Frankfurt am Main
1 August 2014

BVI position on ESMA Consultation Paper on MiFID II/MiFIR (ESMA/2014/549) – Market and Data Issues

BVI[1] gladly takes the opportunity to comment on the Market and Data Issues raised in the ESMA Discussion and Consultation Paper concerning possible proposals to the MiFID II/MiFIR regime.

We would like to highlight the following points:

- **Trading obligation and transparency requirements for equities:** We support the aim to trade and clear as much as possible equities on regulated, transparent and liquid markets (e.g. in practise exchanges and MTFs). Transparent and liquid markets contribute to an efficient price formation process and promote the retail and institutional investors. The calibration of the (new) pre and post trade transparency regime for equities should not hamper the ability of investment fund management companies to execute on behalf of the investment funds large (institutional) block orders with minimal impact on the market price. Otherwise, the execution of such block orders on liquid markets will have a significant impact on the market price and will put the end investor at a disadvantage because of decreased investment performance.

  BVI welcomes the definition of liquid equities and principally the revised concept of a large in scale equity waiver regime. We are of the view that the current deferral regime for the post-trade transparency equity large in scale waivers should be continued and retained in relation to the time frames and the thresholds. According to our observation, the proposed deferral post-trade transparency equity large in scale regime is too tight and does not set an appropriate balance between the need to protect large institutional equity orders and the requirement to publish these orders.

- **Non-discriminatory access to and obligation to license benchmarks:** Benchmark operators, owners or persons with the proprietary right to a benchmark have to provide all relevant information related to the benchmark to the trading venues, CCPs and their clients. Trading venues/CCP and their clients need the values of and the actual weightings of securities within an index to perform their obligations, especially in risk management. Furthermore, there is no valid reason for a benchmark provider to withhold any part of the methodology of a benchmark. Given that financial benchmark providers usually delay the publication of important data, specifically the actual weightings of benchmark components, it is to be considered best practice to disclose the methodology in full to the public.

- **Data publication – Reasonable commercial basis (RCB):** We agree with the assessment that in Europe the costs for trading data are too high. Therefore, we welcome a full and standardised transparency of price listings and changes to the public and especially to the users/clients of the

[1] BVI represents the interests of the German investment fund and asset management industry. Its 82 members currently handle assets of EUR 2.2 trillion in both investment funds and mandates. BVI enforces improvements for fund-investors and promotes equal treatment for all investors in the financial markets. BVI`s investor education programmes support students and citizens to improve their financial knowledge. BVI`s members directly and indirectly manage the capital of 50 million private clients in 21 million households. BVI's ID number in the EU register of interest representatives is 96816064173-47. For more information, please visit www.bvi.de.

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trading venues and CCPs. At a minimum standard disclosure of data license content needs to accompany the relevant pricing disclosure.

I. Discussion Paper

3. Transparency

a. Pre-trade transparency - Equities

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

The minimum necessary information is: Order-Size, Price, Side (Buy,Sell) and input-time, also natural/non-natural.

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

Yes, because these are the existing and practicing trading venues/systems.

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

Yes, it is a valid measure because it is referring to the real-traded volume.

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

Yes, a new ADT class of 0 to EUR 100.000 is useful because microcap blocks will be easier to trade. For the ADT class 100.000 to EUR 500.000 the threshold should be set at EUR 400.000.

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

Yes, it is reasonable because these market participants indicate a practical need.

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

Yes.

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

Please see our answers to questions 50-52.

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

Yes, it is good to have a practical check based on real market behaviour.

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

Annual calculation per financial instrument is appropriate in order to exclude seasonal/pro-cyclical effects.

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

No, stub-orders should not become transparent. This is detrimental to the final execution of the stub-order as market-participants know about the "need" for the completion of a large order.

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

No, we think that the most relevant markets in terms of liquidity should be the relevant trading venues (e.g. exchanges, MTFs) which display together at least more than 50 per cent of the turnover in the relevant financial instrument.

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

Yes, we agree on all types of negotiated transactions. They reflect market needs.

Q63: Do you agree that the proposed list of transactions are subject to conditions other than the current market price and do not contribute to the price formation process? Do you think that there are other transactions which are subject to conditions other than the current market price that should be added to the list? Please provide reasons for your answer.

