake qualitative reports. In these reports the execution technique should be explained in a qualitative and easily understandable manner. Execution quality should then be compared to predetermined thresholds, and those cases where the quality thresholds are not met should be reported to competent authorities.

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

Yes, we firmly believe that ESMA should limit the number of definitions of classes of instruments, and use the same classification for as many purposes as possible. This consistency will make regulatory compliance easier and also allow investors to better understand the information provided to them.

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

We are not in a position to immediately provide an advice on this issue, but the approach should be to keep the information as uniform as possible.

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

Yes, we believe that the data required is correct, although ESMA and/or the Commission should be able to adopt in the future new disclosure requirements in case it would appear the need for additional data, and vice versa in the case it was proved that some of the new information that will need to be reported proved to be irrelevant.

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

Yes,as clients of investment firms, pension funds support the disclosure of all relevant data in order to prevent conflicts of interest. In this regard, we believe that the MiFID II / MiFIR Level I texts have addressed the disclosure requirements on conflict of interests in and adequate manner.

3.1 Pre-trade transparency – Equities

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

We believe that the key issue to differentiate "actionable" indications of interest from "ordinary" indications should be information on timing (indication of the validity of the indication of interest). In this regard, we believe that those trading venues where the trading process does not involve the obligation to execute the order at a specific price or volume should not be considered as actionable indications of interests.

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

Yes, we agree with ESMA that the calibration of transparency requirements based on the different types of trading models as described on Table 1 are still valid for equities traded on those types of trading venues.

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

Yes, we agree once again with ESMA. Since equities and "equity-like instruments" are traded in the same trading systems as shares, the transparency requirements should be alike.

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

Yes, ADT continues to be a valid measure for determining when an order is large in scale. It objectively reflects liquidity and is relatively easy to calculate. It also has the advantage that market participants are already used to it.

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

Yes, ADT should also be used for equity-like products traded in regulated markets and MTFs. Using the same system will bring simplicity for market participants that invest both in equity and equity-like instruments.

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

Yes, we agree a new ADT class of 0 to €100,000 would be justified, as well as a new ADT class of €100,000 to €500,000. The first new threshold would be beneficial for the liquidity of shares of SMEs, since they would be the ones captured by these new thresholds and large institutional investors such as pension funds and financial institutions managing assets on their behalf will be more attracted to their shares. Moreover, ESMA's analysis has shown that the percentage of shares with an ADT below €100.000 has increased from 46% in 2008 to 61%, which highlights the increasing importance and need to enhance liquidity in this segment.

Regarding the large in scale thresholds, in the case of the new ADT class of 0 to €100,000 we believe that it should be set at € 25,000. For new ADT class of €100,000 to €500,000 an appropriate threshold would be at € 150,000. If the threshold would be set higher, large institutional investor will not be encouraged to invest in these illiquid assets.

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

Yes, we support the creation of these new ADT classes; ESMA's analysis has shown that there is a large concentration of shares in these ADT classes. We would support establishing a threshold of €200,000.

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

No, we do not see the need for this new ADT class, since according to ESMA's analysis the increase in the concentration of shares takes place in the ADT classes of €1 to €5m and €5 to €25m and not on the €50m to €100m ADT class.

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

When regulating large in scale transparency waivers for equities, it should be taken into consideration that equity instruments are not allowed to be traded in Organised Trading Facilities (OTF). This already improves the price discovery of these kinds of instruments and therefore ESMA should facilitate the use of transparency waivers for equities.

More generally, we support ESMA's approach adopted on this discussion paper and we believe that ADT remains a valid measure for determining when an order is large in scale compared to normal market size

Q 54: Do you agree with the ADT ranges selected for ETFs? Do you agree with the large in scale thresholds set for each ADT class? Which is your preferred option? Would you calibrate the ADT classes and related large in scale thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc.). (DP)

We strongly believe that scenario A with 5 asset classes and a 20% of turnover above the threshold would be the most appropriate. This would ensure that the balance between detail and simplicity is adequately achieved, as well as the balance between transparency and the need for liquidity.

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

Yes, we agree with ESMA that the thresholds should be subject to a periodic review in order to ascertain if they continue to be appropriate or not. However, a review every 2 years seems excessive and would act in detriment of legal certainty. For this reason we believe that a review every 4 or 5 years will be more adequate and would be sufficient to safeguard the appropriateness of the thresholds. Moreover, market participants should always be given the opportunity to participate in this review.

