



Maria Velentza  
Head of Unit G3 (Securities markets)  
European Commission  
Directorate-General Internal Market and Services  
B - 1049 Bruxelles/Brussels  
Belgium

By e-mail submission to: [markt-consultations-mifid@ec.europa.eu](mailto:markt-consultations-mifid@ec.europa.eu)

2<sup>nd</sup> February 2011

Dear Maria

Public Consultation: Review of the Market in Financial Instruments Directive (MiFID)

Thank you for the opportunity to provide comments in relation to the Commission's review of the Markets in Financial Instruments Directive ("MiFID"). We have set out below our views in relation to: automated trading; consolidation of transparency information; and the further alignment and reinforcement of organisational and market surveillance requirements for Regulated Markets ("RMs") and Multilateral Trading Facilities ("MTFs"). We have provided in the Annex to this letter our responses to the questions posed by the Commission in the Review. We would be happy to discuss our response in more detail with the Commission or provide such data as may be required.

Introduction

BATS Trading Limited<sup>1</sup> ("BATS Europe") is based in the UK and is authorised and regulated by the UK Financial Services Authority ("FSA") as the operator of an MTF.<sup>2</sup> We operate an Integrated Book (for displayed orders and non-displayed Large in Scale orders), a Dark Book (for non-displayed orders that match at an externally generated reference price) and an Order Routing Facility so that orders which are not filled on the BATS Europe order books may be routed to other execution venues.

BATS Europe is supportive of the underlying positive impact of competition and free choice on innovation and efficiency. We agree with the Commission that MiFID has been successful in promoting

---

<sup>1</sup> BATS Trading Limited is a fully owned subsidiary of BATS Global Markets Inc. Owners of BATS Global Markets Inc include affiliates of Citigroup, Credit Suisse, Deutsche Bank, GETCO, JPMorgan, Lime Brokerage, Morgan Stanley, Bank of America Merrill Lynch and Wedbush.

<sup>2</sup> BATS Europe launched its market for the trading of pan-European equity securities on 31st October 2008 and regularly matches more than 12% of the notional value traded in FTSE 100 securities and 5-10% of other major European indices.



competition, which has resulted in increased efficiency and reduced costs in many areas for market users.

In the Review, the Commission notes that the regulatory framework “needs updating”, and also highlights links to other legislative changes that are occurring in parallel, including with respect to OTC derivatives and central counterparties, as well as short selling. Given the interconnected nature of the issues being considered, we appreciate that the Review is necessarily wide ranging with respect to both activities and financial instruments. We also appreciate the short timeframe for change, given the level of global coordination required post-crisis. However, we consider that there are a number of issues discussed in the Review where the risks that the Commission is attempting to address have not been fully articulated, nor is it necessarily clear what the Commission is seeking to achieve through its proposals.

**We consider that it is important to differentiate between where the aims of MiFID have not been achieved, but could be through consistent supervisory efforts across Member States and the enforcement of existing requirements, compared with where there is a clear market failure that will not be resolved by market forces alone.** In the case of the former, we believe that a clear mandate for the new European Securities and Markets Authority (“ESMA”) should address these issues. However, in the case of the latter, i.e. where there is a clear market failure that will not be corrected by market forces, **we believe that where regulatory intervention is proposed it should be both necessary and that the benefits of such intervention will outweigh the costs.**

#### Automated Trading

An efficient market relies upon a multitude of different types of liquidity which will be provided by different market participants with different business models, trading styles and trading strategies that have been implemented using different means. Automation has permeated all aspects of securities trading; whether a proprietary trading firm using its own funds to act like a market maker by providing two way liquidity, a multi-desk bank, an agency broker enabling its clients to have access to more sophisticated trading tools and faster access to organised markets,<sup>3</sup> or a retail client using on-line execution services.

#### *Definition of HFT*

We agree with the Commission that High Frequency trading (“HFT”) is not of itself a trading strategy but rather a broad categorisation of the automation of a number of trading strategies that has enabled market participants to trade more frequently and efficiently. Any firm can choose to invest in technology to automate trading and trading strategies, co-locate in data centres or choose a low latency network

---

<sup>3</sup> We use the term “organised markets” throughout this letter in relation to RMs and MTFs. Such references do not include the proposed OTC “Organised Trading Facilities”.



connection, and use the lowest latency version of any market data feed. However, firms should be able to choose solutions that most appropriately meet their business needs.

The Commission has proposed a definition of HFT and suggested that any HFT firm transacting volume over a certain threshold would have to be authorised. Therefore, any HFT firm currently availing itself of, for example, the exemption in article 2(1)(d) MiFID could no longer do so. We believe that the Commission is aiming to ensure that such firms are subject to appropriate requirements, including with respect to systems and controls, and financial resources, and to ensure the orderly functioning of the market.

**We consider that the definition of HFT proposed by the Commission is problematic**, as it seeks to include in a single definition a wide range of trading strategies which may be implemented in different ways. Fundamentally, we believe that all firms should have in place systems and controls appropriate to the nature of their trading activity. As such, highly automated trading, including where that trading is also high frequency, would require different controls to those needed for voice broking or offering a Direct Market Access (“DMA”) service to clients. Similarly, depending on the nature of its users and their trading activity, all organised markets must have in place appropriate systems and controls and must uphold the MiFID principle of fair access, such that they do not discriminate against or in favour of certain firms through any means with respect to access to that venue.

**In order to best achieve the Commission’s objectives we propose two alternatives: (1) require any firm which trades over a certain threshold to be authorised by an EEA or equivalent regulator; or (2) require all direct participants (regardless of their size) of RMs and MTFs to be authorised by an EEA or equivalent regulator.**

In both cases, we do not consider it is necessary to define the way in which the firm is trading. With respect to Option 1, in all likelihood, in order to exceed the specified threshold, the firm will trade in an automated manner. However, a definition which includes descriptions of trading activities adds an unnecessary layer of complexity. In addition, a threshold could be difficult to administer and enforce on a pan-European basis. At present, organised markets should impose systems and controls requirements on all participants, whether authorised or exempt, and monitor compliance with those requirements. Nonetheless, an authorisation requirement of direct participants would ensure that all firms are also subject to regulatory oversight by an EEA or equivalent regulator with respect to all of their trading activity.

Therefore, on balance, we consider that option 2 is a better solution; that is, requiring all direct participants of organised markets to be authorised by an EEA or equivalent regulator. Consequently, any firm currently using the article 2(1)(d) would need to be authorised or would have to access organised markets via a regulated broker under a DMA or Sponsored Access arrangement.



### *The value of liquidity and obligations to provide liquidity*

There has been much debate about the value of “HFT liquidity”. The Commission has set out the two common opposing views on HFT: on the one hand, it has added liquidity to the market, reduced spreads, and reduced costs; on the other hand, it has resulted in reduced transaction sizes and increased volatility. The Commission also notes that some investors are concerned that, unlike registered market makers on organised markets, there is no obligation or incentive for HFT firms to continue to provide liquidity to the market in the event of adverse market conditions and that they are, therefore, able to withdraw liquidity at any time. There have been suggestions that such firms should be obligated to provide liquidity, including during periods of volatility.

Any well functioning liquid market requires firms willing to provide liquidity and make public prices. Traditionally, specialist and manual market makers have carried out this function by quoting two way prices and generating revenue from the spread. As the market has evolved, the way in which the provision of liquidity is implemented has changed. In particular, a new breed of liquidity providers using algorithms has replaced the specialists and manual market making firms. As previously, these liquidity providers post two sided orders onto electronic orders books, providing liquidity and making a public price.

The democratisation of market making is now such that any appropriately constituted firm can become a liquidity provider. However, such liquidity providers have automated their trading in order that they are able to remain efficient and competitive. Similarly, co-location has replaced traders on the exchange floor, as these firms now instead seek to locate their systems close to a organised market’s matching engine. We consider that **the emergence of a greater number of automated liquidity providers both reduces the market’s dependency on a small number of firms providing this service and introduces greater competition between liquidity providers to the benefit of other market participants through increased liquidity, more efficient price formation and reduced spreads.**

**BATS Europe does not impose market maker obligations on any of its participants and we do not support proposals to require organised markets to impose market maker obligations on their participants.** We have included in the Confidential Annex<sup>4</sup> to this letter some data from our market which demonstrates that, notwithstanding the absence of market maker obligations, liquidity provision on our market remains continuous and consistent, in both normal and volatile trading conditions.

In the three charts in the Confidential Annex, we have plotted the notional value executed on BATS Europe and on all organised markets tracked by BATS Europe.<sup>5</sup> Against this, we have plotted the

---

<sup>4</sup> This data has been included in a Confidential Annex as it provides information which is not available through our public market data feeds.

<sup>5</sup> BATS Europe tracks and publishes market share information on a per market and per index basis for major European exchanges and MTFs. See: [http://www.batstrading.co.uk/market\\_data/](http://www.batstrading.co.uk/market_data/)



percentage of liquidity provided on BATS Europe by firms that we have classified for these purposes as “Automated Liquidity Providers” (“ALPs”), as well as the aggregated effective spread of these ALPs.<sup>6</sup> Effective spread is defined as the theoretical spread to fill an order at size on either the buy or sell side of the book. In the case of the FTSE 100 (the examples provided), effective spread is given for a buy or sell order of €40,000, which is about seven times larger than our average trade size, and is therefore reflective of a deep order book. The effective spread shown is that provided only by ALP liquidity and excludes resting orders from other participants – therefore the effective spread of our entire book is smaller than the figures shown.

Chart 1 shows the data for the FTSE 100 over the period 1<sup>st</sup> September 2010 to 17<sup>th</sup> December 2010. Chart 2 shows the data for the FTSE 100 on an intraday basis on 3<sup>rd</sup> December 2010 (which includes the routine publication of the US non-farm payroll figures, which are published prior to the US open but during the European trading day and routinely result in increased volatility across European markets). Chart 3 shows the data for a single security in the FTSE 100, Rolls Royce Group plc (symbol: RRI) from 1<sup>st</sup> October 2010 to 17<sup>th</sup> December 2010. RRI was chosen over that time period as it enables us to observe normal trading conditions as well as unexpected volatility relating to the Qantas A380 incident in early November 2010.

**In all cases, we see consistent and continuous levels of liquidity provision by our ALPs, and an effective spread provided by ALPs which is consistent with normal trading conditions.** We have similar data for other European indices, which we would be happy to share with the Commission.

Whilst we do not support the mandatory imposition of market maker schemes, we consider that organised markets should be able to offer market maker schemes where necessary, for example, to encourage and ensure liquidity in a new financial instrument or an illiquid instrument. In all cases, any such market maker scheme should be consistent with the following principles: it should be: transparent; non-discretionary (i.e. non-discriminatory); consistent with reliable price formation; and should not be designed to encourage trading for improper purposes. We would, however, note that market maker schemes typically include provisions to allow market makers to stop quoting during period of extreme volatility or during technical difficulties. As such, traditional **market maker schemes do not guarantee the continued provision of liquidity by such firms during volatile market conditions.** Nor do we believe that market maker schemes should impose such obligations; this would significantly increase the risk faced by such firms and this additional risk would likely be seen in wider spreads and less capital committed, to the detriment of end investors.

---

<sup>6</sup> We should note that all participants of BATS Europe are treated equally and no group of participants has any special privileged or obligation. However, for illustrative purposes, we have classified participants as ALP and non-ALP according to the types of firm that we believe the Commission would aim to capture in a liquidity provision obligation.



### *Maintaining an orderly market*

The “Flash Crash” on 6<sup>th</sup> May 2010 in the US has given rise to concerns about, amongst others, the impact of Automated Trading on the orderliness of the market. The Flash Crash highlighted a number of weaknesses in the US market structure, including with respect to approaches to error trades, “stub market maker quotes”, and “circuit breaker” mechanisms aimed at ensuring an orderly market. Since then there has been much debate on whether mechanisms should be implemented to “slow down” trading.

It is important to clearly articulate the risks that we need to address and, where necessary, to propose actions that mitigate those risks. **Trading at high speed is not of itself a risk. By contrast, trading in an uncontrolled manner that has no regard for the impact on the market clearly poses a risk.** This risk may be exacerbated when such uncontrolled trading activity is conducted quickly.

**All trading firms should have in place appropriate systems and controls**, including those required to manage the design, implementation and monitoring of automated systems. Similarly, organised markets themselves should have both: order entry controls to try to minimise the likelihood of orders being accepted that may impact the orderliness of the market; and surveillance controls to ensure that they can monitor trading activity and act quickly to maintain the integrity and orderliness of the market by imposing restrictions on or switching off any participant. **As new trading strategies and technology emerges, technical order entry and surveillance controls must keep pace.** In addition, organised markets must ensure that they have sufficient capacity and are designed to handle the level of messages generated by their market participants and effectively cope with spikes during periods of volatility.<sup>7</sup>

As an organised market, our trading system is designed with mechanisms to safeguard orderly trading and to control all trading activity, including automated and/or algorithmic trading. Controls and monitoring tools should be appropriate to the nature of the market and the users. Our order entry controls include price collars as well as order size, notional value and orders per second thresholds above which orders are rejected. Monitoring tools enable us to track the order and trading activity of all participants to identify any anomalous behaviour and/or disorderly trading. We are able to isolate individual trading firms, place limits on them intraday or disable their access if necessary.