Yes, we agree with the list. The list reflects market observations.

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

Yes, we agree.

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

Yes, we agree with this assessment.

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

Stop-orders are only reasonable if the market has got enough depth in liquidity.

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

Yes, it must fit for all kind of market participants (e.g. retail and institutional investors).

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

Stop-orders are only reasonable if the market has got enough depth in liquidity.

Q69: Which minimum overall sizes for iceberg orders are currently employed in the markets you use and how are those minimum sizes determined?

The current criteria for an iceberg order is: Minimum peak size 100 shares, minimum overall size 1000 shares, plus ruling minimum peak size must be 5% of overall volume.

Q70: Which minimum sizes and which methods for determining them should be pre-scribed via implementing measures? To what level of detail should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?

The current combination of criteria (please see answer to question 69) should be kept, as it has been proven to be highly practicable.

Q71: Which methods for determining the individual peak sizes of iceberg orders are currently employed in European markets?

Please see our answers to question 69 and 70.

Q72: Which methods for determining peaks should be prescribed by implementing measures, for example, should these be purely abstract criteria or a measure expressed in percentages against the overall size of the iceberg order? To what level of details should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?

Please see our answers to question 69 and 70**.**

Q73: Are there additional factors that need to be taken into consideration for equity-like instruments?

Institutional investor use equity-like instruments in this cases via OTC.

3.2 Post-trade transparency - Equities

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

Yes, we agree, this content is still applicable.

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

No.

Q76: Do you think that the current post-trade regime should be retained or that the identity of the systematic internaliser is relevant information which should be published? Please provide reasons for your response, distinguishing between liquid shares and illiquid shares.

Yes, we think the current post-trade regime for the identification of the systematic internaliser should be retained.

Q77: Do you agree with the proposed list of identifiers? Please provide reasons for your answer.

Many of the proposed identifiers are important for regulatory purposes. The buy side requires knowing which trades have been executed and flagged with the LIS field and benefit from the deferred publication.

Q78: Do you think that specific flags for equity-like instruments should be envisaged? Please justify your answer.

No.

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

Yes, we support the proposal.

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

These additional reports have in general no additional value for the buy side.

Q82: Do you agree with the definition of "normal trading hours" given above?

Yes, we agree.

Q83: Do you agree with the proposed shortening of the maximum permissible delay to 1 minute? Do you see any reason to have a different maximum permissible deferral of publication for any equity-like instrument? Please provide reasons for your answer?

We prefer to keep the current ruling with a delay to 3 minutes to protect large order execution.

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

Yes, we agree for the protection of both counterparties.

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

We are of the view that the current deferral regime for the post-trade transparency equity large in scale waivers should be further used and therefore retained in relation to the time frames and the thresholds. According to our observation, the proposed deferral post-trade transparency equity large in scale regime is too tight and does not set an appropriated balance between the needs to protect large institutional equity orders and the requirement to publish these orders in a delayed matter.

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

Please see our answer to question 85.

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

Please see our answer to question 85.

Q88: How frequently should the large in scale table be reviewed? Please provide reasons for your answer

Please see our answer to question 85.

Q89: Do you have concerns regarding deferred publication occurring at the end of the trading day, during the closing auction period?

Please see our answer to question 85. A potential publication at the latest EOD is harmful to market participants, especially in the case of large equity buy side block orders, who are still unwinding LIS positions.

3.3. Systematic Internaliser Regime – Equities

Q91: Do you support maintaining the existing definition of quotes reflecting prevailing market conditions? Please provide reasons for your answer.

Yes.

Q92: Do you support maintaining the existing table for the calculation of the standard market size? If not, which of the above options do you believe provides the best trade-off between maintaining a sufficient level of transparency and ensuring that obligations for systematic internalisers remain reasonable and proportionate? Please provide reasons for your answer.

Yes.

Q93: Do you agree with the proposal to set the standard market size for depositary receipts at the same level as for shares? Please provide reasons for your answer.

No, a lower standard size should be set for depository receipts as they have a lower level of liquidity than local shares.

