Reply form for the Consultation Paper on MiFID II/ MiFIR review report on the transparency regime for equity and equity-like instruments, the DVC and the trading obligations for shares

4 February 2020

esma European Securities and Markets Authority

Date: 4 February 2020

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the transparency regime for equity and equity-like instruments, the double volume cap mechanism and the trading obligations for shares MiFID II/ MiFIR review report published on the ESMA website.

Instructions

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

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_MIFID_EQT_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- if they respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

Naming protocol

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

ESMA_CP_MiFID_EQT_NAMEOFCOMPANY_NAMEOFDOCUMENT.

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

ESMA_CP_MiFID_EQT_ESMA_REPLYFORM or

ESMA_CP_MiFID_EQT_ANNEX1

Deadline

Responses must reach us by **17 March 2020.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

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

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	BVI
Activity	Investment Services
Are you representing an association?	☒
Country/Region	Germany

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MIFID_EQT_1>
BVI[1] responses to this consultation are somewhat limited as the exceptional markets during the past weeks limited possibilities for meaningful exchange with members on many highly technical points. Also the ability to get quantitative input or to get concrete input on the suggested quantitative thresholds was limited by the necessary focus on the market events. With this caveat we reserve to come back to ESMA with more detailed input if possible at a later stage.

With respect to the basic concept of markets regulation, BVI believes that stock exchanges/regulated markets (RM) are not functioning properly today and need to come back to the original idea of offering a market place where all investors, large and small, can execute trades at fair terms for everyone. This is not primarily the fault of the alternative trading venues such as MTFs, or SIs. From our point of view it is up to the RM to improve the existing CLOB product offering which is today too often catering mainly to the needs of principal and high frequency traders only. This means that our members, who are long term investors, are faced with smaller and smaller trade sizes and additional trading and infrastructure costs, as RM pass on their investments in high frequency infrastructure, which our members do not need to fulfil the mandate given by their investor, who is ultimately the man in the street. At the same time retail investors are leaving the stock exchanges *en masse*, as is deplored by the RMs themselves. Stock exchanges need to revisit their business model in order to allow less latency dependant retail and institutional investors to participate more in lit market trading going forward. Especially institutional investors, such as our members, need attractive offers by the exchanges which would allow them to execute large orders on the lit markets without creating too much market impact. The EU policy focus should therefore be on the improvement of the RM CLOB product offering for all clients. Regulation should not curtail the remaining segments of the market such as MTF and SIs which are able to fulfil our members' trading needs better than the RMs do today and which follow a different business model which is not necessarily based on improved pre-trade transparency.

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 114 members manage assets of more than 3.3 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 22%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.
<ESMA_COMMENT_CP_MIFID_EQT_1>

Q1. What is your view on only allowing orders that are large in scale and orders in an order management facility to be waived from pre-trade transparency while removing the reference price and negotiated trade waivers? Instead of removing the RP and NT waivers, would you prefer to set a minimum threshold above which transactions under the RP and NT waivers would be allowed? If so, what should be the value of such threshold? What alternatives do you propose to simplify the MiFIR waivers regime while improving transparency available to market participants? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_1>
Pre-trade transparency waivers are an effective means of meeting the needs of institutional investors, such as fund managers, to be able to place orders without market impact, thus avoiding adverse signalling effects which might be exploited to the disadvantage of the investors. For the investment fund industry which manages large retail funds, the average orders commonly have six-digit euro values which are not always above the LIS threshold but significantly above regular lit market sizes. Therefore, not only the LIS waiver needs to be maintained. An additional practical aspect to be considered is that orders which would qualify for LIS are for technical reasons often split into smaller orders to be able to make use of different pools of liquidity. Today, for those cases the RP waiver is used. We consider the existing waiver regime to be generally suitable but see potential improvement by allowing RM to integrate certain waivers in the CLOB for the benefit of a level playing field between RM, MTF and SI.
<ESMA_QUESTION_CP_MIFID_EQT_1>

Q2. Do you agree to increase the pre-trade LIS threshold for ETFs to EUR 5,000,000? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_2>

Q3. Do you agree with extending the scope of application of the DVC to systems that formalise NT for illiquid instruments?