Following the Flash Crash, there has been significant focus on “circuit breaker” mechanisms. In Europe, volatility halts are a common mechanism employed by organised markets to maintain an orderly market. Typically, if a trade would execute beyond a certain limit – which is parameterised as either “dynamic” (e.g. last traded price) or “static” (e.g. opening price or last auction price) – continuous trading is halted for a short period of time and the market is effectively placed in an auction to aid

---

<sup>7</sup> As part of our published latency statistics, we include data on the maximum number of messages per second observed in live trading. In non-live trading, the system has been tested far in excess of this figure. See: [http://www.batstrading.co.uk/resources/participant\\_resources/BATSEuro\\_Latency.pdf](http://www.batstrading.co.uk/resources/participant_resources/BATSEuro_Latency.pdf)



reliable price formation. Volatility halts may be based on price movements in a single security or across an index.

**Whilst an auction is a valid means to aid price formation where continuous trading is not possible or orderly, ideally trading should remain continuous where possible.** In addition, the current Listing Market volatility halt mechanisms work in isolation and do not take into account trading on a pan-European basis. The specific parameters of the halts are different across different Listing Markets, making the process difficult to manage for trading firms. In addition, in many cases, volatility halts are triggered when prices exceed a range from a static reference price after an orderly decline (or rise). This can result in them being triggered and trading being halted unnecessarily by a single order.

A number of MTFs have put in place “execution price collars” where, if an order is submitted that would result in a trade that would breach a pre-set parameter, the order is rejected. Whilst these collars create bands around trading prices, they are typically set quite widely in order to ensure that orders are not unnecessarily rejected. BATS Europe, for example, has a default collar of 20% from the reference price, but allows participants to choose a narrower collar on a per participant basis. In addition, such execution price collars typically reference an externally generated price. For example, BATS Europe references the Best Bid and Offer on the Listing Market. Whilst MTFs could use the prices on their own markets as the reference for execution price collars, this would increase the number of different mechanisms in place and would not further a pan-European solution, which takes into account trading across the whole market.

We consider that it **would be worthwhile exploring whether it would be more efficient and effective to implement a consistent pan-European “circuit breaker” mechanism.** As an example, instead of each organised markets implementing individual circuit breakers based only on trading on their own market, it could be possible to require all organised markets to implement a limit up/down mechanism based on a reference price which is indicative of trading on a pan-European basis.

A limit up/down mechanism sets floors and ceilings for the prices at which trades can execute. These limits are based on a pre-set distance from a reference price, which updates throughout the trading day to reflect what is happening in the market and to ensure that the parameters remain relevant. **The aim of limit up/down is to ensure that any price decline/increase is orderly without the need to unnecessarily halt continuous trading.** Limit up/down also minimises the likelihood of a single erroneously priced order triggering a volatility halt and, therefore, halting continuous trading for all participants on the relevant organised market.

Under a limit up/down mechanism, all organised markets would be required to reject any incoming order (or part of an order) that would execute outside the limit up/down boundary and reject (or “price slide”) any resting order outside the limit up/down boundary. The limit up/down boundary should be an accurate representation of all trading activity in the market, with mechanisms in place to ensure that it is not triggered unnecessarily. A rolling Volume Weighted Average Price (“VWAP”) taken from all



organised markets and immediate OTC prints (as reported to APAs) would meet these criteria: Consolidated European VWAP (“CEVWAP”).

As a starting point, we would propose that the limit up/down boundary should be set at a specified percentage from the trailing five minute CEVWAP.<sup>8</sup> If a security is locked limit up/down for more than a specified time period, e.g. 5 seconds, this would suggest that the price of a security is genuinely and persistently decreasing/increasing (rather than gapping as a result of, e.g. a single erroneous order). Therefore, the limit up/down boundary could be widened to allow trading to continue in an orderly manner. If the security continued to be locked limit up/down at the wider limit, it would suggest that the market has not found an equilibrium and that there should be a mechanism to gather liquidity and re-set the price. In line with market convention, we would suggest that trading is halted on all organised markets and OTC whilst the most relevant organised market in terms of liquidity conducts a short auction. Following this, and publication of a new price for the security, trading would continue on all organised markets and OTC using the re-set limit up/down boundary.

**Ideally, we should avoid creating a mechanism which has a single point of failure, e.g. relying on a single organised market to re-open trading using an auction.** However, this is the most pragmatic solution where the limits have already been widened and the market has not corrected itself. Nonetheless, it is important to provide flexibility and take into account the fact that the most relevant organised market to hold the auction may not always be the market where the security was first admitted to trading (i.e. the Listing Market) but could be an alternative organised market (including an MTF) whose auctions are regarded by market participants as the best indicator of liquidity and price formation. Similarly, it is important to ensure there is contingency built into the mechanism such that a restart could occur in the event that the Listing Market (or MTF) is unable to hold an auction, e.g. due to a technical outage.

The limit up/down mechanism proposed above would – if implemented by all European organised markets and APAs – create transparent, consistent and predictable boundaries around trading activity. This would remove the occurrence of error trades and, therefore, create greater certainty for market participants. Most importantly, it would ensure that trading could continue on a pan-European basis in an orderly manner, including in the case of genuine price decreases/inclines.

By contrast, instead of looking at ways to ensure that trading is controlled appropriately, there have been a number of proposals to effectively slow down trading by imposing a minimum order rest time, or limiting the frequency by which orders can be updated by imposing order to trade ratios. **We fundamentally disagree with the implementation of crude mechanisms that solely aim to slow down trading, rather than addressing any particular risk.** We believe that appropriate systems and controls, including mechanisms to maintain orderly trading, are far more effective and appropriate.

---

<sup>8</sup> This could be 5/10/15% and tailored to the liquidity of the security.



With respect to the specific proposals noted in the Review, **we would be concerned about the impact of a minimum order rest time on the ability of firms to adequately manage the risk associated with their open resting orders (by cancelling or amending the price or size)**. Moreover, imposing a minimum order rest time would effectively create a situation where resting orders could be gamed if the market moves against them during the mandated time period. This is likely to result in firms being less willing to commit risk capital, which would have the effect of lessening liquidity provision and widening spreads, to the detriment of end investors.

With respect to order to trade ratios, it is not clear what the “right” order to trade ratio is, if indeed there is one. It is also important to note that a firm posting displayed liquidity will tend to have a relatively higher order to trade ratio as there is no guarantee that any order will be executed. Similarly, firms posting resting orders in lower liquidity securities will tend to have a higher order to trade ratio, as it is likely that they will have to update their orders in line with the market (whether in price or size) more frequently than in the case of a liquid security before executing against incoming marketable liquidity. By contrast, a firm executing a predominantly aggressive order strategy in removing displayed liquidity will, by its nature, have a lower order to trade ratio. The differences between these two strategies may be extremely large. **We are concerned that a single (hard cut-off) order to trade ratio could have the unintended consequence of restricting the ability of firms to manage the risk associated with open resting orders.**

Similarly, a start up organised market may have a far higher order to trade ratio than an established organised market. **We would be concerned if a single hard cut-off order to trade ratio created a barrier to entry and, therefore, lessened competition between organised markets.**

There may be other reasons for a high order to trade ratio. For example, recent research<sup>9</sup> has effectively suggested that poorly constructed tick tables where tick sizes are too small result in more frequent order updates and, therefore, higher order to trade ratios. We have included, in the Confidential Annex, data showing the rolling five day average order to trade ratio for all participants on BATS Europe between 1<sup>st</sup> September 2010 and 17<sup>th</sup> December 2010 for a number of indices (see Chart 4). The indices have been chosen as they represent: Table 1 (FTSE 100 – High Liquidity Segment (“HLS”)); Table 2 (FTSE 100 non-HLS, and SMI; and Table 4 (CAC 40, and DAX). For the purposes of this analysis, it is worth noting that Table 1 and Table 4 effectively have the same tick sizes for prices of securities on the relevant markets, which are both finer than Table 2.

There is a clear correlation between the order to trade ratios for securities using Table 2, and between those using Table 1/Table 4. There also appears to be far greater stability in the order to trade ratio for securities using Table 2, rather than Table 1/Table 4. As noted above, it is not clear what the “right” order to trade ratio is, if indeed there is one. Nonetheless, we consider that this merits further study, as

---

<sup>9</sup> See: CA Cheuvreux: *Navigating Liquidity 5* (January 2011)



part of the tick size harmonisation debate and in relation to discussions about the factors affecting order to trade ratios.

Whilst we disagree with imposing a single order to trade ratio on all organised markets, we do consider that monitoring such ratios may contribute to an organised market's overall participant monitoring programme. For example, BATS Europe monitors the "order efficiency" for our overall market and on a participant basis, where order efficiency is defined as the notional value traded per order submitted. Significant changes are monitored to the extent that they may be indicative of systems and controls issues.

### *Tick sizes*

Where trading historically predominantly took place on a single venue, tick sizes were set by that venue (the Listing Market). Depending on the Listing Market, tick sizes were allocated according to varying – and not always transparent – factors, including market capitalisation, index membership, security type and, in some cases, on an individual security basis.

In a pan-European trading environment, there are clearly benefits to market participants and the orderliness of the market if tick schemes are simple and harmonised across all organised markets. For example, where a broker is trading a security on multiple European organised markets, a common tick scheme reduces the complexities associated with order routing and the consolidation of market data from multiple sources. With this in mind, in 2009, a number of the MTFs with the broking community (through AFME) and later FESE attempted to create a simplified tick scheme that could be used by all pan-European organised markets.

Clearly there is a balancing act in setting tick sizes. A tick size that is too large may result in liquidity removers buying at higher prices and selling at lower prices than they would were the security quoted in finer tick sizes. It may also artificially widen spreads on displayed markets, thus making them less attractive. Conversely, tick sizes that are too small create thin liquidity for a security across many price levels. The primary consideration for the group was to create simplified tick schemes that could be used consistently by all European organised markets whilst aiming to ensure that tick increments in each case were appropriate, rather than solely seeking to implement finer tick sizes.

The process of all organised markets moving to the agreed tick tables has been ongoing since 2009. Whilst there were a number of issues still to be resolved, the agreement between organised markets had worked reasonably well, with the notable exceptions of small cap securities and other securities, such as ETFs. However, on 26<sup>th</sup> January 2011, NYSE Euronext announced that it would be reducing tick sizes for French and Dutch blue chips securities on 7<sup>th</sup> February 2011.<sup>10</sup> The proposed tick sizes are not

---

<sup>10</sup> See NYSE Euronext Info-Flash: <http://www.euronext.com/fic/000/062/176/621766.pdf>



consistent with the agreed tables and the change was not discussed and agreed with the other organised markets, or – we understand – many of NYSE Euronext’s members.

NYSE Euronext has argued that the move to finer tick sizes aims to deliver potential price improvement and reduce price discovery constraints. In particular, we understand that NYSE Euronext has evidence to suggest that the current tick constraints are resulting in liquidity moving from displayed markets to dark pools. However, no information has been provided regarding the basis for this claim. Whilst we have seen evidence of this in the US, we have not yet carried out the analysis required to verify whether this is indeed the case in Europe.<sup>11</sup> The securities affected are already on the finest tick sizes (Table 4) and there are polarised views about whether the current fine tick sizes already inhibit price formation, or whether price discovery is constrained by the tick size.

**Regardless, organised markets should not be able to take unilateral action with respect to tick sizes to the detriment of the efforts to harmonise tick regimes. In addition, it is imperative that tick sizes decisions are not based on one venue’s market share to the extent that they become a means by which organised markets compete to the detriment of market efficiency and quality.**

Prior to the announcement by NYSE Euronext, we would have suggested that the current arrangements have worked reasonably well and were a positive example of organised markets cooperating. We would have suggested a number of improvements, including the formalisation of a representative Industry Group to agree tick tables and changes, and to ensure that the process is transparent and consistent. Ideally, this group would have had access to funding to enable it to commission academic studies to quantify the impact of tick sizes on the quality of the market. However, **given the recent NYSE Euronext announcement, the only option may be to give ESMA reserve binding powers to set tick sizes on a pan-European basis in the event that organised markets are unable to cooperate and coordinate. If the Commission takes forward this proposal, we would urge it to provide for the creation of a representative industry group to provide guidance to ESMA and to ensure that there are clear selection criteria based on an objective assessment of the impact of tick sizes on market quality.**

#### Consolidation of transparency information

Post-trade transparency information plays a vital role in ensuring the efficiency of price formation, assisting in the operation of the best execution obligation and mitigating the potential adverse impact of market fragmentation. We fully support the Commission’s proposals to improve the quality of OTC trade data and to eliminate the current barriers to the consolidation of transparency information from multiple sources, including organised markets and OTC. We are supportive of the introduction of an APA

---

<sup>11</sup> Our US sister exchange submitted a proposal to the US Securities and Exchange Commission, which set out data on this point. See: <http://www.sec.gov/spotlight/regms/jointnmsexemptionrequest043010.pdf>



regime and the recent work of the joint CESR/Industry Working Group as set out in CESR's Technical Advice to the Commission on Post-Trade Transparency Standards.<sup>12</sup>

These proposals go a long way to addressing technological, data standards and quality obstacles to data consolidation, specifically related to post-trade information (although do not provide a complete standardised solution). **However, a significant and – as yet – unaddressed barrier to consolidation is the economic and contractual basis under which the underlying data is sold.** Specifically, in order to obtain a complete picture of European trading, a user is subject, either directly or indirectly through vendor agreements, to the contractual terms and pricing of each underlying data provider. These agreements are non-standard and complex, with different terms and usage constraints.