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

It is PensionsEurope's view that the system currently in place for calculating the ADT on a daily basis based in the volume of trades in the previous 12 months is appropriate. ESMA correctly points out that more frequent calculation will increase uncertainty, seasonality and will be more costly.

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

No, we strongly disagree with ESMA's opinion in this point. We firmly believe that stubs should continue to be protected by the large in scale waivers. Several reasons justify this:

In first place, it should be noted that the final execution of large orders are surrounded by a lot of uncertainty, since they require a lot of time and liquidity available to be executed. Making stubs become transparent would discourage pension funds and their asset managers to engage in long-term / large-in-scale transactions since there would be a high risk of eventually being highly exposed.

In second place, it will send wrong signals to the market, negatively affecting price discovery, since the order was not submitted at that particular time.

Thirdly, it could also have a negative effect on correct and orderly functioning of the markets, for instance if several (not only one) stubs become suddenly transparent.

Finally, making stubs become transparent will add a lot of operational complexity to the order since it will need to be transferred to the transparent segment of the order book, which would make it be subject to different rules than the ones originally foreseen when requested the large-in scale order/waivers.

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

Yes, we agree with ESMA's view that the most relevant market in terms of liquidity should be the trading venue with the highest turnover in the relevant financial instrument.

We also support the annual revision of the most relevant market in terms of liquidity.

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

Yes, we agree with ESMA's view in this point.

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

Yes, we agree.

However, before adopting a final decision on this issue we would like to urge ESMA to carefully assess the impact of the caps on liquidity. We believe that this issue has not being sufficiently addressed in the discussion and consultation papers.

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

Yes, PensionsEurope supports ESMA's approach on this issue.

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

No, we don't see any other factors.

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

Although we agree that the possibility to use the stop order functionality should be established at the lowest possible level, we do not see how establishing a minimum quantity would increase transparency.

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

No, we don't see any other factors.

3.2 Post-trade transparency – Equities

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

Yes, we agree. The information is sufficiently comprehensive and on the other hand it is not excessively burdensome for market participants that will need to make the post-trade information public.

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

No, we do not see the need for new fields.

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

No, we do not support the introduction of these flags. We believe that flagging these trades may act against the protection provided by the pre-trade transparency waiver. It could provide information to speculative short term high-frequency traders that could use it in order to detect the large in scale transactions and take advantage of it. This would be detrimental for large in scale / long term investments of pension funds and their asset managers. Moreover we believe that the post-trade transparency objective can perfectly be achieved without this flag.

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

We generally consider that establishing flags for the different types of transactions will not have an added value to the post-trade transparency objective.

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

Yes, we support this approach as it is consistent with the current regulation in place which up to date has worked correctly.

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

Option B is preferable, as it is better adapted for investment firms that execute large-in scale transactions at a later stage during the day.

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

Yes, we agree with the introduction of new ADT classes for the illiquid, moderately liquid as well as the super liquid side. In this sense it would be possible to align the pre-trade and post-trade classes. Moreover, we believe that the thresholds should be set exclusively on absolute numbers.

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

Yes, in our view SME's would benefit from lower thresholds than the ones proposed for the two lowest ADT classes. This would make SME shares more attractive for institutional investors.

3.4 Trading obligation for shares (Article 23, MiFIR)

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

Yes, we don't think that the examples provided contribute to the price discovery process. However we firmly consider that the list must not be exhaustive as it is very difficult to capture all the situations that can take place.

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

Yes, we support the inclusion of a second limb of benchmark trades and/or portfolio trades.

3.6 Liquid market definition for non-equity financial instruments

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

No, we do not support choosing option 3. In our view option 1 should be the preferred option, and alternatively option 2.

For option 1 we believe that setting the time period for the calculation of the frequency of trading at a monthly basis (as opposed to 1 day of option 3) would be appropriate. We believe that this timeframe would strike the correct balance between the need of detecting changes in liquidity and not being excessively volatile. We do not suggest setting a higher timeframe, for instance one year, because it is not appropriate for fixed income bonds.

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

Yes, we agree with ESMA that option 2 is the best option.

