Frankfurt,
12 April 2023

**BVI Position on the upcoming MiFID II/MiFIR trilogues**

BVI[1] is pleased to present its views on the MiFID/MiFIR Review interinstitutional negotiations (trilogues) which are set to start on 18 April 2023.

The European Commission presented MiFID II/MiFIR Review in November 2021 as a part of the development of the Capital Markets Union. The proposal is of crucial importance in increasing the competitiveness of financial market actors operating in the EU-27 and the attractiveness of the European Union's regulatory framework.

The purpose of this note is to highlight the German buyside core priorities in relation to the coming trilogue to ensure that the EU will develop an internationally competitive and efficient Capital Markets Union for the benefit of companies and investors. The buyside main priorities are the removal of Article 26 transaction reporting on AIF/UCITS, a viable real-time and pre-trade shares consolidated tape (CT), cost-based market data pricing rules, and liquidity protecting bond deferrals on large trades. In addition, we continue to support in full sell-side demands not to restrict the use of waivers, deferrals, and Systematic Internalisers (SI) in order to keep liquidity in the EU, cf. European Forum of Securities Associations - Trade Associations' Positions on Trilogue for MiFIDII/MiFIR Review 6 April 2023.

First and foremost, we recognize that both the Council and the Parliament to a large extend have proposed considerable improvements of parts of the European Commission's initial proposals, i. e. on the development of the CT, the recognition of ever-increasing market data costs as also stressed by ESMA as well as the delicate balance between transparency and liquidity within non-equities.

However, we still see significant challenges with the parts on transparency in the equities markets and the role of SIs, where we support the Council approach, which generally embraces the competitive environment, rather than the of the European Parliament, which seems to oppose the liberalisation mandate from MiFID I and which, if adopted, might strengthen the role of trading venues and in particular incumbent exchanges at the expense of other execution venues, thus weakening the EU competitive position towards the UK and lead to worse outcomes for companies and investors.

It should not be underestimated that EU is facing an unprecedented challenge from the UK as a strong competitor that is very agile from a legislative/regulatory perspective and has already shown concrete proof of its willingness to diverge as per the Wholesale Markets Review (e. g., end of the share trading obligation and double volume cap, lighter transparency constraints for non-equity market).

[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 115 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 28%, 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.

BVI
Bundesverband Investment und Asset Management e.V.

Contact
Phone +49 69 15 40 90 0
www.bvi.de

BVI Berlin
Unter den Linden 42
10117 Berlin

BVI Brussels
Rue du Trône 14–16
1000 Bruxelles

BVI Frankfurt
Bockenheimer Anlage 15
60322 Frankfurt am Main

Executive Board
Thomas Richter CEO
Rudolf Siebel MD

## 1. No extension of Article 26 MiFIR transaction reporting

The present transaction reporting regime requiring investment firms to report transactions in financial instruments to the competent authority is well balanced and the reporting requirements should not be extended to other types of firms. The reporting regime enables competent authorities to efficiently engage in surveillance of the EU securities markets. BVI is strongly against the EP proposal to analyse whether AIFM/UCITS firms should be added to the scope of entities obliged to report transactions to NCAs. We consider this would have a huge detrimental impact on the current regime of the reporting mechanism for investment firms. It would place a disproportionate burden on firms without any benefits for market transparency or any improvement of fund supervision.

## 2. EU consolidated tapes for shares, ETF, bonds, and derivatives

Appropriately constructed, as close to real-time as technically possible, CTs for shares, ETF, bonds, and derivatives would help to build deeper and more open capital markets in Europe. On the share tape we support the EP position to include pre (5 levels of quotes) as well as post-trade data in the data offering of the CT, which needs to be as close to real time as technically possible. Shares and ETF CT data should be disseminated at seconds speed which still can be assimilated by the human eye of both retail and institutional investors. We accept that a tape at such latency is not usable for fast algo-trading purposes. However, it has uses in multiple other cases in the asset management value chain as described in the Market Structure Partners Report on the CT commissioned by the EU Commission.