**Given the implicit requirement for market participants to take data from all significant venues, there is no competitive market force to constrain the price charged by venues,** which is why MiFID contains the “reasonable cost” provision. However, there is no guidance on what constitutes reasonable cost and in the absence of this requirement being enforced, **the suppliers of the data are unfettered in their ability to exploit the pricing power this affords them.**

The exploitation of this pricing power is evident at present: whilst there has been some downward pressure on headline trading or transaction fees, there has not been a significant reduction in the fees charged by major European Listing Markets for data (or, indeed, other ancillary charges), and indeed in some cases there have been significant increases by Listing Markets. We believe that the direct charges levied by the incumbent Listing Markets are significantly higher than that which would have been established in a truly competitive, non-constrained environment. It is also worth noting that a number of new entrant MTFs have made their data available in real-time free of charge. This would tend to suggest that, despite the significant decrease in market share for many of the Listing Markets since the implementation of MiFID, they still wield dominant market power.

It is important to note that this issue is present for both post-trade data, which has been the focus of regulatory attention, and pre-trade data. In relation to the latter, whilst we agree that there is at present less demand for a mandated consolidated pre-trade data feed, we would be concerned if regulatory focus on post-trade costs was at the expense of pre-trade costs to the extent that organised markets reduce costs for post-trade data only to recoup those losses through excessive and unjustifiable rises in pre-trade data costs. We believe there is already evidence of this, as some Listing Markets have recently increased charges for pre-trade data, in some cases by a significant magnitude.

We consider that “reasonable cost” is too subjective and that the current MiFID provision creates an unhelpful tension between the role of the regulatory authorities to enforce the provision and the role of the competition authorities. Given the importance of removing the barriers to the consolidation of

---

<sup>12</sup> CESR/10-882 – *CESR Technical Advice to the European Commission in the context of the MiFID Review – Equity Markets: Post-trade Transparency Standards* (October 2010): <http://www.esma.europa.eu/popup2.php?id=7282>



transparency information, **we are supportive of Option B; that is, the operation of the consolidated tape by a single entity appointed by public tender for a fixed term.** In the absence of clear guidelines on reasonable costs and the enforcement of this requirement, we believe that competitive forces (i.e. Option C) will not be able to deliver a solution that meets the Commission’s objectives. We are not supportive of Option A as it would be extremely costly, and does not leverage current industry expertise. In addition, it would create a monopoly provider with no break point. Option B has the benefit of including an element of competition, which should help to ensure pressure on quality of service and costs.

With respect to costs and revenues, given the issues relating to the definition and enforcement of the “reasonable cost” requirement, we consider that the second option is more likely to meet the Commission’s aims. That is, all Listing Markets (i.e. RMs), MTFs and APAs would be required to provide data to the operator of the consolidated tape free of charge, and would participate in the revenues obtained (minus costs of distribution). We also consider it is imperative to create a firewall between the suppliers of the underlying data and the end user, such that the end user only has one contract with the operator of the consolidated tape and is not directly or indirectly subject to the contractual terms of the supplier of the underlying data.

**We propose that the Commission prescribes certain structural aspects of the operator of the consolidated tape, and that only the operational arrangements and technology provider are appointed by public tender.** Key aspects relating to governance and the management of conflicts of interest should not be decided as part of a public tender process.

We suggest that the consolidated tape operator entity should be subject to the regulatory oversight of ESMA and should be governed by an Operating Committee composed of one representative from each of the participating RMs, MTFs and APAs, and that each representative should have one vote. Votes to amend contractual terms and to change fees would require an affirmative vote of at least two-thirds of the members. To support the Operating Committee, we propose the creation of an Advisory Committee, consisting of buy-side and sell-side subscribers, and data vendors. The Advisory Committee would provide non-binding guidance on technical standards, data quality standards, contractual terms and pricing. In order to ensure transparency of decision making, the minutes of both the Operating Committee and the Advisory Committee should be made public, and the entity operating the consolidated tape should have to make public an audited statement of accounts on an annual basis.

The operator of the consolidated tape should establish clear and transparent terms under which consolidated post-trade data is disseminated to subscribers, including direct subscribers (who use the data for their own purposes) and vendors (who disseminate the data to third parties). The standard contracts should be made public and there should be no special arrangements with any direct subscriber or vendor.



Pricing must be significantly lower than the current price of a synthesised consolidated tape generated from individual organised markets and OTC publication mechanisms. Revenues should be used to cover the costs of production. Any excess should be distributed to the suppliers of the underlying data. We suggest that the distribution formula relates to market share of executed notional value. There is an argument that trades resulting from pre-trade transparent liquidity (e.g. from pre-trade transparent liquidity on organised markets) are more valuable in terms of price formation and should be weighted more highly in the revenue sharing arrangement, or that the provision of pre-trade data should factor into the allocation algorithm.

### The further alignment and reinforcement of organisational and market surveillance requirements for RMs and MTFs

#### *Organisational requirements*

We fully support proposals to ensure a level playing field between RMs and MTFs, and agree that Market Operators and Investment Firms should be subject to the same requirements when conducting the same activities, including the operation of an MTF. We would, however, note that we consider this to be largely an issue of perception rather than substance.

As a UK FSA authorised firm, BATS Europe is currently subject to a number of requirements relating to the areas discussed by the Commission in its Review. These include: the FSA Principles, including Principle 3 (Management and control) and Principle 8 (Conflicts of interest)<sup>13</sup>; the detailed systems and controls requirements in the FSA Sourcebook *Senior Management Arrangements, Systems and Controls* (SYSC)<sup>14</sup>; and the detailed prudential requirements in the FSA *Prudential Sourcebook for Banks, Building Societies and Investment Firms* (BIPRU)<sup>15</sup>.

As a result, we believe that we already comply with the requirements proposed by the Commission and, as such, we would not incur any additional burden or costs. We would also note comments made by the FSA in its recent publication *The FSA's markets regulatory agenda*<sup>16</sup> that: "we [the FSA] supervise the most important MTFs to the same standards as Recognised Investment Exchanges (i.e. Regulated Market operators)".

---

<sup>13</sup> <http://fsahandbook.info/FSA/html/handbook/PRIN/2/1>

<sup>14</sup> <http://fsahandbook.info/FSA/html/handbook/SYSC> - including provisions relating to: governance arrangements; the identification and management of risks; the identification and management of conflicts of interest; and systems, resources and procedures to ensure continuity and regularity in the performance of regulated activities.

<sup>15</sup> <http://fsahandbook.info/FSA/html/handbook/BIPRU>

<sup>16</sup> UK FSA: *The FSA's markets regulatory agenda* (May 2010): <http://www.fsa.gov.uk/pubs/other/markets.pdf>



### *Market surveillance*

We believe that market surveillance is one area where competitive forces should not be at work. Whilst, as the operator of an MTF, our market monitoring and surveillance obligations relate to activity on our own market, we consider that it is important to have regard to overall trading activity in the market and we use public market data feeds from Listing Markets and other MTFs for these purposes. **We would be supportive of a requirement for organised markets to provide their public pre- and post-trade data feeds to each other at no cost, for market monitoring and surveillance purposes.**<sup>17</sup>

We believe that ESMA could usefully perform a role in offering guidance and ensuring consistency between organised markets with respect to market surveillance. **We would also be supportive of the creation of a Surveillance Practitioners Group, which would also include representatives from ESMA, through which organised markets could share information about types of behaviour observed that may constitute market abuse or result in disorderly trading conditions.** However, we are reluctant to support any proposal that requires organised markets to share specific information about individual participants. We consider that this would create a number of issues relating to confidentiality.

Organised markets must play their part in fulfilling their obligations with respect to their own market, as well as contributing to regulatory oversight of the whole market. To support the administration of the Market Abuse Directive by Competent Authorities, we would also be supportive of organised markets being required to provide both order book and trade data to regulators on request and in a timely fashion.

### *Sharing information about halts, suspensions and disruptions*

Article 41 of MiFID provides a mechanism by which regulatory suspensions are imposed across all organised markets. This has been implemented by means of a manual email notification process, which is extremely inefficient: it requires manual intervention and monitoring by all of the regulators involved and by the organised markets. There are also inconsistencies in the way in which regulatory suspensions are imposed. For example, if an issuer requests to its Listing Market that its securities are suspended, this is not a regulatory suspension and so not notified under the article 41 procedure. In such cases, it is not mandated that all organised markets should also suspend trading, which has led to different actions being taken by different organised markets.

BATS Europe currently takes feeds of data from all of the markets we trade and has attempted to use this data to automate the process by reading the data feeds and halting trading in securities subject to a

---

<sup>17</sup> We should note that we provide commercial services for which we use external data, including our Order Routing Facility and Dark Book reference system. We would not expect to use any data feed provided for surveillance purposes in connection with these services, and would continue to obtain and pay for data for these purposes under standard commercial terms.



regulatory suspension. However, this is not fail safe as there is no standard protocol governing how Listing Markets flag suspensions; in particular, the differentiation between regulatory halts (where we are obliged to also suspend trading) or exchange-imposed halts (where we may also decide to suspend trading if there is an orderly markets issue).

We consider that the Commission should require all organised markets to include certain information in their market data feeds, including exchange-imposed halts (e.g. a volatility halts); regulatory suspensions imposed by a regulatory authority; and any disruptions in trading at that venue (e.g. a systems failure). All of these flags should be clear and unambiguous. By including them on market data feeds, all market participants and organised markets would be able to automate processes based on those flags, which would remove the inefficiencies and inconsistencies in the current system.

Yours sincerely

A handwritten signature in black ink that reads 'A. Westbury'.

Anna Westbury  
Head of Compliance and Regulatory Affairs

A handwritten signature in black ink that reads 'Paul O'Donnell'.

Paul O'Donnell  
Chief Operating Officer

BATS Europe



## Annex

### 2. DEVELOPMENTS IN MARKET STRUCTURES

#### 2.1. Defining admission to trading

1. What is your opinion on the suggested definition of admission to trading? Please explain the reasons for your views.

It is important to draw a distinction between primary market and secondary market activities with respect to RMs and MTFs. In particular, primary market MTF activities and secondary market MTF activities. BATS Europe, for example, offers secondary trading in securities which have been admitted to trading on an EEA or equivalent RM. As such, whilst traded on an MTF, these securities are already subject to the requirements in European directives relating to the admission to trading on an RM, including the MiFID requirements and MAD.

The concept of “admission to trading on an RM” triggers a number of requirements under European directives. The Commission has suggested that “admission to trading” would be defined as “the decision by the operator of a regulated market, MTF or organised trading facility to allow a financial instrument to be traded on its systems”. Whilst the definition of “admission to trading” would be useful as a means to facilitate the extension of the transaction reporting obligation, as suggested by CESR in its Technical Advice to the Commission and as set out in the Commission’s Review, it is not clear whether it is the intention that other provisions currently limited to admission to trading on an RM would also be triggered.

#### 2.2. Organised trading facilities

##### 2.2.1. General requirements for all organised trading facilities

2. What is your opinion on the introduction of, and suggested requirements for, a broad category of organised trading facility to apply to all organised trading functionalities outside the current range of trading venues recognised by MiFID? Please explain the reasons for your views.

3. What is your opinion on the proposed definition of an organised trading facility? What should be included and excluded?

There has been much discussion about whether there is regulatory arbitrage between organised markets and OTC, in particular “Broker Crossing Systems” (“BCSs”) with respect to pre-trade



transparency requirements. There has also been debate about whether the current level of OTC trading is detrimental to price formation on displayed markets and should be capped (see also our response to question 5 below).

We were encouraged that, as part of its MiFID review process, CESR conducted a data gathering exercise to verify the extent of OTC business conducted in BCSs. This exercise showed that the percentage of business conducted by large investment firms in these types of systems ranged from an average of 0.7% in 2008 to an average of 1.15% in 2009.<sup>18</sup> The data gathered by CESR also demonstrated relative stability in the level of OTC trading over the period considered (that is, 2009) and in the use of the pre-trade transparency waivers by organised markets (see also our response to questions 29 to 31 below).

It is not clear to what extent the current level of OTC trading is the “right” level or whether it poses risk to the overall quality and efficiency of the market. To the extent that the Commission is seeking to address issues relating to the level of OTC trading, we consider the Commission should take into consideration:

1. Whether the lack of granularity in the flagging of trades makes it difficult to assess the type of liquidity executed outside of organised markets.
2. Whether current structural inefficiencies in the European market – including with respect to clearing and settlement; tick sizes; market data costs, etc – result in constraints on the amount of business conducted on organised markets relative to trading taking place OTC.<sup>19</sup>

In order to address these points, we propose:

1. The implementation of consistent pan-European flags by organised markets and OTC trades. To this extent, we are supportive of the recent CESR Technical Advice to the Commission on Post-Trade Transparency Standards.<sup>20</sup> This should help to ensure that OTC trades are reported on a consistent basis, and that there is more granular information about the type of trading activity conducted on organised markets and OTC. We would also note the recent report by the TABB Group including data from the UK market on “executable” (or “addressable”) liquidity and “non-addressable” liquidity.
2. The Commission should ensure that trading on organised markets is as attractive as possible and that there are no regulatory barriers that may force business that could have otherwise been conducted on an organised market to take place OTC.