However, we would like to also suggest the following alternative (more detailed) step-by-step approach:

1. In first place divide the turnover per period into percentiles.
2. Then, for each percentile divide by the amount of trading contained in that percentile.
3. Finally, divide the ratio of the top percentile by the ratio of the bottom percentile
4. If the resulting ratio is relatively large, this would mean that there is an unstable liquidity (i.e. illiquidity)

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

No, we do not believe that ESMA's approach is the best available option. In our opinion, ESMA's mechanism to evaluate the level of liquidity should better reflect the fact that the number of market participants over a given period of time vary widely. Indeed, ESMA's approach would overestimate those participants that only participate in the markets on an occasional basis. Additionally, we believe that there is no legal requirement under MiFID II / MiFIR to incorporate market participants as a parameter, so therefore we don't see the need for this approach.

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

No, we disagree with ESMA's approach. It fails to take into account important factors such as the seasonality of spreads or the market impact that follows from a series of subsequent transactions in an instrument class or related classes.

Moreover, it is also inappropriate to use the end-of-day relative bid-ask spreads to reflect liquidity in many markets. Instead it should be used an intraday moment (or several moments) or the average intraday trading.

Furthermore, ESMA's proposed approach may only be used for lid order-book trading systems, but in other trading systems they are not immediately available.

An alternative approach could be to undertake a periodic review of spreads by interviewing buy and sell side market participants as well as the trading venues where they operate. Another option would be to ask trading venues to regularly publish average spreads for each financial instrument.

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

Yes, we believe that different thresholds should be applied for different classes of financial instruments. In this regards it is very important to take into account the variations in maturity on interest rate swaps.

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

Trading venues should be asked to provide this information.

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

Yes, we prefer option 1. ESMA could consider using additional criteria which are also very important for non-equity instruments such as maturity and issue size.

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

We would prefer Scenario 3 for corporate bonds and 2400/240/50 million for sovereign bonds.

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

We support applying the concept of liquid market to classes of financial instruments (COFIA), as we believe that it is more predictable and stable and small and medium size pension funds are used to it.

Moreover, we believe that the determination of the liquidity thresholds should not be done through the proposed Option 2 (page 124) as we believe that professional experts should verify case by case the suitability of each threshold.

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

No. As far as the periodic assessment of the liquidity of the instruments is concerned, we do not support the allocation of weights to the data as this would not provide an adequate assessment of the liquidity of the instrument. Instead, we suggest increasing the review interval, in order to detect fluctuations in market conditions.

Regarding the periodic review of the liquidity thresholds, it would be sensible to preview the possibility of exceptional reviews in case of exceptional market conditions that distort the correct functioning of the market.

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

We would suggest using Delta and Expiry for interest rate swaps.

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

No. Although we support the idea of combining qualitative and quantitative assessments, we believe that the proposed approach is not accurate enough and it will not be able to detect unexpected drops in liquidity. In particular, using the ADT of the last 20 trading days is an excessively lengthy timeframe.

Moreover, we believe that ESMA should also consider the possibility of using similar quantitative criteria than for equities: use sudden drops in non-equity prices as a measure of sudden drops in liquidity.

As far as the qualitative criteria is concerned, we believe that this assessment should be privileged compared to the quantitative one. We would also like to recommend the introduction of a non-exhaustive list of circumstances (such as war, mergers and acquisitions etc.) that would trigger such suspensions. Finally, it would be important to involve market participants in this qualitative assessment.

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

Please see our response to question 117.

3.7 Pre-trade transparency requirements for non-equity instruments

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

Yes, we believe that it is important that the definition of RFQ should also reflect that:

1. The quote provider has the right to retract the quote after quotation in those cases where the requesting party has still not responded to the quote.
2. The requesting party is the only party to which the quote is disclosed and it is also the only one entitled to trade against such quote.

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

No, we believe that the definition should also capture other IT tools frequently used by market participants such as instant messaging / chat functionalities as well as emails under the term "any means of interstate commerce", as it is the case in the USA.

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

Please refer to our responses to questions 121 for the definition of RFQ systems and to question 122 for the voice trading system definition.

Furthermore, we suggest clarifying the differences between RFQ systems and Quote Driven systems, in particular as regards the concept of "request for stream".

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

No.

In first place, we would like to urge ESMA to give adequate treatment to those large in-scale transactions which are cut into a number of smaller, but interrelated pieces with the aim of avoiding 'market imp act' and adapt to liquidity constraints in the markets. Such correlated transactions should be treated aggregately and protected from harmful disclosure requirements. If small child orders would be published, the presence of the parent order would be inferred by other market participants, resulting in front-running. This would distort competition between operators, because of asymmetry of information. By amalgamating the child transaction data before publication to the public, the order flow of large institutional investors is less likely to be detected.