<ESMA_QUESTION_CP_MIFID_EQT_3>
We disagree. DVC systems are not helpful for the orderly development of market liquidity. Regulated markets need to improve firstly the existing CLOB product offering which currently is mainly catering to the needs of principal and high frequency traders. This means our members, who are long term investors, are faced with smaller and smaller trade sizes and additional costs arising from RM's investments in high frequency infrastructure which our members do not need to fulfil the mandate given by their investor, who is ultimately the man in the street. At the same time, retail investors are leaving the stock exchanges *en masse*, as is deplored by the RMs themselves. This means stock exchanges need to revisit their business model in order to allow less latency dependant retail and institutional investors to participate more in lit market trading. Especially institutional investors, such as our members, need attractive offers by the exchanges which would allow them to execute large orders on the lit markets without creating too much market impact. The EU policy focus should therefore be on the improvement of the RM CLOB product offering for all clients. Regulation should not to curtail the remaining segments of the market such as MTF and SIs which are able to fulfil our members' trading needs better than the RMs do today.
<ESMA_QUESTION_CP_MIFID_EQT_3>

Q4. Would you agree to remove the possibility for trading venues to apply for combination of waivers? Please justify your answer and provide any other feedback on the waiver regime you might have.

<ESMA_QUESTION_CP_MIFID_EQT_4>
We disagree. Removing the combination of waivers is not helpful for the orderly development of market liquidity. Quite often LIS and RP waivers need to be combined to deal with larger orders which are split up for the purpose of best execution. Regulated markets need to improve firstly the existing CLOB product offering which currently is mainly catering to the needs of principal and high frequency traders. This means our members, who are long term investors, are faced with smaller and smaller trade sizes and additional costs arising from RM's investments in high frequency infrastructure which our members do not need to fulfil the mandate given by their investor, who is ultimately the man in the street. At the same time, retail investors are leaving the stock exchanges *en masse*, as is deplored by the RMs themselves. This means stock exchanges need to revisit their business model in order to allow less latency dependant retail and institutional investors to participate more in lit market trading. Especially institutional investors such as our members need attractive offers by the exchanges which would allow them to exe-cute large orders on the lit markets without creating too much market impact. The EU policy focus should therefore be on the improvement of the RM CLOB product offering for all clients. Regulation should not to curtail the remaining segments of the market such as MTF and Sis which are able to fulfil our members trading needs better than the RMs do today.
<ESMA_QUESTION_CP_MIFID_EQT_4>

Q5. Do you agree with the proposal to report the volumes under the different waivers separately to FITRS? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_5>

Q6. What would be in your view an alternative way to incentivise lit trading and ensure the quality and robustness of the price determination mechanism for shares and equity-like instruments? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_6>
We suggest strengthening the competitiveness of RM by allowing RM to integrate mechanisms that are currently only accessible for MTF, e.g. use of waivers, to reach a level playing field. Our observation is that RM in the past have decided to optimize trading infrastructure for high frequency trading (HFT), and by focussing on speed neglecting retail and other "slower" market participants. For long-only institutional investors it is not the (HFT-optimized) speed that matters, but it is crucial that large orders can be placed with the lowest possible market impact. There are also larger orders below LIS that can lead to HFT signalling issues. This circumstance is expressed in the need to apply waivers. Lit markets, however, adapted minimum order sizes to HFT requirements neglecting institutional investors. For investment funds that strive for best execution possible in the interest of the investors, auctions are also a means alongside the waivers. Summing up, investment funds look for ways to avoid suffering from HFT. Possible measures against HFT on lit markets could include slowing the speed of trade by mandatory resting time or similar measures and increase in the minimum trading sizes on the stock exchanges which would not be an obstacle for institutional investors but limit HFT intervention; for retail investors on RM a reference price regime should then be allowed. Also, (frequent) lit market auctions with preference for larger orders could be established.
<ESMA_QUESTION_CP_MIFID_EQT_6>