---

<sup>18</sup> Paragraph 171 of CESR/10-802 – *Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets* (July 2010): <http://www.esma.europa.eu/popup2.php?id=7004>

<sup>19</sup> We also note that the percentage of business conducted on US organised market is higher than in Europe, which tends to suggest that organised markets are a more attractive place to trade. We contend that this is indicative of the greater flexibility in the type of business permitted on organised markets.

<sup>20</sup> CESR/10-882 – *CESR Technical Advice to the European Commission in the context of the MiFID Review – Equity Markets: Post-trade Transparency Standards* (October 2010): <http://www.esma.europa.eu/popup2.php?id=7282>



In neither case would the creation of a new regulatory regime for Organised Trading Facilities (“OTFs”) – and a subset for BCSs – necessarily address these issues. To the extent that an OTF regime is required to implement other related legislative changes, we consider that this should have a bearing on the nature of the obligations imposed on the operators of OTFs.

We can appreciate the benefits for regulators if investment firms operating OTFs and BCSs notify their regulators and provide information on the functionality operated. However, given the current trading activity in BCSs, we do not consider that a case has necessarily been made for each system to have a unique identifier code and for real-time trade reports to contain this code. We consider that a better approach is to require BCSs to publish the acronym “BCS” on trade reports (cf. the SI requirement) and for aggregate end of day statistics to be published for each BCS.

We would also note that BCSs currently operate under a regulatory framework that includes requirements relating to best execution, the identification and management of conflicts of interest, post-trade transparency obligations and the reporting of suspicious transactions to regulators.

4. What is your opinion about creating a separate investment service for operating an organised trading facility? Do you consider that such an operator could passport the facility?

To the extent that an OTF definition is necessary, we agree that operators should be capable of using a passport. In addition, where an investment firm operates multiple OTFs, it should not have to apply for separate authorisation for each OTF.

5. What is your opinion about converting all alternative organised trading facilities to MTFs after reaching a specific threshold? How should this threshold be calculated, e.g. assessing the volume of trading per facility/venue compared with the global volume of trading per asset class/financial instrument? Should the activity outside regulated markets and MTFs be capped globally? Please explain the reasons for your views.

We believe that – provided the market is orderly and fair – market participants should have choice in where and how to trade such that they achieve the best possible result. We do not consider that an outcome, which results in regulation preventing the operation of functionality that is useful for investors and helps them to achieve the best possible result, where there is no clear market failure, would be desirable.

Where operating the same activities as organised markets, as a matter of principle, we believe that market operators and investment firms should be subject to the same requirements; where a broker wishes to operate an MTF, it should be subject to the same requirements. That said, we believe that, in many cases, OTFs and BCSs have a substantively different business model from organised markets and that they fulfil a different function. Therefore, in such cases, we do not believe that OTFs and BCSs should be subject to the same requirements, nor that they should be forced to amend their business



model to that of an MTF once they reach a certain threshold. MTFs are structured in a way (bringing together multiple third party buying and selling interests according to non-discretionary rules) and must meet specific obligations, which may not be consistent with the structure of the OTF.

To the extent that the Commission is concerned about regulatory arbitrage between organised markets (i.e. RMs/MTFs) and OTFs, we consider that the Commission could better achieve its aims by imposing comparable requirements on OTFs if they reach a certain size threshold, e.g. pre-trade transparency requirements and the associated waiver regime.

There has been much discussion about whether there should be a cap on volumes conducted OTC and the tipping point above which price formation on displayed markets is negatively impacted by the level of trading OTC. We have yet to see any conclusive evidence demonstrating that these risks are evident in the European market, although we consider this merits further study based on data and clear market quality metrics (see also our response to questions 2 and 3 above).

There has also been discussion about whether OTC facilities are being used to circumvent the strict pre-trade transparency requirements applicable to RMs and MTFs. We have argued for a relaxation of the current MiFID pre-trade transparency waivers to ensure that business that could have otherwise been conducted on organised markets can be, rather than being forced onto OTC facilities. We consider that this is a better outcome than imposing a cap on OTC trading, and that it would recognise that OTC and OTC facilities provide important execution opportunities. See also our response to question 29 to 31 below.

### **2.2.2. Crossing systems**

6. What is your opinion on the introduction of, and suggested requirements for, a new sub-regime for crossing networks? Please explain the reasons for your views.

7. What is your opinion on the suggested clarification that if a crossing system is executing its own proprietary share orders against client orders in the system then it would prima facie be treated as being a systematic internaliser and that if more than one firm is able to enter orders into a system it would be prima facie be treated as a MTF? Please explain the reasons for your views.

See responses to questions 2 to 5 above.



### 2.3. Automated trading and related issues

13. Is the definition of automated and high frequency trading provided above appropriate?

14. What is your opinion of the suggestion that all high frequency traders over a specified minimum quantitative threshold would be required to be authorised?

We agree with the Commission that High Frequency trading (“HFT”) is not of itself a trading strategy but rather a broad categorisation of the automation of a number of trading strategies that has enabled market participants to trade more frequently and efficiently. Any firm can choose to invest in technology to automate trading and trading strategies, co-locate in data centres or choose a low latency network connection, and use the lowest latency version of any market data feed. However, firms should be able to choose solutions that most appropriately meet their business needs.

The Commission has proposed a definition of HFT and suggested that any HFT firm transacting volume over a certain threshold would have to be authorised. Therefore, any HFT firm currently availing itself of, for example, the exemption in article 2(1)(d) MiFID could no longer do so. We believe that the Commission is aiming to ensure that such firms are subject to appropriate requirements, including with respect to systems and controls, and financial resources, and to ensure the orderly functioning of the market.

**We consider that the definition of HFT proposed by the Commission is problematic**, as it seeks to include in a single definition a wide range of trading strategies which may be implemented in different ways. Fundamentally, we believe that all firms should have in place systems and controls appropriate to the nature of their trading activity. As such, highly automated trading, including where that trading is also high frequency, would require different controls to those needed for voice broking or offering a Direct Market Access (“DMA”) service to clients. Similarly, depending on the nature of its users and their trading activity, all organised markets must have in place appropriate systems and controls and must uphold the MiFID principle of fair access, such that they do not discriminate against or in favour of certain firms through any means with respect to access to that venue.

**In order to best achieve the Commission’s objectives we propose two alternatives: (1) require any firm which trades over a certain threshold to be authorised by an EEA or equivalent regulator; or (2) require all direct participants (regardless of their size) of RMs and MTFs to be authorised by an EEA or equivalent regulator.**

In both cases, we do not consider it is necessary to define the way in which the firm is trading. With respect to Option 1, in all likelihood, in order to exceed the specified threshold, the firm will trade in an automated manner. However, a definition which includes descriptions of trading activities adds an unnecessary layer of complexity. At present, organised markets should impose systems and controls requirements on all participants, whether authorised or exempt, and monitor compliance with those



requirements. Nonetheless, an authorisation requirement of direct participants would ensure that all firms are also subject to regulatory oversight by an EEA or equivalent regulator with respect to all of their trading activity.

We would note that a threshold could be difficult to administer and enforce on a pan-European basis. On balance, we consider that option 2 is a better solution; that is, requiring all direct participants of organised markets to be authorised by an EEA or equivalent regulator. Consequently, any firm currently using the article 2(1)(d) would need to be authorised or would have to access organised markets via a regulated broker under a DMA or Sponsored Access arrangement.

15. What is your opinion of the suggestions to require specific risk controls to be put in place by firms engaged in automated trading or by firms who allow their systems to be used by other traders?

As noted in our response to question 16 below, all **trading firms should have in place appropriate systems and controls**, including those required to manage the design, implementation and monitoring of automated systems. Similarly, organised markets themselves should have both: order entry controls to try to minimise the likelihood of orders being accepted that may impact the orderliness of the market; and surveillance controls to ensure that they can monitor trading activity and act quickly to maintain the integrity and orderliness of the market by imposing restrictions on or switching off any participant.

With respect to DMA, under a typical DMA model, the client's order passes through the systems of the broker prior to being entered onto the organised market's order book. As a result, the broker is able to conduct pre-trade validation checks prior to the order being entered onto the order book.

By contrast, in a Sponsored Access model, the client's order does not first pass through the systems of the Sponsoring Broker. As a result, in the absence of any pre- and post-trade controls, there is an increased risk of error trades and the Sponsoring Broker's ability to effectively monitor its client would be impaired. In order to mitigate these risks, Sponsoring Brokers can put in place a number of controls. In the first instance, a Sponsoring Broker will need to conduct appropriate due diligence on its client, including whether Sponsored Access is a suitable service for that client and the types of systems and controls in place at the client. In addition, it is important that the Sponsoring Broker has access to a mechanism over which it has unequivocal control to apply pre-trade validation checks and to a complete audit trail of activity conducted by its client in its name in order to monitor that activity. Sponsoring Brokers should also have the ability to block their clients' access to an organised market where necessary, for example, if credit risks limits would otherwise be breached. BATS Europe has taken the view that, as an organised market, it should make all of this functionality available to Sponsoring Brokers.



16. What is your opinion of the suggestion for risk controls (such as circuit breakers) to be put in place by trading venues?

The “Flash Crash” on 6<sup>th</sup> May 2010 in the US has given rise to concerns about, amongst others, the impact of Automated Trading on the orderliness of the market. The Flash Crash highlighted a number of weaknesses in the US market structure, including with respect to approaches to error trades, “stub market maker quotes”, and “circuit breaker” mechanisms aimed at ensuring an orderly market. Since then there has been much debate on whether mechanisms should be implemented to “slow down” trading.

It is important to clearly articulate the risks that we need to address and, where necessary, to propose actions that mitigate those risks. **Trading at high speed is not of itself a risk. By contrast, trading in an uncontrolled manner that has no regard for the impact on the market clearly poses a risk.** This risk may be exacerbated when such uncontrolled trading activity is conducted quickly.

**All trading firms should have in place appropriate systems and controls**, including those required to manage the design, implementation and monitoring of automated systems. Similarly, organised markets themselves should have both: order entry controls to try to minimise the likelihood of orders being accepted that may impact the orderliness of the market; and surveillance controls to ensure that they can monitor trading activity and act quickly to maintain the integrity and orderliness of the market by imposing restrictions on or switching off any participant. **As new trading strategies and technology emerges, technical order entry and surveillance controls must keep pace.** In addition, organised markets must ensure that they have sufficient capacity and are designed to handle the level of messages generated by their market participants and effectively cope with spikes during periods of volatility.<sup>21</sup>

As an organised market, our trading system is designed with mechanisms to safeguard orderly trading and to control all trading activity, including automated and/or algorithmic trading. Controls and monitoring tools should be appropriate to the nature of the market and the users. Our order entry controls include price collars as well as order size, notional value and orders per second thresholds above which orders are rejected. Monitoring tools enable us to track the order and trading activity of all participants to identify any anomalous behaviour and/or disorderly trading. We are able to isolate individual trading firms, place limits on them intraday or disable their access if necessary.

Following the Flash Crash, there has been significant focus on “circuit breaker” mechanisms. In Europe, volatility halts are a common mechanism employed by organised markets to maintain an orderly market. Typically, if a trade would execute beyond a certain limit – which is parameterised as either “dynamic” (e.g. last traded price) or “static” (e.g. opening price or last auction price) – continuous

---

<sup>21</sup> As part of our published latency statistics, we include data on the maximum number of messages per second observed in live trading. In non-live trading, the system has been tested far in excess of this figure. See: [http://www.batstrading.co.uk/resources/participant\\_resources/BATSEuro\\_Latency.pdf](http://www.batstrading.co.uk/resources/participant_resources/BATSEuro_Latency.pdf)



trading is halted for a short period of time and the market is effectively placed in an auction to aid reliable price formation. Volatility halts may be based on price movements in a single security or across an index.

**Whilst an auction is a valid means to aid price formation where continuous trading is not possible or orderly, ideally trading should remain continuous where possible.** In addition, the current Listing Market volatility halt mechanisms work in isolation and do not take into account trading on a pan-European basis. The specific parameters of the halts are different across different Listing Markets, making the process difficult to manage for trading firms. In addition, in many cases, volatility halts are triggered when prices exceed a range from a static reference price after an orderly decline (or rise). This can result in them being triggered and trading being halted unnecessarily by a single order.

A number of MTFs have put in place “execution price collars” where, if an order is submitted that would result in a trade that would breach a pre-set parameter, the order is rejected. Whilst these collars create bands around trading prices, they are typically set quite widely in order to ensure that orders are not unnecessarily rejected. BATS Europe, for example, has a default collar of 20% from the reference price, but allows participants to choose a narrower collar on a per participant basis. In addition, such execution price collars typically reference an externally generated price. For example, BATS Europe references the Best Bid and Offer on the Listing Market. Whilst MTFs could use the prices on their own markets as the reference for execution price collars, this would increase the number of different mechanisms in place and would not further a pan-European solution, which takes into account trading across the whole market.

We consider that it **would be worthwhile exploring whether it would be more efficient and effective to implement a consistent pan-European “circuit breaker” mechanism.** As an example, instead of each organised markets implementing individual circuit breakers based only on trading on their own market, it could be possible to require all organised markets to implement a limit up/down mechanism based on a reference price which is indicative of trading on a pan-European basis.