Furthermore, we believe that the term "public" should be relativized, as ESMA's consultation paper notes on paragraph 9 of page 210, when it differentiates between different layers of public: (i) disclosure of a quote to an individual client; (ii) disclosure of a quote to the firm's clients or a sub-set of them (iii) disclosure of quote to the public.

We strongly support that ESMA adopts a restrictive / reduced interpretation of the concept of public in this important matter, so as to limit the vulnerability of long term investor such us pension funds (and their beneficiaries) to short term speculators.

We ask ESMA to limit the publication to market participants of the trading venue where the transaction takes place or to a reduced sub-set of these participants.

Moreover, we also believe that only information about price requests should be required to be published, and the identity of the trading venue member or client which has offered the price should also not be disclosed.

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

No, we intensely ask ESMA to adopt a restrictive interpretation of the term public and require the publication of volume/size of bids and offers only to the market participants in a given trading venue or a reduced subgroup of them (please see our response to question 124).

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

No. In PensionsEurope we regret the provision of Article 8(4) MiFIR since the publication of indicative pre-trade bid and offers may give hints to short term speculators and allow them to take advantage of a large in scale transaction of a pension fund and/or financial institutions managing assets on their behalf that is about to take place (or is taking place).

For this we request ESMA to only demand the need to make public such indicative pre-trade bid and offers to market participants in a given trading venue or a reduced subgroup of them (please see our response to questions 124 and 125)

Moreover, we do not agree on the use of average weighed bid and offer prices, since the latter do not move on a linear basis but rather on non-linear / exponential basis as the volume increases.

Moreover, we would like to ask ESMA to impose the obligation to trading venues to use as much as possible standardised methodologies to reduce the possibility of manipulation of such methodologies.

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

Please refer to our response to question 124.

3.8 Post-trade transparency requirements for non-equity instruments

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

Yes, we agree with ESMA that the publication of information should be harmonized as much as possible. In this sense we believe that the information that will need to be published should be kept broad, and the level of detail should in any case be greater than the one demanded for the COFIA classification.

Moreover, we would kindly like to ask ESMA to clarify the definition of an identifier for an OTC derivative transaction, which is currently missing.

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

No, PensionsEurope strongly opposes the extension of the current post-trade regime for shares on the systematic internaliser's (SI) identity. We believe that such measure oversteps the provision of the Level I text, and it will also largely discourage systemic internaliser's to act as market makers and provide liquidity to the markets.

Indeed, extending such transparency provision would unveil to other market participants (including other market makers) the SI's exposure to the risk that it has taken in a particular instrument. This would allow the latter to strategically price against the SI's unveiled position. In summary, SI will not have incentives to commit capital for their clients, and will therefore stop acting as a market makers with the negative effects that this would have on liquidity and, consequently, on trading costs.

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

No, we do not support the introduction of these flags, as it would be against the protection given, for instance, to large-in-scale transactions through the corresponding waiver. It could provide information (hints) to speculative short term high-frequency traders that could use it in order to detect the large in scale transactions and take advantage of it. This would be detrimental for large in scale / long term investments of pension funds and their asset managers. We believe that post-trade transparency can perfectly be achieved without this flag.

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

Yes, we support exempting securities financing transactions. We believe that the transparency regime established in MiFID 2 / MIFIR is not valid for these types of transactions. Moreover, it should be beard in mind that there the European Commission has recently published a legislative proposal on this particular issue that will now be debated by the European Parliament and the Council.

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

No. PensionsEurope strongly opposes this measure. A five minutes timeframe is excessively short and risks negatively affecting the functioning of the markets.

As opposed to equity markets where transactions majorly take place on automatized systems where the data is produced automatically, non-equity markets depend on manual/human operations and processes. Establishing a five minute timeframe will require to manually processing a large number of operations very fast. It will certainly produce inaccurate data that will need to be amended, providing inaccurate information to market participants, which will eventually need to cancel or amend their trades.

