



European Securities and  
Markets Authority

# Reply form for the Consultation Paper on Draft Implementing Technical Standards under MiFID II



## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on Draft Implementing Technical Standards under MiFID II, published on the ESMA website.

### **Instructions**

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

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA\_QUESTION\_MIFID\_ITS\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

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

### **Naming protocol**

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

ESMA\_MiFID\_ITS\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_MiFID\_ITS\_ESMA\_REPLYFORM or

ESMA\_MiFID\_ITS\_ESMA\_ANNEX1

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

### **Deadline**

Responses must reach us by **31 October 2015**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input/Consultations'.



### ***Publication of responses***

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

### ***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings 'Legal notice' and 'Data protection'.



## General information about respondent

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

## Introduction

**Please make your introductory comments below, if any:**

< ESMA\_COMMENT\_MIFID\_ITS\_1 >

Deutsche Börse Group (DBG) welcomes the opportunity to contribute to the recent consultation on three Implementing Technical Standards and to support ESMA in its efforts to develop implementing measures for the revised Markets in Financial Instruments Directive (MiFID). We kindly ask ESMA to provide for an adequate and consistent set of implementing measures, thereby taking into account the implications for the functioning of financial markets in Europe, in particular with regards to the following aspects:

Draft ITS 1 on format and timing of the communications and the publication regarding the suspension and removal of financial instruments from trading on a Regulated Market, an MTF or an OTF

- With regard to the timing and format of communications and publications we argue to consider different characteristics of actions by including changes to the data structure.
- In order to contain data flow in case related derivatives are affected by an action, a data field for related securitized derivatives affected should be introduced.
- Finally, we argue for more flexibility to the individual process structure of each trading venue without unnecessarily delaying the communication of the information.

Draft ITS 2 under Article 61(5) of Directive 2014/65/EU

- Deutsche Börse Group strongly appreciates the designation of a dedicated and advertised contact point specifically for the purpose of guiding the application process and in order to facilitate communication between the applicant and the competent authority where necessary. In this context, we like to recommend as well that clearly defined explanations on data fields, templates and procedures as well as details requested are being delivered to the applicant together with the application forms.
- Furthermore, we would like to recommend clarifying how the gap between conducting the application process in 2016 and the foreseen application of the respective standard not before 3 January 2017 should be filled, if necessary by introducing an interim solution.
- DBG would appreciate clarification with regards to authorisation requirements for market operators, especially if there will be any practical effect on the information to be submitted to the NCA by a market operator.

Draft ITS 3 on the format and timing of weekly position reports

- We argue for the exclusion of positions of retail investors in securitized derivatives from reporting requirements of ITS 3 as well as RTS 21 in order to avoid severe distortions of securitized derivatives' markets which would substantially reduce investment choice for retail investors.

< ESMA\_COMMENT\_MIFID\_ITS\_1 >



## **Q1. Do you agree with the draft ITS on the timing and format of communications and publications?**

<ESMA\_QUESTION\_MIFID\_ITS\_1>

With regards to Table 1 and Table 2 in the Annex of draft ITS 1 we have the following comments:

1. The three action types "suspension", "lifting of suspension" and "removal" show different characteristics regarding period behaviour. As "suspension" could have a predefined period, "lifting of suspension" and "removal" become effective to a specific point in time. To minimize the message traffic each action should require only one message. This requirement could be achieved by the following changes to the data structure:

- Field „started on“ should be renamed to „Effective from“ (mandatory)
- Field „ended on“ should be renamed to „Effective to“ (optional or valid value: Alphanumeric-350; which allows for "Date\_Time\_Format" or free text, e.g. "until further notice")
- Field „ongoing“ should be deleted.

2. With regards to removals we suggest that there should only be a date format and no date time format because there are no intraday removals.