On the bond and derivatives tapes, latency may be even longer as the usually deferred post-trade transaction data is anyway somewhat stale, but it is required to get a view of the liquidity and pricing in the market and to optimise research, asset allocation and trading processes within asset managers.

However, some **points on governance** need to be addressed for all CTs:

- **Voluntary consumption of the CT tape data is key** – with no direct nor indirect requirements to consume. First, it is impossible to currently predict the pricing rules of the tape, the quality of the data feed, and the speed of its delivery. Additionally, - as the US experience has shown - CT data when it comes to trading can never replace proprietary data feeds from the trading venues. CT consist of data from most trading venues. It cannot be used to document best execution as no intermediary/broker is connected to all the venues contributing to the CT. Secondly, best execution especially in the institutional investment fund sphere is not only about price, but an evaluation of the full trade execution package, including costs, speed, and quality of execution. Market participants therefore need to remain free to buy the CT offering or not, while fulfilling their best execution requirements vis-à-vis investors.

- **The link between CT and best execution needs to be removed** (cf. Recital 7 in MiFID draft) in the EC, Council, and the EP positions in order not to construe indirectly a mandatory consumption requirement for CT data. If a CT delivers a high-quality product at a reasonable price, there will be a natural demand to purchase a CT licence for the respective feeds.

- **Appropriate governance of the CTP** is essential for confidence and quality. It is of the highest importance for the commercial viability of the CT that the governance framework allows for a broad representation of market participants and the governance entity should

be empowered to make decisions on setting policies and fees on market data which reflect users interests and does not allow the CT to become a new commercial data distribution channel for trading venues (TVs) and APAs. Up to now the trialogue parties have failed to set rules for the good governance of the CT, leaving the data users at the commercial will of the dominant trading venues and APAs. Therefore, we support giving ESMA the power to ensure good governance standards for the CTs, which prevent undue influence of TVs and APAs. The FSB ROC governance of the GLEIF (LEI) and the ANNA/DSB (OTC-ISIN and UPI), including an independent body consisting of regularly elected experts representing the views of data users is key. Additionally, the language on the use of CT data in the MiFID/R should clearly focus on one single and simple licensing framework that allows full use of the original and derived data in the downstream value chain of each data user without any need for further licensing. Especially, derived data licenses based on the value created with the CT data, e. g., in index production, should be expressly discouraged in the regulation. The CT offering will only be viable if it is affordable and data users can license the data economically for use for our internal trading systems, client reporting, etc. Finally, no trading venue(s) should be allowed to acquire the CTP, nor to be the outsourcing partner to the CTP to administer the policy, licensing, reporting, collecting of fees, etc.

- **Revenue sharing should cover all contributors and supporters** and be subject to a competitively priced offering, subject to a primarily cost based approach under the **Reasonable Commercial Basis** principle of Article 13 MiFIR: The share tape rules appear to support this, other than the aspect to expressly disallow pricing based on the value created with the data, e. g., in index production. For other asset classes than shares and ETF revenue sharing should not be allowed as in the bonds and derivatives areas market data consumption still largely is a by-product of the trading activity. Also, the additional language around loss of revenue for the bond CT in the Council proposal is profoundly misguided and opens the CT to abuse by the three dominant TVs and approved publication arrangements (APA) who have announced that they will offer such a CT as a joint venture. Also allowing all CTs to charge for 15 minutes delayed data, which today is available for free under MiFID, would be the wrong signal by the trialogue parties. The EC is focusing on Regulated Markets whereas the Council has trading venues in scope and EP is taking all contributors into account. All contributors should be a part of the revenue scheme for the delivery of (voluntary) pre-trade share data only, but otherwise only be entitled primarily to the recovery of their cost of production and dissemination of their data to the CT. Where reference to contribution is linked to, e.g., price discovery, exact and quantifiable mechanisms to measure contribution to price discovery must be developed.

## 3. Market data cost rules must reflect user needs

A share CT is not the solution for the procurement of market data from exchanges at reasonable cost. The requirement for obtaining fast proprietary data feeds from trading venues is indispensable for market participants to conduct their trading business and to comply with regulatory requirements in this context.