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

No. We believe that the proposed measures should be improved:

1. Deferral in publication of post-trade data in large in scale transactions aims to allow large institutional investors to trade on markets without having their order flow detected by high frequency traders and speculating traders. The deferred publication should apply not only to large parent orders. The smaller child orders (when the large order is cut into a number of smaller, but interrelated pieces with the aim of avoiding 'market imp act' and adapt to liquidity constraints in the markets) should not be made transparent as this would imply double reporting. If small child orders would be published, the presence of the parent order would be inferred by other market participants, resulting in front-running. This would distort competition between operators, because of asymmetry of information. By amalgamating the child transaction data before publication to the public, the order flow of large institutional investors is less likely to be detected.

2. Also, the counterparty of the pension fund, for instance a bank that has provided liquidity for part of the whole order, should be able to protect (hedge) its resulting exposure under the deferral regime. If this was not the case banks would be able to hedge these transactions and therefore they would not have incentives to provide liquidity for these large transactions, especially considering the large exposures that they assume. Additionally, this would allow warrantying discretion and avoidance of market-impact which ultimately hurts the end-investor.

3. We do not see the use of the proposed flag indicating that the transaction is above the threshold. This would be against the rationale of providing a protection to large orders with a waiver since kind of information could be used by short term speculative investors to take advantage of large-in scale long-term investments of pension funds and their asset managers and consequently make the operation collapse.

4. In order to enable the possibility to hedge against large in scale investment (which typically is a difficult and long process for these types of large orders) the delay on the deferred publication should be at least 120 minutes. If this is not the case in many cases hedging will not be possible.

5. More in particular, we believe that it is important that the publication of the volume of the order should be granted an extended time period of deferral of several months. The deferral of the size of the transaction has proved to be of key importance in order to allow market makers to hedge these kinds of illiquid instruments.

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

No, we believe that the intra-day deferral periods should be more than 120 minutes. We believe that the objective of preserving liquidity should be prioritised rather than the reporting one.

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

No, we do not support ESMA's approach on this. Intra-day deferral periods should be more than 120 minutes.

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

Yes, we agree with ESMA's approach. However we consider that the different deferral periods should not only apply to sovereign bonds but also to other types of asset classes. Please see our response to question 141, in particular as regards parent-child orders as well as the need to protect market makers acting as counterparties of pension funds and their asset managers in large in scale transactions.

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

No, we believe that the deferral period should be longer, in particular in order to allow large investors and their counterparties acting as market makers to hedge such low liquid instruments (see point 4 of our answer to question 141).

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

If the deferral period is sufficiently long, then we believe that the universal deferral period could be appropriate.

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

No, we do not agree with ESMA. In first place such information would have very little added value for most investors. Moreover, it could be introduced in into complex algorithms of high frequency traders which could be used to detect large exposures and take advantage of it.

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

We believe that these specific criteria should not only apply to sovereign bonds but also to other asset classes.

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

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

Yes, like ESMA we prefer option 2, but on condition that segmentation of liquid assets/instruments is done in a sufficiently accurate/detailed manner.

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

No, but on condition that the segmentation of instrument classes is sufficiently accurate/detailed.

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

Yes, we support this approach.

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

Yes, we agree with ESMA that the approach should be as consistent as possible with the one adopted in other parts of the legislation. However, we would like to also suggest (as we did for the determination of the average size of transactions) the following alternative (more detailed) step-by-step approach:

1. In first place divide the turnover per period into percentiles.
2. Then, for each percentile divide by the amount of trading contained in that percentile
3. Finally, divide the ratio of the top percentile by the ratio of the bottom percentile
4. If the resulting ratio is relatively large, this would mean that there is an unstable liquidity (i.e. illiquidity)

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

In our view Option 1 would be more suitable for computing the large in scale thresholds. We believe that the objective of ensuring the correct functioning of financial market and the promotion of long-term investments in Europe should be preferred rather than the objective of safeguarding a 67% transparency threshold.

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

No, we believe that the conditions for deferred publication of large in scale transactions for non-equities should be eased compared to the ones for shares. This would be justified because non-equity transactions are more complex and due to the low liquidity that characterizes these markets the complete execution of a transaction often needs to be divided into consecutive transactions during several days, weeks or even months.

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

No, we believe that the review should also be possible to be performed on an ad-hoc basis in the case market conditions suddenly change. Moreover, market participants should always be given the opportunity to participate in this review.

3.10 Size specific to the instrument

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

Yes, we strongly support that transactions above the size of the instrument are eligible for deferred publication, irrespective of the trading venue where it takes place. Although it has not been reflected in the pre-trade transparency regime, these transactions do not only take place in trading venues operating RFQ and voice trading systems but also on other trading venues. For this reason we urge ESMA to provide for deferred publication of any transaction above the size of the instrument, regardless of the trading venue where it takes place.