3. As many market operators have more than one MIC, the field "trading venue" should allow for multiple MICs

4. The data fields representing the information about the instrument are split in two fields "instrument identifier" ({ISIN}) and "instrument full name" ({ALPHANUM-350}). Contrary to this the issuer information is combined in one field. For better data handling the issuer information should be split to "issuer identifier" ({LEI}, optional) and "issuer full name" ({ALPHANUM-350}, mandatory)

5. We assume that (for each action type) all affected products have to be published. Furthermore securitized derivatives are not derivatives referred to in points (4) to (10) of Section C, Annex I. As a result the suspension of an instrument related to thousands of securitized derivatives leads to a massive data output. To avoid such distracting consequence, the following field should be introduced: „Related securitized derivatives affected“ (valid values: „True“, „False“).

6. Furthermore, DBG would like to amend the wording in Art. 4(1), (3), as well as Art. 6(1), (2) of ITS 1 to "as soon as reasonably practicable" instead of "immediately". Especially as the suspension and removal of financial instruments may often impact numerous related derivatives, TVs have to ensure accurate communication enabling a good functioning of the system. With the proposed wording, more flexibility is granted to the individual process structure of each TV without unnecessarily delaying the communication of the information.

The attached file provides the adjusted/new fields as well as examples.

<ESMA\_QUESTION\_MIFID\_ITS\_1>

## **Q2. Do you agree with the draft implementing technical standards for data reporting services providers? Please provide reasons.**

<ESMA\_QUESTION\_MIFID\_ITS\_2>

Deutsche Börse Group (DBG) welcomes the opportunity to provide feed-back to the ITS for data reporting services providers.

### Designation of a dedicated contact point strongly supported

Deutsche Börse Group strongly appreciates the designation of a dedicated and advertised contact point specifically for the purpose of guiding the application process and in order to facilitate communication between the applicant and the competent authority where necessary. It is important to ensure a common

understanding about the content and scope of the information the applicant shall include in its application for authorisation as a data service provider.

The time left between now and the application of MiFIR / MiFID II in Jan 2017 is extremely short and industry and regulators will have to work hand in hand in the short time left. While the documents provided by ESMA in the Annexes are a very good basis to start with, we expect additional questions to arise during the preparation of the application process. Therefore, the NCA should designate and identify a dedicated contact person as early in the process as possible.

#### Further clarification on the detailed content of the deliverable documents requested

While a dedicated contact person at the NCA would be both necessary as well as welcome, we like to recommend as well that clearly defined explanations on data fields, templates and procedures as well as details requested are being delivered to the applicant together with the application forms:

- Responsibilities for the assignment of the Reference Number must be drawn up.
- The position of the designated contact person at the applicant as well as the person at the applicant in charge of preparing the application must be defined. Are only members of the management body of the data reporting services provider suitable or are any other persons responsible for the application process allowed too?
- The structure of the information to be set out as defined in Annex I basically follows the structure of the articles in RTS 13 (Draft regulatory technical standards on authorisation, organisational requirements and the publication of transactions for data reporting services providers). For a comprehensible structure of Annex I a break-down of the information on publication arrangements according to article 14 to article 20 of RTS 13 is recommended.
- With respect to Article 4(1)(36) of Directive 2014/65/EU the competent authority of the member state should assign the management body pursuant to national law. To ensure a full list the assignment of members of the management body in Annex II should be stated clearly.

#### Application of ITS 2 seems to be planned too late in the process

In this context we would like to point your attention to recital (7) of proposed ITS 2 which states *“The new legislation ... applies from 3 January 2017. To ensure consistency and legal certainty, this regulation should apply from the same date.”*

While we understand that according to the Level 1 text NCAs will have to review and provide feed-back to the applicant within 6 months at the latest, we wonder how the practical application process should be conducted in 2016 while ITS 2 is planned to be applied no earlier than 3 January 2017? How shall the industry be enabled to report transactions as early as 3 January 2017 (using a data reporting service provider) if no authorisation is legally foreseen before this date?

Therefore, we would like to recommend clarifying how this gap should be filled going forward, if necessary by introducing an interim solution.

#### No prior authorisation requested for “market operators” – practical implications to be defined within ITS

According to Article 59 (2) of Directive 2014/65/EU a market operator operating a trading venue seeking authorisation to operate the data reporting services of an APA, a CTP and an ARM shall not be subject to prior authorisation. Such a service shall be included in their authorisation.