A limit up/down mechanism sets floors and ceilings for the prices at which trades can execute. These limits are based on a pre-set distance from a reference price, which updates throughout the trading day to reflect what is happening in the market and to ensure that the parameters remain relevant. **The aim of limit up/down is to ensure that any price decline/increase is orderly without the need to unnecessarily halt continuous trading.** Limit up/down also minimises the likelihood of a single erroneously priced order triggering a volatility halt and, therefore, halting continuous trading for all participants on the relevant organised market.

Under a limit up/down mechanism, all organised markets would be required to reject any incoming order (or part of an order) that would execute outside the limit up/down boundary and reject (or “price slide”) any resting order outside the limit up/down boundary. The limit up/down boundary should be an accurate representation of all trading activity in the market, with mechanisms in place to ensure that it



is not triggered unnecessarily. A rolling Volume Weighted Average Price (“VWAP”) taken from all organised markets and immediate OTC prints (as reported to APAs) would meet these criteria: Consolidated European VWAP (“CEVWAP”).

As a starting point, we would propose that the limit up/down boundary should be set at a specified percentage from the trailing five minute CEVWAP.<sup>22</sup> If a security is locked limit up/down for more than a specified time period, e.g. 5 seconds, this would suggest that the price of a security is genuinely and persistently decreasing/increasing (rather than gapping as a result of, e.g. a single erroneous order). Therefore, the limit up/down boundary could be widened to allow trading to continue in an orderly manner. If the security continued to be locked limit up/down at the wider limit, it would suggest that the market has not found an equilibrium and that there should be a mechanism to gather liquidity and re-set the price. In line with market convention, we would suggest that trading is halted on all organised markets and OTC whilst the most relevant organised market in terms of liquidity conducts a short auction. Following this, and publication of a new price for the security, trading would continue on all organised markets and OTC using the re-set limit up/down boundary.

**Ideally, we should avoid creating a mechanism which has a single point of failure, e.g. relying on a single organised market to re-open trading using an auction.** However, this is the most pragmatic solution where the limits have already been widened and the market has not corrected itself. Nonetheless, it is important to provide flexibility and take into account the fact that the most relevant organised market to hold the auction may not always be the market where the security was first admitted to trading (i.e. the Listing Market) but could be an alternative organised market (including an MTF) whose auctions are regarded by market participants as the best indicator of liquidity and price formation. Similarly, it is important to ensure there is contingency built into the mechanism such that a restart could occur in the event that the Listing Market (or MTF) is unable to hold an auction, e.g. due to a technical outage.

The limit up/down mechanism proposed above would – if implemented by all European organised markets and APAs – create transparent, consistent and predictable boundaries around trading activity. This would remove the occurrence of error trades and, therefore, create greater certainty for market participants. Most importantly, it would ensure that trading could continue on a pan-European basis in an orderly manner, including in the case of genuine price decreases/inclines.

#### 17. What is your opinion about co-location facilities needing to be offered on a non-discriminatory basis?

We agree that where an organised market offers co-location facilities, these should be made available on a non-discriminatory basis. We would support the publication of co-location fees charged by the

---

<sup>22</sup> This could be 5/10/15% and tailored to the liquidity of the security.



organised market, as this would help ensure non-discriminatory pricing and enable trading firms to compare prices between different organised markets.

18. Is it necessary that minimum tick sizes are prescribed? Please explain why.

Where trading historically predominantly took place on a single venue, tick sizes were set by that venue (the Listing Market). Depending on the Listing Market, tick sizes were allocated according to varying – and not always transparent – factors, including market capitalisation, index membership, security type and, in some cases, on an individual security basis.

In a pan-European trading environment, there are clearly benefits to market participants and the orderliness of the market if tick schemes are simple and harmonised across all organised markets. For example, where a broker is trading a security on multiple European organised markets, a common tick scheme reduces the complexities associated with order routing and the consolidation of market data from multiple sources. With this in mind, in 2009, a number of the MTFs with the broking community (through AFME) and later FESE attempted to create a simplified tick scheme that could be used by all pan-European organised markets.

Clearly there is a balancing act in setting tick sizes. A tick size that is too large may result in liquidity removing buying at higher prices and selling at lower prices than they would were the security quoted in finer tick sizes. It may also artificially widen spreads on displayed markets, thus making them less attractive. Conversely, tick sizes that are too small create thin liquidity for a security across many price levels. The primary consideration for the group was to create simplified tick schemes that could be used consistently by all European organised markets whilst aiming to ensure that tick increments in each case were appropriate, rather than solely seeking to implement finer tick sizes.

The process of all organised markets moving to the agreed tick tables has been ongoing since 2009. Whilst there were a number of issues still to be resolved, the agreement between organised markets had worked reasonably well, with the notable exceptions of small cap securities and other securities, such as ETFs. However, on 26<sup>th</sup> January 2011, NYSE Euronext announced that it would be reducing tick sizes for French and Dutch blue chips securities on 7<sup>th</sup> February 2011.<sup>23</sup> The proposed tick sizes are not consistent with the agreed tables and the change was not discussed and agreed with the other organised markets, or – we understand – many of NYSE Euronext’s members.

NYSE Euronext has argued that the move to finer tick sizes aims to deliver potential price improvement and reduce price discovery constraints. In particular, we understand that NYSE Euronext has evidence to suggest that the current tick constraints are resulting in liquidity moving from displayed markets to dark pools. However, no information has been provided regarding the basis for this claim. Whilst we have seen evidence of this in the US, we have not yet carried out the analysis required to verify whether this

---

<sup>23</sup> See NYSE Euronext Info-Flash: <http://www.euronext.com/fic/000/062/176/621766.pdf>



is indeed the case in Europe.<sup>24</sup> The securities affected are already on the finest tick sizes (Table 4) and there are polarised views about whether the current fine tick sizes already inhibit price formation, or whether price discovery is constrained by the tick size.

**Regardless, organised markets should not be able to take unilateral action with respect to tick sizes to the detriment of the efforts to harmonise tick regimes. In addition, it is imperative that tick sizes decisions are not based on one venue’s market share to the extent that they become a means by which organised markets compete to the detriment of market efficiency and quality.**

Prior to the announcement by NYSE Euronext, we would have suggested that the current arrangements have worked reasonably well and were a positive example of organised markets cooperating. We would have suggested a number of improvements, including the formalisation of a representative Industry Group to agree tick tables and changes, and to ensure that the process is transparent and consistent. Ideally, this group would have had access to funding to enable it to commission academic studies to quantify the impact of tick sizes on the quality of the market. However, **given the recent NYSE Euronext announcement, the only option may be to give ESMA reserve binding powers to set tick sizes on a pan-European basis in the event that organised markets are unable to cooperate and coordinate. If the Commission takes forward this proposal, we would urge it to provide for the creation of a representative industry group to provide guidance to ESMA and to ensure that there are clear selection criteria based on an objective assessment of the impact of tick sizes on market quality.**

19. What is your opinion of the suggestion that high frequency traders might be required to provide liquidity on an ongoing basis where they actively trade in a financial instrument under similar conditions as apply to market makers? Under what conditions should this be required?

There has been much debate about the value of “HFT liquidity”. The Commission has set out the two common opposing views on HFT: on the one hand, it has added liquidity to the market, reduced spreads, and reduced costs; on the other hand, it has resulted in reduced transaction sizes and increased volatility. The Commission also notes that some investors are concerned that, unlike registered market makers on organised markets, there is no obligation or incentive for HFT firms to continue to provide liquidity to the market in the event of adverse market conditions and that they are, therefore, able to withdraw liquidity at any time. There have been suggestions that such firms should be obligated to provide liquidity, including during periods of volatility.

Any well functioning liquid market requires firms willing to provide liquidity and make public prices. Traditionally, specialist and manual market makers have carried out this function by quoting two way prices and generating revenue from the spread. As the market has evolved, the way in which the provision of liquidity is implemented has changed. In particular, a new breed of liquidity providers using

---

<sup>24</sup> Our US sister exchange submitted a proposal to the US Securities and Exchange Commission, which set out data on this point. See: <http://www.sec.gov/spotlight/regms/jointnmsexemptionrequest043010.pdf>



algorithms has replaced the specialists and manual market making firms. As previously, these liquidity providers post two sided orders onto electronic orders books, providing liquidity and making a public price.

The democratisation of market making is now such that any appropriately constituted firm can become a liquidity provider. However, such liquidity providers have automated their trading in order that they are able to remain efficient and competitive. Similarly, co-location has replaced traders on the exchange floor, as these firms now instead seek to locate their systems close to a organised market's matching engine. We consider that **the emergence of a greater number of automated liquidity providers both reduces the market's dependency on a small number of firms providing this service and introduces greater competition between liquidity providers to the benefit of other market participants through increased liquidity, more efficient price formation and reduced spreads.**

**BATS Europe does not impose market maker obligations on any of its participants and we do not support proposals to require organised markets to impose market maker obligations on their participants.** We have included in the Confidential Annex<sup>25</sup> to this letter some data from our market which demonstrates that, notwithstanding the absence of market maker obligations, liquidity provision on our market remains continuous and consistent, in both normal and volatile trading conditions.

In the three charts in the Confidential Annex, we have plotted the notional value executed on BATS Europe and on all organised markets tracked by BATS Europe.<sup>26</sup> Against this, we have plotted the percentage of liquidity provided on BATS Europe by firms that we have classified for these purposes as "Automated Liquidity Providers" ("ALPs"), as well as the aggregated effective spread of these ALPs.<sup>27</sup> Effective spread is defined as the theoretical spread to fill an order at size on either the buy or sell side of the book. In the case of the FTSE 100 (the examples provided), effective spread is given for a buy or sell order of €40,000, which is about seven times larger than our average trade size, and is therefore reflective of a deep order book. The effective spread shown is that provided only by ALP liquidity and excludes resting orders from other participants – therefore the effective spread of our entire book is smaller than the figures shown.

Chart 1 shows the data for the FTSE 100 over the period 1<sup>st</sup> September 2010 to 17<sup>th</sup> December 2010. Chart 2 shows the data for the FTSE 100 on an intraday basis on 3<sup>rd</sup> December 2010 (which includes the routine publication of the US non-farm payroll figures, which are published prior to the US open but

---

<sup>25</sup> This data has been included in a Confidential Annex as it provides information which is not available through our public market data feeds.

<sup>26</sup> BATS Europe tracks and publishes market share information on a per market and per index basis for major European exchanges and MTFs. See: [http://www.batstrading.co.uk/market\\_data/](http://www.batstrading.co.uk/market_data/)

<sup>27</sup> We should note that all participants of BATS Europe are treated equally and no group of participants has any special privileged or obligation. However, for illustrative purposes, we have classified participants as ALP and non-ALP according to the types of firm that we believe the Commission would aim to capture in a liquidity provision obligation.



during the European trading day and routinely result in increased volatility across European markets). Chart 3 shows the data for a single security in the FTSE 100, Rolls Royce Group plc (symbol: RRI) from 1<sup>st</sup> October 2010 to 17<sup>th</sup> December 2010. RRI was chosen over that time period as it enables us to observe normal trading conditions as well as unexpected volatility relating to the Qantas A380 incident in early November 2010.

**In all cases, we see consistent and continuous levels of liquidity provision by our ALPs, and an effective spread provided by ALPs which is consistent with normal trading conditions.** We have similar data for other European indices, which we would be happy to share with the Commission.

Whilst we do not support the mandatory imposition of market maker schemes, we consider that organised markets should be able to offer market maker schemes where necessary, for example, to encourage and ensure liquidity in a new financial instrument or an illiquid instrument. In all cases, any such market maker scheme should be consistent with the following principles: it should be: transparent; non-discretionary (i.e. non-discriminatory); consistent with reliable price formation; and should not be designed to encourage trading for improper purposes. We would, however, note that market maker schemes typically include provisions to allow market makers to stop quoting during period of extreme volatility or during technical difficulties. As such, traditional **market maker schemes do not guarantee the continued provision of liquidity by such firms during volatile market conditions.** Nor do we believe that market maker schemes should impose such obligations; this would significantly increase the risk faced by such firms and this additional risk would likely be seen in wider spreads and less capital committed, to the detriment of end investors.

20. What is your opinion about requiring orders to rest on the order book for a minimum period of time? How should the minimum period be prescribed? What is your opinion of the alternative, namely of introducing requirements to limit the ratio of orders to transactions executed by any given participant? What would be the impact on market efficiency of such a requirement?

Instead of looking at ways to ensure that trading is controlled appropriately, there have been a number of proposals to effectively slow down trading by imposing a minimum order rest time, or limiting the frequency by which orders can be updated by imposing order to trade ratios. **We fundamentally disagree with the implementation of crude mechanisms that solely aim to slow down trading, rather than addressing any particular risk.** We believe that appropriate systems and controls, including mechanisms to maintain orderly trading, are far more effective and appropriate.

With respect to the specific proposals noted in the Review, **we would be concerned about the impact of a minimum order rest time on the ability of firms to adequately manage the risk associated with their open resting orders (by cancelling or amending the price or size).** Moreover, imposing a minimum order rest time would effectively create a situation where resting orders could be gamed if the market moves against them during the mandated time period. This is likely to result in firms being less willing to



commit risk capital, which would have the effect of lessening liquidity provision and widening spreads, to the detriment of end investors.