This is particularly relevant for large-in scale transactions in which long-term investors such as pension funds and their asset managers engage therein. Indeed, these large transactions are typically cut into a number of smaller, but interrelated transactions with the aim of avoiding 'market imp act' and adapt to liquidity constraints in the markets. Also counterparties that provide liquidity for these large transactions need to hedge their large exposures (an operation that can require several moths). The aggregate of these transactions would be superior of the size of the instrument, and should also be protected by the deferred publication regime, irrespective of the trading venue where they take place. Making visible these transactions (or the aggregate of transactions) above the size of the instrument would allow short term speculative investors to detect them price against it, especially considering that the correlated transactions typically need several days, weeks or months to be completely executed mainly due to their complexity as well as liquidity constraints.

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

It would depend if the liquidity thresholds and the large in scale thresholds are sufficient.

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

We consider that it would be important to take into account the historic volatility, preferably calculated in short periods of time, as well as the implied/market volatility.

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

Please see our response to the previous question.

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

Please see our response to question 167.

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

Please see our response to question 162

3.11 The Trading Obligation for Derivatives

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

Yes, we agree that there should be consistent categories of derivatives contracts. However, given the complexity of the matter regulated in MiFIR, in those categories of derivative contracts it should possible to create sub-categories that are consistent with EMIR's definitions.

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

We recommend ESMA to create a working group with market participants in order to assess the impact of such a ground-breaking measure. Please note that important end users such as pension funds and their asset managers were not selected to form part of ESMA's stakeholder group. We would like to participate in this working group.

7.2 Position limits

Q493: Should the regime for subsidiaries of a person other than entities that are wholly owned look to aggregate on the basis of a discrete percentage threshold or on a more subjective basis? What are the advantages and risks of either approach? Do you agree with the proposal that where the positions of an entity that is subject to substantial control by a person are aggregated, they are included in their entirety?

Yes, if control of one entity by another effectively exists, then their positions should be aggregated.

Q494: Should the regime apply to the positions held by unconnected persons where they are acting together with a common purpose (for example, "concert party" arrangements where different market participants collude to act for common purpose)?

Yes, we support this approach

Q495: Do you agree with the approach to link the definition of economically equivalent OTC contract, for the purpose of position limits, with the definitions used in other parts of MiFID II? If you do not agree, what alternative definition do you believe is appropriate?

Yes, we support this approach

Q496: Do you agree that even where a contract is, or may be, cash-settled it is appropriate to base its equivalence on the substitutability of the underlying physical commodity that it is referenced to? If you do not agree, what alternative measures of equivalence could be used?

Yes, we support this approach

Q497: Do you believe that the definition of "economically equivalent" that is used by the CFTC is appropriate for the purpose of defining the contracts that are not traded on a trading venue for the position limits regime of MiFID II? Give reasons to support your views as well as any suggested amendments or additions to this definition.

No. We believe that a consistent approach across EU regulations is more important that equivalence with third country regimes.

Q499: Do you agree with ESMA's proposal that the "same" derivative contract occurs where an identical contract is listed independently on two or more different trading venues? What other alternative definitions of "same" could be applied to commodity derivatives?

Yes, we support a strict interpretation of the concept "same"

Q500: Do you agree with ESMA's proposals on aggregation and netting? How should ES-MA address the practical obstacles to including within the assessment positions entered into OTC or on third country venues? Should ESMA adopt a model for pooling related contracts and should this extend to closely correlated contracts? How should equivalent contracts be converted into a similar metric to the exchange traded contract they are deemed equivalent to?

Yes, PensionsEurope supports ESMA's proposals on aggregation and netting.

Q501: Do you agree with ESMA's approach to defining market size for physically settled contracts? Is it appropriate for cash settled contracts to set position limits without taking into account the underlying physical market?

It is still early to say as it would depend on the final delineation of position limits. Nevertheless we believe that spot month position limits should at all times be referenced to the underlying market for deliverable supply/capacity irrespective of contracts being physically delivered or cash-settled. Moreover, "open interest" would be a more suitable measure as the time of expiration of the contract increases.

Q502: Do you agree that it is preferable to set the position limit on a contract for a fixed (excluding exceptional circumstances) period rather than amending it on a real-time basis? What period do you believe is appropriate, considering in particular the factors of market evolution and operational efficiency?