While we strongly agree with the L1 text in this respect, we are missing concrete suggestions in the ITS as regards the practical implications for market operators introduced by the Level 1 text. DBG would strongly appreciate clarification of this question, especially if there will be any practical effect on the information to be submitted to the NCA by a market operator.

While we are eager to see ESMA's proposal on this issue, we would like to suggest at least one allowance to be included explicitly. With respect to Article 63 (1)(3) of Directive 2014/65/EU all members of the management body of the APA, CTP or ARM which will be the same as the members of the management body of a market operator are deemed to comply with the following requirements:

- be of sufficiently good repute,



- possess sufficient knowledge, skills and experience and
- commit sufficient time to perform their duties.

This allowance should also be reflected in Art 2, ITS 2 including Annex II and Annex III of ITS 2. We recommend to explicitly state, that the following information is not relevant for members of the management body of the data reporting services provider which will be the same as the management body of the regulated market:

- professional experience and other relevant experience,
- educational qualification and relevant training,
- criminal records or self-declaration of good repute,
- self-declaration of good repute,
- minimum time (approximate) that will be devoted to the performance of the person's functions within the data reporting services provider and
- any additional information necessary for the assessment that the member is of sufficiently good repute, possesses sufficient knowledge, skills and experience and commits sufficient time to perform the duties.

Further allowances of course would be both, justified as well as appreciated.

<ESMA\_QUESTION\_MIFID\_ITS\_2>

**Q3. Do you agree with the proposed time and day for submission? If not, please explain why and provide an alternative time and/or day.**

<ESMA\_QUESTION\_MIFID\_ITS\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_ITS\_3>

**Q4. Do you have any comments on the format or fields for the weekly position report?**

<ESMA\_QUESTION\_MIFID\_ITS\_4>

From DBG perspective, when studying the draft reporting format, it becomes obvious again that neither ESMA nor the European Parliament had the intention to include positions of retail investors into this regulation, considering that only the positions of investment firms, investment funds, other financial institutions, commercial undertakings and emission operators shall be reported.

Securitized derivatives such as warrants or structured notes are affected by Art. 57 and 58 MiFID and RTS 21, since a small portion of these instruments refer to underlyings such as gold or silver. However, warrants and structured notes on commodities are almost exclusively used by self-directed retail investors, who like to diversify their assets and often trade via online brokerage companies. Typical retail order sizes in securitized derivatives range from EUR 1,000 to EUR 10,000 and are therefore highly unlikely to have any impact on the underlying commodity market.

We strongly suggest to exempt securitized derivatives from the reporting requirements under RTS 21 and ITS 3.

Commodity derivatives make up a small portion of the retail securitized derivatives market with limited revenues for retail brokerage firms and issuers. Moreover, many retail banks have no procedures in place today to identify commodity products among the large range of securitized derivatives. Therefore, the reporting requirements would require excessive IT projects for retail banks, while delivering little added value for regulators.

In case the reporting requirements under RTS 21 and ITS 3 will be imposed on securitized derivatives, we expect that securitized derivatives on commodities will no longer be offered from 2017, reducing the investment choices for retail investors who do not want to invest into commodities physically (storage problems and costs, risk of theft). We consider this imminent consequence as contradicting ESMA's



standpoint in RTS 21(17) which states that 'Position limits should not create barriers to the development of new commodity derivatives and should not prevent less liquid sections of the commodity derivatives market from working adequately.'

Furthermore, questions of data privacy evolve in case daily and weekly reports contain information, i.e. positions, on natural persons. DBG sees substantial implementation risks due to discrepancies to national and European data protection and privacy regulations.

<ESMA\_QUESTION\_MIFID\_ITS\_4>

**Q5. Do you have any comments on the validation and error management checks proposed?**

<ESMA\_QUESTION\_MIFID\_ITS\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_ITS\_5>

**Q6. Do you agree with ESMA's proposals? Please specify those proposals with which you do not agree, with the reasons why, and provide an alternative proposal.**

<ESMA\_QUESTION\_MIFID\_ITS\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_ITS\_6>