With respect to order to trade ratios, it is not clear what the “right” order to trade ratio is, if indeed there is one. It is also important to note that a firm posting displayed liquidity will tend to have a relatively higher order to trade ratio as there is no guarantee that any order will be executed. Similarly, firms posting resting orders in lower liquidity securities will tend to have a higher order to trade ratio, as it is likely that they will have to update their orders in line with the market (whether in price or size) more frequently than in the case of a liquid security before executing against incoming marketable liquidity. By contrast, a firm executing a predominantly aggressive order strategy in removing displayed liquidity will, by its nature, have a lower order to trade ratio. The differences between these two strategies may be extremely large. **We are concerned that a single (hard cut-off) order to trade ratio could have the unintended consequence of restricting the ability of firms to manage the risk associated with open resting orders.**

Similarly, a start up organised market may have a far higher order to trade ratio than an established organised market. **We would be concerned if a single hard cut-off order to trade ratio created a barrier to entry and, therefore, lessened competition between organised markets.**

There may be other reasons for a high order to trade ratio. For example, recent research<sup>28</sup> has effectively suggested that poorly constructed tick tables where tick sizes are too small result in more frequent order updates and, therefore, higher order to trade ratios. We have included, in the Confidential Annex, data showing the rolling five day average order to trade ratio for all participants on BATS Europe between September and December 2010 for a number of indices (see Chart 4). The indices have been chosen as they represent: Table 1 (FTSE 100 – High Liquidity Segment (“HLS”)); Table 2 (FTSE 100 non-HLS, and SMI); and Table 4 (CAC 40, and DAX). For the purposes of this analysis, it is worth noting that Table 1 and Table 4 effectively have the same tick sizes for prices of securities on the relevant markets, which are both finer than Table 2.

There is a clear correlation between the order to trade ratios for securities using Table 2, and between those using Table 1/Table 4. There also appears to be far greater stability in the order to trade ratio for securities using Table 2, rather than Table 1/Table 4. As noted above, it is not clear what the “right” order to trade ratio is, if indeed there is one. Nonetheless, we consider that this merits further study, as part of the tick size harmonisation debate and in relation to discussions about the factors affecting order to trade ratios.

---

<sup>28</sup> See: CA Cheuvreux: *Navigating Liquidity 5* (January 2011)



## 2.5. Further alignment and reinforcement of organisational and market surveillance requirements for MTFs and regulated markets as well as organised trading facilities

### 23. What is your opinion of the suggestions to further align organisational requirements for regulated markets and MTFs? Please explain the reasons for your views.

We fully support proposals to ensure a level playing field between RMs and MTFs, and agree that Market Operators and Investment Firms should be subject to the same requirements when conducting the same activities, including the operation of an MTF. We would, however, note that we consider this to be largely an issue of perception rather than substance.

As a UK FSA authorised firm, BATS Europe is currently subject to a number of requirements relating to the areas discussed by the Commission in its Review. These include: the FSA Principles, including Principle 3 (Management and control) and Principle 8 (Conflicts of interest)<sup>29</sup>; the detailed systems and controls requirements in the FSA Sourcebook *Senior Management Arrangements, Systems and Controls* (SYSC)<sup>30</sup>; and the detailed prudential requirements in the FSA *Prudential Sourcebook for Banks, Building Societies and Investment Firms* (BIPRU)<sup>31</sup>.

As a result, we believe that we already comply with the requirements proposed by the Commission and, as such, we would not incur any additional burden or costs. We would also note comments made by the FSA in its recent publication *The FSA's markets regulatory agenda*<sup>32</sup> that: "we [the FSA] supervise the most important MTFs to the same standards as Recognised Investment Exchanges (i.e. Regulated Market operators)".

### 24. What is your opinion of the suggestion to require regulated markets, MTFs and organised trading facilities trading the same financial instruments to cooperate in an immediate manner on market surveillance, including informing one another on trade disruptions, suspensions and conduct involving market abuse?

#### *Market surveillance*

We believe that market surveillance is one area where competitive forces should not be at work. Whilst, as the operator of an MTF, our market monitoring and surveillance obligations relate to activity on our own market, we consider that it is important to have regard to overall trading activity in the market and

---

<sup>29</sup> <http://fsahandbook.info/FSA/html/handbook/PRIN/2/1>

<sup>30</sup> <http://fsahandbook.info/FSA/html/handbook/SYSC> - including provisions relating to: governance arrangements; the identification and management of risks; the identification and management of conflicts of interest; and systems, resources and procedures to ensure continuity and regularity in the performance of regulated activities.

<sup>31</sup> <http://fsahandbook.info/FSA/html/handbook/BIPRU>

<sup>32</sup> UK FSA: *The FSA's markets regulatory agenda* (May 2010): <http://www.fsa.gov.uk/pubs/other/markets.pdf>



we use public market data feeds from Listing Markets and other MTFs for these purposes. **We would be supportive of a requirement for organised markets to provide their public pre- and post-trade data feeds to each other at no cost, for market monitoring and surveillance purposes.**<sup>33</sup>

We believe that ESMA could usefully perform a role in offering guidance and ensuring consistency between organised markets with respect to market surveillance. **We would also be supportive of the creation of a Surveillance Practitioners Group, which would also include representatives from ESMA, through which organised markets could share information about types of behaviour observed that may constitute market abuse or result in disorderly trading conditions.** However, we are reluctant to support any proposal that requires organised markets to share specific information about individual participants. We consider that this would create a number of issues relating to confidentiality.

Organised markets must play their part in fulfilling their obligations with respect to their own market, as well as contributing to regulatory oversight of the whole market. To support the administration of the Market Abuse Directive by Competent Authorities, we would also be supportive of organised markets being required to provide both order book and trade data to regulators on request and in a timely fashion.

#### *Sharing information about halts, suspensions and disruptions*

Article 41 of MiFID provides a mechanism by which regulatory suspensions are imposed across all organised markets. This has been implemented by means of a manual email notification process, which is extremely inefficient: it requires manual intervention and monitoring by all of the regulators involved and by the organised markets. There are also inconsistencies in the way in which regulatory suspensions are imposed. For example, if an issuer requests to its Listing Market that its securities are suspended, this is not a regulatory suspension and so not notified under the article 41 procedure. In such cases, it is not mandated that all organised markets should also suspend trading, which has led to different actions being taken by different organised markets.

BATS Europe currently takes feeds of data from all of the markets we trade and has attempted to use this data to automate the process by reading the data feeds and halting trading in securities subject to a regulatory suspension. However, this is not fail safe as there is no standard protocol governing how Listing Markets flag suspensions; in particular, the differentiation between regulatory halts (where we are obliged to also suspend trading) or exchange-imposed halts (where we may also decide to suspend trading if there is an orderly markets issue).

---

<sup>33</sup> We should note that we provide commercial services for which we use external data, including our Order Routing Facility and Dark Book reference system. We would not expect to use any data feed provided for surveillance purposes in connection with these services, and would continue to obtain and pay for data for these purposes under standard commercial terms.



We consider that the Commission should require all organised markets to include certain information in their market data feeds, including exchange-imposed halts (e.g. a volatility halts); regulatory suspensions imposed by a regulatory authority; and any disruptions in trading at that venue (e.g. a systems failure). All of these flags should be clear and unambiguous. By including them on market data feeds, all market participants and organised markets would be able to automate processes based on those flags, which would remove the inefficiencies and inconsistencies in the current system.

## 2.6. SME markets

25. What is your opinion of the suggestion to introduce a new definition of SME market and a tailored regime for SME markets under the framework of regulated markets and MTFs? What would be the potential benefits of creating such a regime?

26. Do you consider that the criteria suggested for differentiating the SME markets (i.e. thresholds, market capitalisation) are adequate and sufficient?

We consider that there could be benefits to creating a pan-European regime for SMEs, including where the securities of those issuers are only admitted to trading on an MTF. In particular, the creation of a pan-European regime for SMEs could increase investor confidence in SME markets. Clearly such a regime would need to carefully balance the protection of investors whilst ensuring the cost of compliance did not limit the ability of issuers to access capital.

We would be supportive of the extension of the main provisions of MAD to a pan-European SME regime. As a corollary, we would also be supportive of the extension of the transaction reporting requirement to these securities.

With respect to whether a pan-European SME regime should include detailed pre- and post-trade requirements, we would be supportive of a framework that would allow for greater competition in the secondary market trading of a broader spectrum of financial instruments, given the benefits of competition, including on lowering transaction costs and increasing efficiency.



### 3. PRE- AND POST-TRADE TRANSPARENCY

#### 3.1. Equity markets

27. What is your opinion of the suggested changes to the framework directive to ensure that waivers are applied more consistently?

ESMA (CESR) has for some time operated an “approval” process to ensure consistent interpretation of the waivers. Whilst we appreciate these efforts, the process is rather cumbersome and lengthy. A rules-based regime would have the benefit of providing greater consistency and legal certainty. That said, by hard coding the current waivers into rules, there is a risk that the rules would be inflexible, in particular with respect to future innovation and changes to trading behaviour. On balance, we would be minded to support a rules-based regime but would urge the Commission to ensure that the rules are drafted in such a way to ensure provide certainty but retain sufficient flexibility to allow for further innovation.

We would also note our overall comments in relation to pre-trade transparency and the waivers set out in our response to questions 29 to 31.

28. What is your opinion about providing that actionable indications of interest would be treated as orders and required to be pre-trade transparent? Please explain the reasons for your views.

BATS Europe does not send out Indications of Interest (“IOIs”) with respect to non-displayed liquidity on its order books and has no intention to do so.

To the extent that an actionable IOI contains the same information as an order and is addressable in the same manner, we consider that the treatment of orders and actionable IOIs should be consistent.

29. What is your opinion about the treatment of order stubs? Should they not benefit from the large in scale waiver? Please explain the reasons for your views.

30. What is your opinion about prohibiting embedding of fees in prices in the price reference waiver? What is your opinion about subjecting the use of the waiver to a minimum order size? If so, please explain why and how the size should be calculated.

31. What is your opinion about keeping the large in scale waiver thresholds in their current format? Please explain the reasons for your views.

#### *Overall comments*

As a matter of principle, we believe that market participants should have choice in where they execute orders, whether on an organised market or OTC, to suit their individual requirements and those of their



clients. The pre-trade transparency waivers effectively allow market participants to bring certain business onto organised markets where it would have otherwise taken place OTC. It should be noted that this activity would not be pre-trade transparent whether taking place OTC or on an organised market. It should also be recognised that, whilst non pre-trade transparent liquidity does not contribute to price formation from a pre-trade point of view, it does contribute valuable post-trade information (to the extent that the last traded price makes a significant contribution to subsequent pre-trade information), thus contributing to the overall efficiency of the market.

We consider that the current restrictive approach to the use by organised markets of the pre-trade transparency waivers is resulting in liquidity being fragmented further and potentially held at different points along the trading chain rather than being available for execution on an organised market (whether pre-trade transparent or not). As an example, current regulation with respect to the reference price pre-trade transparency waiver has effectively mandated the creation of a separate pool of liquidity by organised markets wishing to offer this service with no interaction with the displayed order book of the same organised market. This structural inefficiency denies investment firms the opportunity to provide best execution to their clients since non pre-trade transparent liquidity cannot interact readily with pre-trade transparent liquidity. We would contend that this is an unintended and unwanted consequence of the current restrictive interpretation of the waiver.

Similarly, only permitting non pre-trade transparent liquidity to execute at the mid-point (or bid or offer) under the reference price waiver rather than anywhere in the spread of a reference bid-offer undermines the competitiveness of organised markets. Allowing RMs and MTFs to provide services that are attractive to market participants that currently use OTC facilities would encourage the migration of OTC activity to organised markets.

We would urge the Commission to consider further the effects of the current approach to the pre-trade transparency waivers. In particular, to ensure that further regulatory intervention is based on clear evidence of market failure, whilst taking into consideration the sub-optimal implementation of pre-trade transparency waivers created by their current interpretation, and with the aim of ensuring that any proposals would better achieve MiFID's objectives. We consider that the current approach and any proposals for further restrictions have the opposite effect.

#### *Minimum order sizes for reference price systems*

BATS Europe does not believe that there should be a minimum threshold on orders submitted under the reference price waiver. The minimum threshold should be a parameter that market participants, of their own choice, can set on an order. Setting a minimum threshold could have unintended consequences, including complications related to creating bands or security level thresholds, which requires complex implementation, in addition to requiring regular review and revision of the thresholds.



### *LIS thresholds*

Given the limited use of the LIS waiver, it is difficult to argue that it is serving a valuable function. In its data gathering exercise, CESR confirmed that, in 2008, an average of 3.1% of trading on organised markets took place under the LIS waiver. This rose to 4.2% in 2009. However, the whole of this increase, and approximately 75% of all trading using this waiver, is attributable to one jurisdiction. As noted by CESR, elsewhere, the waiver is used relatively little, accounting for only one percent of overall trading.<sup>34</sup>

We consider that there is a strong case to suggest that the Commission or ESMA should conduct further analysis to ascertain whether the thresholds are sensibly calibrated in order to achieve the aims of the waiver.