Yes, we agree that it is preferable to set the position limit on a contract for a fixed period.

We support the establishment of periods that at least exceed 3 months.

Moreover, we believe that it is important to note that position limits also take into account the time to expiration of the contract.

Q503: Once the position limits regime is implemented, what period do you feel is appropriate to give sufficient notice to persons of the subsequent adjustment of position limits?

It is PensionsEurope's view that at least a period of 3 months should be required to notice to persons of the adjustments of position limits.

Q504: Should positions based on contracts entered into before the revision of position limits be grandfathered and if so how?

Yes, we support this approach.

Q505: Do you agree with ESMA's proposals for the determination of a central or primary trading venue for the purpose of establishing position limits in the same derivative contracts? If you do not agree, what practical alternative method should be used?

No, we believe that this would not be enough; information could easily be manipulated and would not provide adequate and reliable information. Position limits should be determined by taking into account all contracts (in aggregate), not only the ones of a single trading venue. This could be implemented by requiring market participants trading that derivative contract to report to competent authorities their positions.

Q506: Should the level of "significant volume" be set at a different level to that proposed above? If yes, please explain what level should be applied, and how it may be determined on an ongoing basis?

Please see our response to the previous question.

Q507: In using the maturity of commodity contracts as a factor, do you agree that competent authorities apply the methodology in a different way for the spot month and for the aggregate of all other months along the curve?

Yes, we consider that it is necessary to clearly distinguish it from other months for the spot month. In addition to the spot month, we believe that a "one-off" approach is also picked for all months.

Q508: What factors do you believe should be applied to reflect the differences in the nature of trading activity between the spot month and the forward months?

It is very important to apply maturity considerations; once the contract expires and becomes deliverable during the present month, the position should be directed towards local physical markets. Before the contract matures, contracts could also be used to manage positons in a global basis between positions which are highly correlated.

Q509: Do you agree with ESMA's proposal for trading venues to provide data on the deliverable supply underlying their contracts? If you do not agree, what considerations should be given to determining the deliverable supply for a contract?

Yes, we strongly believe that ESMA should require trading venues to provide data on the deliverable supply underlying their contracts. In fact, trading venues should not only provide this information but also they should provide information about their inventories in their warehouses and part of global supply that potentially could be delivered. The manipulation of inventories of LME warehouses has been signalled (widely covered by the media) by many market participants as the cause of abrupt price increases in commodities markets during the last years. PensionsEurope firmly believes that trading venues and entities controlling their warehouses should be much more transparent in this regard.

Q510: In the light of the fact that some commodity markets are truly global, do you consider that open interest in similar or identical contracts in non-EEA jurisdictions should be taken into account? If so, how do you propose doing this, given that data from some trading venues may not be available on the same basis or in the same timeframe as that from other trading venues?

Yes, in order to prevent biased information, open interest in similar contracts in non-EEA jurisdictions should be taken into account. Market participants could report this kind of information and complement it with the information coming from trading venues.

Q511: In the absence of published or easily obtained information on volatility in derivative and physical commodity markets, in what ways should ESMA reflect this factor in its methodology? Are there any alternative measures that may be obtained by ESMA for use in the methodology?

In our view ESMA should consult market participants. This practice is very common in commodity markets, were market participants are in permanent contact with Price Reporting Agencies (PRA's).

Q512: Are there any other considerations related to the number and size of market participants that ESMA should consider in its methodology?

We would like to highlight to ESMA that although a participant might be dominant in a specific futures market, this does not mean that that participant is dominant on the market of the underlying commodity.

Q513: Are there any other considerations related to the characteristics of the underlying commodity market that ESMA should consider in its methodology?

From a technical point of view, if only the delivery point is taken into account, the future markets will not signal the need (or provide the financial incentive) to increase the delivery points' capacity. It is very important to take into account the inventories of commodity trading houses as well as transportation capacity. Otherwise information given to market participant would be incomplete. Perishability and seasonality are less relevant factors.

PensionsEurope would like to emphasis the impact on the price discovery and price formation in the commodities markets of the manipulation of the inventories of warehouses of commodity trading venues (LME in particular). ESMA should tackle this problem and enhance the transparency (and potential conflicts of interest) on the management of the inventories of these warehouses.