Q7. Which option do you prefer for the liquidity assessment of shares among Option 1 and 2? Do you have an alternative proposal? Do you think that the frequency of trading should be kept as a criterion to assess liquidity? If so, what is in your view the appropriate thresholds for the percentage of days traded measured as the ratio between number of days traded and number of days available for trading (e.g. 95%, 90%, 85% etc.)? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_7>

Q8. Do you agree in changing the approach for ETFs, DRs as proposed by ESMA? Do you have an alternative proposal? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_8>

Q9. Do you agree in removing the category of certificates from the equity-like transparency scope? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_9>

Q10. Do you agree in deeming other equity financial instruments to be illiquid by default? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_10>

Q11. Do you agree in separating the definition of conventional periodic auctions and frequent batch auctions? Do you agree with ESMA's proposal to require the disclosure of all orders submitted to FBAs? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_11>
Further specifications regarding conventional auctions and frequent batch auctions (FBA) should consider that the latter have merits for investors. We are convinced that FBA can be construed in a way that addresses the buy-side needs to execute especially large orders in an orderly fashion with low market impact. Execution at the midpoint of the reference market best bid and offer is agreed as a global standard that ensures a fair way to split the cost of trading between buyer and seller. Especially for Large in Scale (LIS) orders the existing waivers under MiFIR that allow execution at midpoint have a meaningful impact for execution efficiency and liquidity matching opportunities.
<ESMA_QUESTION_CP_MIFID_EQT_11>

Q12. Do you agree that all non-price forming systems should operate under a pre-trade transparency waiver? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_12>
We agree. Applying pre-trade transparency on batch of unmatched transactions would be detrimental to institutional investors as it would cause information leakage and consequently increase transaction costs.
<ESMA_QUESTION_CP_MIFID_EQT_12>

Q13. What is your view on increasing the minimum quoting size for SIs? Which option do you prefer?

<ESMA_QUESTION_CP_MIFID_EQT_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_13>

Q14. What is your view on extending the transparency obligations under the SI regime to illiquid instruments?

<ESMA_QUESTION_CP_MIFID_EQT_14>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_14>

Q15. With regard to the SMS determination, which option do you prefer? Would you have a different proposal? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_15>

Q16. Which option do you prefer among Options A, B and C? Would you suggest a different alternative? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_16>

Q17. Would you envisage a different system than the DVC to limit dark trading? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_17>

Q18. Do you agree in removing the need for NCAs to issue the suspension notice and require trading venues to suspend dark trading, if required, on the basis of ESMA's publication? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_18>

Q19. Do you agree in removing the requirement under Article 5(7)(b)? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_19>

Q20. Please provide your answer to the following survey (<= click here to open the survey) on the impact of DVC on the cost of trading for eligible counterparties and professional clients.

<ESMA_QUESTION_CP_MIFID_EQT_20>
[CLICK ON THE WORD "SURVEY" IN THE QUESTION IN ORDER TO PROVIDE YOUR ANSWER]
<ESMA_QUESTION_CP_MIFID_EQT_20>

Q21. Do you agree in applying the DVC also to instruments for which there are not 12 months of available data yet? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_21>

Q22. Do you agree foresee any issue if the publication occurs after 7 working days instead of 5? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_22>

Q23. Do you agree that the mid-month reports should not be published? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_23>

Q24. Do you agree with ESMA's proposal to include in Article 70 of MiFID II the infringements of the DVC suspensions? Please explain.