BATS Europe launched after the implementation of MiFID, therefore, we are unable to provide comparative figures relating to order and trade sizes on our market at the time when the LIS bands and thresholds were calibrated. However, we would note the interesting and useful work conducted by the London Stock Exchange Group in this regard and would urge the Commission to take this type of analysis into consideration when formulating its views.<sup>35</sup>

### *Stub LIS orders*

We would be interested to understand the proportion of LIS orders that partially execute and where the remaining executed portion of the order, i.e. the “stub”, falls below LIS. Given the small percentage of orders that currently qualify as LIS, we consider it unlikely that mandatory publication of stubs would result in a significant increase in transparency. We would also contend that, unless the LIS thresholds are significantly decreased, the mandatory pre-trade publication of stubs would disincentivise market participants further from using organised markets for LIS orders. Therefore, we do not support the mandatory publication of below LIS stub orders.

### **3.1.2. Post trade transparency**

32. What is your opinion about the suggestions for reducing delays in the publication of trade data? Please explain the reasons for your views.

---

<sup>34</sup> Paragraph 24 of CESR/10-802 – *Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets* (July 2010): <http://www.esma.europa.eu/popup2.php?id=7004>

<sup>35</sup> See pages 3-5 of LSEG’s response to CESR’s consultation: <http://www.londonstockexchange.com/about-the-exchange/regulatory/leg-resp-consultation-paper-10-394.pdf>



### *Real-time reporting*

We would note that MiFID currently requires transactions to be published as close to real-time as possible, and that CESR has provided guidance that the three minute deadline should only be used in exceptional circumstances.

There have been concerns that some firms are routinely using the maximum delay. If there is evidence of this, either because of poor quality reporting systems or an attempt to gain any advantage by delaying the publication of post-trade information, we believe that this should be a supervisory matter and that national regulators should enforce compliance with the current rule.

We agree that there are clear benefits in post-trade information being made available instantaneously, and have no objection to the Commission's proposal to reduce the publication deadline. However, we do not believe that an amendment to the requirement will resolve what appears to be a supervisory issue.

### *Deferred publication for large trades*

Given the importance of post-trade transparency information in ensuring an efficient price formation process and aiding the functioning of the best execution obligation, we agree that it is necessary to ensure that there is a comprehensive and clear framework to ensure the publication of post-trade transparency information. Within this, it is important to ensure there is a mechanism to allow for the delayed publication of certain post-trade information to minimise market impact and to safeguard the continued provision of risk capital, such that investors receive the best possible result.

Whilst there are clear benefits to price formation in ensuring timely post-trade disclosure of trading activity, we appreciate concerns expressed by a number of market participants about the potential negative impact of reducing certain thresholds and the introduction of an end of day reporting requirement.

Transparency is an important tool to achieve regulatory aims. However, the Commission should carefully weigh whether the benefits of the earlier publication of data outweigh any additional costs associated with risk positions that could be created and which would likely be passed on to the end investor.

BATS Europe publishes all trades conducted on its MTF instantaneously and does not operate an OTC trade reporting facility. Therefore, we will be interested in the views of the operators of trade reporting facilities, and sell side and buy side firms, who are best placed to respond to the Commission's specific proposals on deferred publication thresholds and delays.



### 3.2. Equity-like instruments

33. What is your opinion about extending transparency requirements to depositary receipts, exchange traded funds and certificates issued by companies? Are there any further products (e.g. UCITS) which could be considered? Please explain the reasons for your views.

We believe that ETF volumes in European are significantly lower than those in, for example, the US. However, given the lack of a transparency regime, it is not possible to verify current trading levels. In order to develop such instruments into a well functioning market, it is imperative to have transparency. We are, therefore, supportive of proposals to create a transparency regime for equity-like instruments, such as ETFs, that trade in a similar way to shares.

34. Can the transparency requirements be articulated along the same system of thresholds used for equities? If not, how could specific thresholds be defined? Can you provide criteria for the definition of these thresholds for each of the categories of instruments mentioned above?

As noted in our responses to questions 29 to 31, we consider that there are significant inefficiencies in the current pre-trade transparency regime for shares. We would also note that a number of organised markets currently offer trading in equity-like instruments (such as ETFs) with more flexibility in the types and size of orders that can be non-displayed. In the case of BATS Europe, this has not resulted in an overwhelming preference for non-displayed orders, nor has there been any negative impact on price formation.

Therefore, we would urge the Commission to craft a pre-trade transparency regime that addresses the concerns we have expressed in relation to the current regime for shares. Similarly, we would highlight the concerns about the quality of post-trade transparency information, and the consolidation and cost of transparency information. Whilst the proposals in relation the post-trade transparency regime for shares should go some way to address the current issues, as noted in our responses to questions 47 and 49, we do not believe the proposals will resolve the issues relating to real-time costs.

### 3.3. Trade transparency regime for shares traded only on MTFs or organised trading facilities

35. What is your opinion about reinforcing and harmonising the trade transparency requirements for shares traded only on MTFs or organised trading facilities? Please explain the reasons for your views.

36. What is your opinion about introducing a calibrated approach for SME markets? What should be the specific conditions attached to SME markets?

See response to questions 25 and 26 with respect to SME markets.



### **3.5. Over the counter trading**

#### 42. Could further identification and flagging of OTC trades be useful? Please explain the reasons.

We are supportive of the recent CESR Technical Advice to the Commission on Post-Trade Transparency Standards. This document builds on the work of the Joint CESR/Industry Work Group, of which BATS Europe was a member.

We consider that more granular and consistent flagging of trading activity conducted OTC – and similar activity conducted on organised markets – would improve the quality of post-trade transparency data.

See also our detailed response to questions 2 and 3.



## 4. DATA CONSOLIDATION

### 4.1. Improving the quality of raw data and ensuring it is provided in a consistent format

43. What is your opinion of the suggestions regarding reporting to be through approved publication arrangements (APAs)? Please explain the reasons for your views.

44. What is your opinion of the criteria identified for an APA to be approved by competent authorities? Please explain the reasons for your views.

45. What is your opinion of the suggestions for improving the quality and format of post trade reports? Please explain the reasons for your views.

We are supportive of the proposals to require investment firms to publish their trade reports through an APA. The majority of concerns (including relating to duplicate reporting and uncorrected errors in terms) have related to post-trade transparency information. We believe that reducing search costs and improving the quality of post-trade OTC information will ease the consolidation of data from multiple sources. Similarly, we agree that greater standardisation will facilitate the consolidation of data from organised markets and the new APAs.

However, we believe that the success of the proposed APA regime in addressing the concerns related to the quality of OTC post-trade transparency information, will depend on a commitment by national regulators to effectively supervise these entities both at the point of approval and ongoing, and to take steps where necessary to ensure consistent, high standards and compliance with the requirements. It would appear that ESMA has a role to play in ensuring supervisory convergence.

As noted above, we are supportive of the recent CESR Technical Advice to the Commission on Post-Trade Transparency Standards, which builds on the work of the Joint CESR/Industry Work Group, of which BATS Europe was a member.

As part of the joint CESR/Industry Working Group, BATS Europe noted that whilst standardising the rules governing the timing and content of post-trade data is necessary, it is dangerous and counter-productive to prescribe that specific data formats and values are retrofitted into existing protocols, which may be unsuited to carrying such values. Any such requirement would add cost to both the provider and the consumer of data (who would both be forced to make code changes), without providing either with the benefit of building a standard feed handler to be used for all post-trade data.

CESR presented two proposals:

1. Prescribe the standards to which post-trade data needs to be mapped for dissemination to end users but not require all primary data providers (RMs, MTFs and APAs) to use a common message protocol employing these standards. Under this option individual data providers could



continue to provide post-trade data using their own protocols, codes and symbols, but would have to provide a mapping to common standards.

2. Prescribe both the standards and the use of a common message protocol; preferably based on a non-proprietary open protocol.

Option 2 clearly carries a high initial implementation cost in that such a protocol must be designed and implemented. Nonetheless, it is a better solution in terms of easing the long term cost of consolidating data from multiple sources.

In the absence of an MCT, we would be supportive of requiring RMs, MTFs and APAs to provide a standardised post-trade market data feed, which would use standard message formats and protocols. To assist in the creation of this protocol, we would suggest the creation of a Joint ESMA/Industry Working Group. Notwithstanding the requirement to provide a standardised market data feed, we consider that organised markets and APAs should also be able to offer proprietary protocol market data feeds in addition to the regulatory-mandated standardised feed. In the event that an MCT is created, it is likely that the operator of the MCT would prescribe such a protocol to be used by data providers (as is the case in the operation of the consolidated tapes in the US). However, the governance of the MCT should ensure that there is industry consultation around the design of such a protocol (see also our response to question 56 below).

#### **4.2. Reducing the cost of post trade data for investors**

47. What is your opinion of the suggestions for reducing the cost of trade data? Please explain the reasons for your views.

Whilst we consider that the Commission has made a number of sensible proposals to address certain issues relating to the quality and timeliness of post-trade transparency information, and the consolidation of transparency information, we are concerned that there are no specific direct measures aimed at reducing the cost of real-time transparency information. We would agree that reducing search costs and easing the consolidation of data from multiple sources (through the introduction of the APA regime and of common standards) should have downward pressure on costs. However, we are concerned that the issue of real-time data costs will not be resolved without regulatory intervention.

See also our responses below to questions 49 and 52.

48. In your view, how far data would need to be disaggregated? Please explain the reasons for your views.

Pre- and post-trade information should be made available separately since their utilisation could be quite different. The manipulation of the vast amount of real-time pre-trade information requires



significantly more technical resources and capabilities than post-trade information. As well as being more expensive to process, bundled pre- and post-trade information is also likely to be more expensive to acquire. However, **our concern is that, given the lack of competitive pressure on pricing, the sum of the cost of pre- and post-trade data from organised markets may well be higher than the previous bundled cost.**

We are concerned that any requirement on organised markets to further disaggregate data (for example, by index or down to the single security level) will add significant complexity, latency and cost to the systems required to distribute such data. Instead, **the focus should be on the definition and enforcement of the “reasonable cost” provision, or the implementation of a suitable competitive framework for data, which would allow market forces to determine the appropriate trade off between the requirement for disaggregated data bundles and the cost of creating such bundles.**

49. In your view, what would constitute a "reasonable" cost for the selling or dissemination of data? Please provide the rationale/criteria for such a cost.

Post-trade transparency information plays a vital role in ensuring the efficiency of price formation, assisting in the operation of the best execution obligation and mitigating the potential adverse impact of market fragmentation. We fully support the Commission’s proposals to improve the quality of OTC trade data and to eliminate the current barriers to the consolidation of transparency information from multiple sources, including organised markets and OTC. We are supportive of the introduction of an APA regime and the recent work of the joint CESR/Industry Working Group as set out in CESR’s Technical Advice to the Commission on Post-Trade Transparency Standards.<sup>36</sup>

These proposals go a long way to addressing technological, data standards and quality obstacles to data consolidation, specifically related to post-trade information (although do not provide a complete standardised solution). **However, a significant and – as yet – unaddressed barrier to consolidation is the economic and contractual basis under which the underlying data is sold.** Specifically, in order to obtain a complete picture of European trading, a user is subject, either directly or indirectly through vendor agreements, to the contractual terms and pricing of each underlying data provider. These agreements are non-standard and complex, with different terms and usage constraints.

**Given the implicit requirement for market participants to take data from all significant venues, there is no competitive market force to constrain the price charged by venues,** which is why MiFID contains the “reasonable cost” provision. However, there is no guidance on what constitutes reasonable cost and in the absence of this requirement being enforced, **the suppliers of the data are unfettered in their ability to exploit the pricing power this affords them.**

---

<sup>36</sup> CESR/10-882 – *CESR Technical Advice to the European Commission in the context of the MiFID Review – Equity Markets: Post-trade Transparency Standards* (October 2010): <http://www.esma.europa.eu/popup2.php?id=7282>



The exploitation of this pricing power is evident at present: whilst there has been some downward pressure on headline trading or transaction fees, there has not been a significant reduction in the fees charged by major European Listing Markets for data (or, indeed, other ancillary charges), and indeed in some cases there have been significant increases by Listing Markets. We believe that the direct charges levied by the incumbent Listing Markets are significantly higher than that which would have been established in a truly competitive, non-constrained environment. It is also worth noting that a number of new entrant MTFs have made their data available in real-time free of charge. This would tend to suggest that, despite the significant decrease in market share for many of the Listing Markets since the implementation of MiFID, they still wield dominant market power.

It is important to note that this issue is present for both post-trade data, which has been the focus of regulatory attention, and pre-trade data. In relation to the latter, whilst we agree that there is at present less demand for a mandated consolidated pre-trade data feed, we would be concerned if regulatory focus on post-trade costs was at the expense of pre-trade costs to the extent that organised markets reduce costs for post-trade data only to recoup those losses through excessive and unjustifiable rises in pre-trade data costs. We believe there is already evidence of this, as some Listing Markets have recently increased charges for pre-trade data, in some cases by a significant magnitude.

We consider that “reasonable cost” is too subjective and that the current MiFID provision creates an unhelpful tension between the role of the regulatory authorities to enforce the provision and the role of the competition authorities.

### **4.3. A European Consolidated tape**

51. What is your opinion of the suggestion for the introduction of a European Consolidated Tape for post-trade transparency? Please explain the reasons for your views, including the advantages and disadvantages you see in introducing a consolidated tape.