Q517: What do you consider to be the risks and/or the advantages of applying a different methodology for determining position limits for prompt reference contracts compared to the methodology used for the position limit on forward maturities?

In our opinion if the methodology is consistently applied there should be no risks.

Q519: If a different methodology is set for the prompt reference contract, would it be appropriate to make an exception where a contract other than the prompt is the key benchmark used by the market?

No. We disagree. We consider that consistency should be preserved. Otherwise arbitrage opportunities could arise.

Q520: Do you agree that the baseline for the methodology of setting a position limit should be the deliverable supply? What concrete examples of issues do you foresee in obtaining or using the measure?

In the case of prompt reference contracts we agree that the baseline for the methodology of setting a position limit should be the deliverable supply. Nevertheless, we consider that it is very important to also take into account existent inventories as well global transportation capacity.

On the other hand, when it comes to forward maturities, we do not believe that the proposed baseline would be appropriate. In this case it would be enough to use the deliverable supply by itself.

Q521: If you consider that a more appropriate measure exists to form the baseline of the methodology, please explain the measure and why it is more appropriate. Consideration should be given to the reliability and availability of such a measure in order to provide certainty to market participants.

Please refer to our response of question 520.

Q524: Does the approach to asset classes have the right level of granularity to take into account market characteristics? Are the key characteristics the right ones to take into account? Are the conclusions by asset class appropriate?

We would like to make a few remarks in relation to the grouping of contracts into asset classes performed by ESMA:

- Metals: In this asset class position limits will represent a relatively high percentage of the deliverable supply. We consider that the deliverable supply should not be limited to non-perishable stock in warehouses. We believe that the deliverable supply should also take into account global inventories as well as global production, since miners and commodity traders also represent a great percentage of the deliverable supply which is not reflected in the inventories of LME warehouses.

- Oil and Oil products: these derivative contracts are important because they are used to hedge oil and oil products as well as other correlated products.

- Agricultural products: The problem of perishable products is solved to a big extent through inventory.

Q525: What trading venues or jurisdictions should ESMA take into consideration in defining its position limits methodology? What particular aspects of these experiences should be included within ESMA's work?

As a starting point, we consider that ESMA could use the methodology developed by the CFTC in the USA, improving it if possible while taking into account the specificities of the European financial markets.

Q526: Do you agree that the RTS should accommodate the flexibility to express position limits in the units appropriate to the individual market? Are there any other alternative measures or mechanisms by which position limits could be expressed?

For the sake of simplicity, we strongly consider that ESMA should use absolute numbers.

Q528: Do you agree that limits for option positions should be set on the basis of delta equivalent values? What processes should be put in place to avoid manipulation of the process?

Yes, we support ESMA's proposal to use delta equivalent values. Periodic checks should be performed, comparing them to independent quotes and historical volatility.

More precisely, we believe that the use of a delta value of 0.5 would be appropriate in case there was not public data available. Successively it would be possible to gather implied volatility data based on a historical series of transactions and develop a volatility curve.

Q529: Do you agree that the preferred methodology for the calculation of delta-equivalent futures positions is the use of the delta value that is published by trading venues? If you do not, please explain what methodology you prefer, and the reasons in favour of it?

Yes, we support ESMA's approach.

Q530: Do you agree that the description of the approach outlined above, combined with the publication of limits under Article 57(9), and would fulfil the requirement to be transparent and non-discriminatory?

Yes, we support ESMA's approach.

Q531: What challenges are posed by transition and what areas of guidance should be provided on implementation? What transitional arrangements would be considered to be appropriate?

In first place it is important to gather sufficient data to determine if position limits could be disruptive or not. Secondly, position limits should be phased-in: at the beginning they should be set in a way that does not change radically the previous state-of-play, in order to be increased gradually.

Market participants should be timely informed of the phase-in process.

8.1 Obligation to report transactions

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

We have two main concerns with ESMA's proposal:

1. We consider that the definitions of "transaction" and "execution of a transaction" are excessively broad and will give rise to excessive and unnecessary reporting. In our opinion there is no need for all this information, and on the other hand too much information can be counterproductive. In our opinion only key relevant information should need to be reported, as it was the case in the "principle of the execution chain" of MiFID I when only the transaction at the end of the chain had to be reported.

2. We are concerned of duplicities/incoherencies between EMIR's and MiFID II's reporting requirements. In our opinion financial instruments subject to reporting requirements on EMIR should not be subject to reporting requirements under MIFID II.