<ESMA_QUESTION_CP_MIFID_EQT_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_24>

Q25. **Do you agree with ESMA's assessment that the conditions for deferred publication for shares and depositary receipts should not be subject to amendments? If not, please explain.**

<ESMA_QUESTION_CP_MIFID_EQT_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_25>

Q26. **Do you agree with ESMA's proposal to increase the applicable threshold for ETFs and request for real-time publication for transactions that are below 20,000,000 EUR? If not, please explain.**

<ESMA_QUESTION_CP_MIFID_EQT_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_26>

Q27. **Do you agree with ESMA assessment of the level of post trade transparency for OTC transactions?**

<ESMA_QUESTION_CP_MIFID_EQT_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_27>

Q28. **Do you agree with the proposal to report and flag transactions which are not subject to the share trading obligations but subject to post-trade transparency to FITRS? Please explain.**

<ESMA_QUESTION_CP_MIFID_EQT_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_28>

Q29. **What is your experience related to the publication of post-trade transparency information within 1 minute from the execution of the transaction? Do you think that the definition of "real-time" as maximum 1 minute from the time of the execution of the transaction is appropriate/too stringent/ too lenient? Please explain.**

<ESMA_QUESTION_CP_MIFID_EQT_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_29>

Q30. **Do you agree with ESMA's approach to third-country trading venues for the purpose of transparency requirements under MiFID II? If no, please explain.**

<ESMA_QUESTION_CP_MIFID_EQT_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_30>

Q31. Do you agree that the scope of the share trading obligation in Article 23 of MiFIR should be reduced to exclude third-country shares? If yes, what is the best way to identify such shares, keeping in mind that ESMA does not have data on the relative liquidity of shares in the EU versus in third countries? More generally, would you include any additional criteria to define the scope of the share trading obligation and, if yes, which ones?

<ESMA_QUESTION_CP_MIFID_EQT_31>
We support a general limitation of the STO to EU-ISINs. An exception could be foreseen, possibly upon request by the issuer and assessment by ESMA, for those EU shares that have either no relevant liquidity on EU trading venues or where a fragmentation of liquidity would otherwise have an adverse market effect, e.g. certain double listings (STO discussion in context of Brexit has been a practical example).
<ESMA_QUESTION_CP_MIFID_EQT_31>

Q32. Would you support removing SIs as eligible execution places for the purposes of the share trading obligation? If yes, do you think SIs should only be removed as eligible execution places with respect to liquid shares? Please provide arguments (including numerical evidence) supporting your views.

<ESMA_QUESTION_CP_MIFID_EQT_32>
SIs provide critical liquidity to markets. From the perspective of our members, which represent the buy-side, a variety of types of execution, e.g. trading venues, auctions and SIs, best serves the interest of the industry to maintain flexibility and different options when trading. The primary objective is to keep trading costs as low as possible for the benefit of the investors and to ensure best in class execution for large trades.
<ESMA_QUESTION_CP_MIFID_EQT_32>

Q33. Would you support deleting the first exemption provided for under Article 23 of MiFIR (i.e. for shares that are traded on a "non-systematic, ad-hoc, irregular and infrequent" basis)? If not, would you support the introduction in MiFIR of a mandate requiring ESMA to specify the scope of the exemption? Please provide arguments supporting your views.

<ESMA_QUESTION_CP_MIFID_EQT_33>
Apart from a general review of the STO (see also answer to Q31) we would support ESMA specifications.
<ESMA_QUESTION_CP_MIFID_EQT_33>

Q34. Would you support simplifying the second exemption of Article 23 of MiFIR and not limiting it to transactions "carried out between eligible and/or professional counter-parties"? Please provide arguments supporting your views.

<ESMA_QUESTION_CP_MIFID_EQT_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_EQT_34>

Q35. What is your view on the increase of volumes executed through closing auctions? Do you think ESMA should take actions to influence this market trend and if yes which one?

<ESMA_QUESTION_CP_MIFID_EQT_35>
The trend towards closing auctions is a decision of the market participants, driven by passive investment products. We would not support a further concentration of liquidity towards closing auctions.
<ESMA_QUESTION_CP_MIFID_EQT_35>