There are clear advantages to creating an MCT, in particular, it would create a single, consistent, reliable and reasonably priced tape of record, which is essential for firms in meeting their regulatory obligations.

Ideally market forces would have delivered a number of competing consolidated tape solutions, such that competitive forces would ensure high levels of service and pressure on costs. However, given the competitive forces and monopoly position of data providers, we do not consider that a competitive solution is likely to be reached, i.e. Option C is not likely to achieve the Commission’s aims to create a consolidated tape of all trading activity on all RMs, MTFs and OTC (as reported to APAs).



52. If a post-trade consolidated tape was to be introduced which option (A, B or C) do you consider most appropriate regarding how a consolidated tape should be operated and who should operate it? Please explain the reasons for your view

**We are supportive of Option B; that is, the operation of the consolidated tape by a single entity appointed by public tender for a fixed term.** In the absence of clear guidelines on reasonable costs and the enforcement of this requirement, we believe that competitive forces (i.e. Option C) will not be able to deliver a solution that meets the Commission's objectives. We are not supportive of Option A as it would be extremely costly, and does not leverage current industry expertise. In addition, it would create a monopoly provider with no break point. Option B has the benefit of including an element of competition, which should help to ensure pressure on quality of service and costs.

53. If you prefer option A please outline which entity you believe would be best placed to operate the consolidated tape (e.g. public authority, new entity or an industry body).

Not applicable. We are not supportive of Option A as it would be extremely costly, and does not leverage current industry expertise. In addition, it would create a monopoly provider with no break point. Option B has the benefit of including an element of competition, which should help to ensure pressure on quality of service and costs.

54. On Options A and B, what would be the conditions to make sure that such an entity would be commercially viable? In order to make operating a European consolidated tape commercially viable and thus attaining the regulatory goal of improving quality and supply of post-trade data, should market participants be obliged to acquire data from the European single entity as it is the case with the US regime?

To the extent that the Commission prescribes an MCT, we do not believe that there should be an explicit requirement on market participants to take the feed, and certainly not to take a direct feed (from the MCT rather through a vendor). Provided that the data is useful, market participants will subscribe to the data and it will become the de facto standard.

Some market participants will take the feed directly from the MCT, which incurs connectivity costs and the maintenance of a feed handler. Other market participants will want to take the MCT data through a vendor solution. It is imperative that vendors carry the MCT data. Regulators will need to monitor this to the extent that there will be a competitive and commercial tension between the vendors carrying the MCT data and offering their own proprietary consolidated data products.



55. On Option B, which of the two sub-options discussed for revenue distribution for the data appears more appropriate and would ensure that the single entity described would be commercially viable?

With respect to costs and revenues, given the issues relating to the definition and enforcement of the “reasonable cost” requirement, we consider that the second option is more likely to meet the Commission’s aims. That is, all Listing Markets (i.e. RMs), MTFs and APAs would be required to provide data to the operator of the consolidated tape free of charge, and would participate in the revenues obtained (minus costs of distribution). We also consider it is imperative to create a firewall between the suppliers of the underlying data and the end user, such that the end user only has one contract with the operator of the consolidated tape and is not directly or indirectly subject to the contractual terms of the supplier of the underlying data.

56. Are there any additional factors that need to be taken into account in deciding who should operate the consolidated tape (e.g. latency, expertise, independence, experience, competition)?

57. Which timeframe do you envisage as appropriate for establishing a consolidated tape under each of the three options described?

As noted in our response to question 52 above, we are supportive of Option B; that is, the operation of the consolidated tape by a single entity appointed by public tender for a fixed term. We are not supportive of Option A as it would be extremely costly, and does not leverage current industry expertise. In addition, it would create a monopoly provider with no break point. Option B has the benefit of including an element of competition, which should help to ensure pressure on quality of service and costs. It should also be more capable of delivering the proposed MCT in a more timely fashion than Option A. With respect to Option C, in the absence of clear guidelines on reasonable costs and the enforcement of this requirement, we believe that competitive forces (i.e. Option C) will not be able to deliver a solution that meets the Commission’s objectives.

With respect to Option B, **we propose that the Commission prescribes certain structural aspects of the operator of the consolidated tape, and that only the operational arrangements and technology provider are appointed by public tender.** Key aspects relating to governance and the management of conflicts of interest should not be decided as part of a public tender process.

We suggest that that the consolidated tape operator entity should be subject to the regulatory oversight of ESMA and should be governed by an Operating Committee composed of one representative from each of the participating RMs, MTFs and APAs, and that each representative should have one vote. Votes to amend contractual terms and to change fees would require an affirmative vote of at least two-thirds of the members. To support the Operating Committee, we propose the creation of an Advisory Committee, consisting of buy-side and sell-side subscribers, and data vendors. The Advisory Committee would provide non-binding guidance on technical standards, data quality standards, contractual terms and pricing. In order to ensure transparency of decision making, the minutes of both the Operating



Committee and the Advisory Committee should be made public, and the entity operating the consolidated tape should have to make public an audited statement of accounts on an annual basis.

The operator of the consolidated tape should establish clear and transparent terms under which consolidated post-trade data is disseminated to subscribers, including direct subscribers (who use the data for their own purposes) and vendors (who disseminate the data to third parties). The standard contracts should be made public and there should be no special arrangements with any direct subscriber or vendor.

Pricing must be significantly lower than the current price of a synthesised consolidated tape generated from individual organised markets and OTC publication mechanisms. Revenues should be used to cover the costs of production. Any excess should be distributed to the suppliers of the underlying data. We suggest that the distribution formula relates to market share of executed notional value. There is an argument that trades resulting from pre-trade transparent liquidity (e.g. from pre-trade transparent liquidity on organised markets) are more valuable in terms of price formation and should be weighted more highly in the revenue sharing arrangement, or that the provision of pre-trade data should factor into the allocation algorithm.

58. Do you have any views on a consolidated tape for pre-trade transparency data?

We agree that the requirement for a consolidated tape of pre-trade transparency information is not as evident or pressing.

Nonetheless, we would reiterate our concerns about “reasonable cost” as set out in our response to question 49, as these are equally applicable to both pre- and post-trade transparency information.

We also consider that a voluntary arrangement between RMs and MTFs based on the criteria set out in our response to question 56 could go some way to creating a reasonably priced consolidated tape of pre-trade transparency information.



## 6. TRANSACTION REPORTING

### 6.1. Scope

72. What is your opinion of an obligation for regulated markets, MTFs and other alternative trading venues to report the transactions of nonauthorised members or participants under MiFID? Please explain the reasons for your views.

We agree that regulators should have access to a complete picture of trading activity. In our response to question 14, we suggested that the Commission could introduce a requirement that all direct participants of organised markets are authorised by an EEA or equivalent regulator. If adopted, the proposal to require organised markets to report transactions conducted by exempt MiFID article 2(1)(d) firms would be unnecessary, as these firms would be authorised and so directly caught by the transaction reporting obligations.

We think this is a better solution, as, in line with the current transaction reporting obligations on MiFID investment firms, we believe that the obligation should be placed on the trading firm rather than on the RM or MTF. As a matter of principle, we consider that the trading firm itself should take responsibility for its own transaction reporting obligations, including the choice of the channel used to fulfil these obligations.

MiFID does not currently obligate RMs and MTFs to provide a transaction reporting facility for their participants, although does provide an exemption under article 45(3) for trading firms using such facilities. Where an RM or MTF has taken the commercial decision to offer such a facility, we consider that it is appropriate that firms, including those to whom the transaction reporting obligation would be extended, could choose to use this mechanism to meet their transaction reporting obligations.

73. What is your opinion on the introduction of an obligation to store order data? Please explain the reasons for your views.

We agree that organised markets and APAs should be required to store order data in a manner accessible to national regulators for at least five years.

74. What is your opinion on requiring greater harmonisation of the storage of order data? Please explain the reasons for your views.

We consider that greater harmonisation will be extremely difficult and costly to achieve given the different internal systems and processes at each organised market, APA and investment firm. We believe that a better approach is to ensure that there is a requirement to store the data in an accessible way, and that such data is provided to the regulator in a timely manner and with all necessary



information to be able to use the data. This may be aided if regulators request data in a pre-defined format.

TEL. +44 20 7012 8900 | 25 COPTHALL AVE., GROUND FLOOR | LONDON, UK EC2R 7BP | [BATSTRADING.CO.UK](http://BATSTRADING.CO.UK)

BATS Trading Limited is authorised and regulated by the Financial Services Authority. BATS Trading Limited is a company registered in England and Wales with Company Number 6547680 and registered office at Ground Floor, 25 Copthall Avenue, London EC2R 7BP.



## 7. INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES

### 7.2.7. Execution quality and best execution

109. What is your opinion about requesting execution venues to publish data on execution quality concerning financial instruments they trade? What kind of information would be useful for firms executing client orders in order to facilitate compliance with best execution obligations? Please explain the reasons for your views.

110. What is your opinion of the requirements concerning the content of execution policies and usability of information given to clients should be strengthened? Please explain the reasons for your views.

As trading has fragmented across multiple competing venues and become more pan-European in nature, there has been increased demand for additional types of data. We agree that it is important that tools are made available to investment firms to ensure that they can compare execution venues and make decisions on which to include in their execution policies, in addition to monitoring the effectiveness of those execution venues. Similarly, we would agree that investors require data to evidence the effective functioning of the best execution obligation.

BATS Europe, for example, has sought to improve the level of data available to market participants by making publicly available and free of charge real-time pre- and post-trade data feeds, in addition to near real-time analytical information, including in relation to market share and price improvement statistics. We would note that – even in the absence of specific regulatory requirements – execution venues are clearly incentivised in a competitive environment to make public information relating to execution quality and the performance of the venue. We would also note that market forces have developed solutions to provide information to market participants (for example, services provided by vendors such as Fidessa and Thomson Reuters).

Whilst standardisation would bring benefits with respect to the ease with which different execution venues can be compared, we believe that there is generally a good level of information currently provided to market participants on which execution venue selection decisions may be made. We would also highlight the significant amount of discretion in the best execution obligation, which means that a narrowly defined comparison of execution venues would probably be inconsistent with the broader best execution policies utilised by investment firms to manage their interaction with their clients. Therefore, whilst we can see some benefit in key metrics of execution quality data being defined for voluntary use by execution venues, we do not consider that the costs of mandating their use would outweigh the benefits.

With respect to the Commission's comments in relation to the number of orders cancelled prior to execution, we would note our response in relation to question 20.



The best execution obligation – along with a comprehensive transparency regime that allows for the consolidation of data from multiple execution venues – is fundamental in mitigating any adverse impact arising from fragmentation. We appreciate that MiFID specifically included a review clause with respect to execution quality data and that CESR was tasked with conducting Level 3 work on the overall operation of the execution regime. However, in our opinion, it is not clear how broader concerns relating to the implementation and enforcement of the current MiFID best execution obligation will be resolved solely by measures such as imposing additional information publication requirements on execution venues.

We believe that there is evidence to suggest that the lack of clarity in the best execution obligation, and inconsistent adherence to and enforcement of the MiFID best execution obligation, is resulting in a worse outcome for end investors. In particular, there is data to suggest that a high proportion of trades “miss” or trade through a better price on a different venue.<sup>37</sup> Whilst not a perfect measure, we believe that this, in conjunction with the current high market share of the incumbent exchanges compared with the measures of price only or price and fees, combined implies that the best execution obligation is not working optimally. We would agree with comments made in Pierre Fleuriot’s report *The Review of the Markets in Financial Instruments Directive* (February 2010)<sup>38</sup> that “[t]he MiFID provisions dealing with best execution raise interpretation difficulties that complicate its implementation and supervision of compliance”.

Given the importance of the best execution obligation in protecting investors and fostering market efficiency, we would be supportive of greater regulatory scrutiny of the way in which the best execution obligation has been implemented with a view to ensuring consistency between Member States.

---

<sup>37</sup> See: *The MiFID Metamorphosis* published by The European Capital Markets Institute (“ECMI”) which refers to Equiduct VBBO data: <http://www.ceps.eu/book/mifid-metamorphosis>

<sup>38</sup> Pierre Fleuriot’s report *The Review of the Markets in Financial Instruments Directive (MiFID)* (February 2010): <http://www.eifr.eu/files/file4315653.pdf>



## 9. REINFORCEMENT OF SUPERVISORY POWERS IN KEY AREAS

### 9.1. Ban on specific activities, products or practices

142. What is your opinion on the possibility to ban products, practices or operations that raise significant investor protection concerns, generate market disorder or create serious systemic risk?

Please explain the reasons for your views.

To the extent that this proposal could extend to short selling, we made the following observation in our response to the Commission's consultation on short selling:<sup>39</sup>

Where regulators have powers to intervene where necessary to ensure continued market confidence and financial stability, it is essential that these powers are narrowly drawn (emergency situations) and that they are subject to clear and objective criteria to provide greater certainty over the circumstances in which they will be used and to ensure consistency between Member States.

---

<sup>39</sup> BATS Europe's response (July 2010) to the Commission's Public Consultation on Short Selling:  
[http://www.batstrading.co.uk/resources/publications/BATS\\_ResponseToEComShortSellingproposal\\_July2010.pdf](http://www.batstrading.co.uk/resources/publications/BATS_ResponseToEComShortSellingproposal_July2010.pdf)