The challenge of high and ever-increasing market data costs must be addressed at all regulatory levels. This implies including a clear cost-based approach in Article 13 MiFIR and recognising that market data is a by-product of the trading activity and that trading venues must refrain from value-based pricing.

However, the work associated with standardisation and implementation of Article 13 related measures such as pricelists, license policies, audit procedures, must be the responsibility of ESMA, regardless of the existence of a CT. To protect the data user communities there need not to be any exemptions for CTs from the reformed Article 13 MiFIR framework.

We welcome the Council and the EP position that the price of market data should be based on the cost of production and dissemination, with reasonable margins as recommended in the 2019 ESMA Final Report on the subject. In this respect, we strongly support the EP which has largely adopted the recommendations from ESMA and recognizes that **market data is a by-product of trading activity**. We urge at this stage at least to include that the price of market data shall not be based on the value generated by the data user as stressed by ESMA too.

## 4. Preserving the balance of the non-equity transparency regime

We consider it is of paramount importance to consider the specificities of the bonds and derivatives markets to enable market makers to (i) hedge their risks as well as (ii) to unwind their positions and hence their ability and willingness to enter transactions of significant sizes or on illiquid instruments.

Pre-trade transparency requirements should be abolished for all execution venues. Post-trade requirements, and the framework for efficient deferral regimes, should be harmonised and leave room for adequate protection of liquidity providers. This would create a more supportive framework for liquidity pro vision and be a recognition of the trade-off between liquidity and transparency. Additionally, the introduction of a separate transparency regime for derivatives should be considered which reflects their specific characteristics.

We welcome the approaches from both the Council and EP, which both propose improvements over the EC proposals. The Council leaves more room for protection of liquidity providers than the EP. However, both the Council and the EP, leave much room to ESMA to determine the relevant deferral thresholds for both, bonds, and derivatives, so it is key to involve the market participants before setting the thresholds. The liquidity determination rules need to include a differentiation between high-yield and investment-grade in the corporate bonds space as well as a prohibition on the aggregation of sovereign bond trades which prevent timely transparency on the bond CT.

We welcome the Council's approach to remove the SI obligation for non-equities and urge the EP to support this approach to ensure a level playing field with other systems where pre-trade requirements are abolished by the Council and EP (i. e., voice trading and Request for Quote (RFQ)).

## 5. An equity transparency regime which supports competition and liquidity

Enabling competition in the EU is key – and should be a fundamental principle in the framework for creating an efficient Capital Markets Union. Therefore, all market players should enjoy a level playing field and a framework that allows for a range of options and choices for investors, issuers, and financial service companies. Preferably, the EU approach should reflect as much as possible a level playing field with the UK.

All execution venues should in principal face similar rules. Any undue restrictions for a subset of execution venues simply for the benefit of the incumbent national exchanges are not acceptable in a competitive EU trading environment. SI play a key role as liquidity providers for asset managers and should not be limited in trading below certain thresholds or at mid-point to allow for best investor outcomes.

Exchanges should be required in MiFID to offer products and services which cater to the needs of institutional investors to allow them to implement large trades without creating too much market impact as certain MTFs and SIs already do today. In this direction, it is not acceptable that the EP has suggested a threshold for allowing the use of RPW which is like the quoting obligation for SIs and the threshold for allowing SIs to provide midpoint prices. The level is unspecified and to be determined by ESMA. We see the EP approach as a step towards reintroducing a concentration rule in EU. However, we welcome the Council approach to introduce a volume cap (VC) on the RPW only and to remove restrictions on NTW and SIs in respect of the STO. We do not support the restraining approach from EP with a VC on both, RPW and NTW, which prevents a reduction in the number of SIs by converting to the DRE/DPE status.

## 6. Reduce investment firms' best-execution reporting burden

Reporting on best execution is best when the information is valued by investors and other data users. The so-called RTS 27 and RTS 28 reports, however, are examples of information which, at best, is not useful. Therefore Article 27 MiFID, which enables RTS 27 and RTS 28 at Level 2, should be repealed. We support in full the proposal from EC, Council and EP proposals to repeal the requirements to produce RTS 27 reports. Consequently, we support the EP proposal to repeal RTS 28 report requirements too.