3.11. The Trading Obligation for Derivatives

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

Yes, we agree that there should be consistent categories of derivatives throughout MiFIR/EMIR. As a starting point of discussion, we recommend using the definition proposed in the ESMA Consultation Papers on the clearing obligation for interest rate and credit default swaps. [2]

However, ESMA needs to take into account that a consistent approach has to contribute to the price formation process and therefore improve the liquidity of the derivative contracts. Furthermore, any categorization of derivatives should not lead to a fragmentation of different liquidity pools which could hamper investment fund management companies to trade derivative contracts in an efficient way and reduce their ability to fulfill their best execution obligations.

We believe that it needs to be audited for each case separately, whether a category of derivatives contracts subject to a clearing obligation can be subject to the trading obligation.

A certain category of derivatives can only be cleared through a central counterparty if (a) the systems of the central counterparty arrange for clearing of the relevant category of derivatives and (b) parties are able to transmit the data related to a transaction, agreed OTC, into the system of the central counterparty.

Even if both (a) and (b) are given for a certain category of derivatives, it does not automatically mean that there is a RM, MTF or OTF through which parties could agree on the relevant transaction.

ESMA should carefully verify the existence of a RM, MTF and OTF that grants access to all financial counterparties as defined in EMIR (e.g. UCITS/AIF) in a timely manner rather than defining an automatism of the trading obligations.

Q169: Do you agree with this approach to the treatment of third countries?

Generally yes. ESMA should ensure that such approach is not in conflict with the regulation of third countries.

Q170: Do you agree with the proposed criteria based anti-avoidance procedure?

ESMA has to clarify the point “other criteria”. In this context, ESMA has to take into account that a category of derivatives could have a regulatory feature applicable to a financial counterparty (e.g. ISDA’s additional provisions applying to CDS with UCITS).

Furthermore, UCITS/AIFs are not allowed to agree on OTC derivatives with non- financial counterparties. ESMA could also take into their analyses that trading venues may allow its participants to limit the counterparties admitted to trading for eligible OTC transactions. If the venue does not offer such calibration, it may not be considered as trading venue available for the fulfillment of the trading obligation.

Q171: Do you think it would be reasonable for ESMA to consult venues with regard to which classes of derivatives contracts are traded on venue? Do you think venues would be well placed to undertake this task?

Trading venues have the obligation to ensure that the standardized derivatives fulfill the requirements of the trading obligation. However, ESMA also has to consult with all relevant market participants (e.g.

[2] http://www.esma.europa.eu/consultation/Consultation-paper-Clearing-Obligation-no1-IRS; http://www.esma.europa.eu/consultation/Consultation-paper-Clearing-Obligation-no2-CDS

investment fund management companies) if a derivative fulfills the requirements for the trading obligation.

Q172: The discussion in section 3.6 on the liquid market for non-equity instruments around 'average frequency', 'average size', 'number and type of active market participants' and average size of spreads is also relevant to this chapter and we would welcome respondent's views on any differences in how the trading obligation procedure should approach the following:

ESMA has to analyze the "average frequency" separately for groups of market participants that are eligible as OTC derivatives counterparty. UCITS/AIFs are not allowed to enter into OTC derivatives with non- financial counterparties or with financial counterparties like for instance insurance companies. There could be very frequent trading in a given category of OTC derivatives but 95% of the transactions are agreed between insurance companies and non-financial counterparties. As a result, the overall high frequency would mean a low trading frequency for UCITS/AIFs.

Therefore, the criteria "average frequency" should be determined separately for major categories of market participants. Within each category there should be only market participants for which it is ensured that each market participant of the category is allowed to enter into OTC derivatives with any other market participant within the same category.

Average frequency should be determined for the shortest time period possible in order to incorporate any sudden illiquidity. ESMA should be aware of the potential volatility of numbers of trades and trade volume with short time periods. For example, according to numbers published by ISDA SwapsInfo (e-mail on June 3, 2014) for the week ending May 30, 2014 the number of trades in interest rates derivatives (cleared and uncleared) decreased in the week between May 23 and May 30, 2014 from 16,880 to 14,381 (-14,8%) and the volume from USD 2,644 bn to 2,294 bn (-13,2%). The number of trades in CDS (cleared and uncleared) decreased in the week between May 23 and May 30, 2014 from 3,357 to 2,332 (-30,5%) and the volume from USD 129 bn to 89 bn (-31%).

Regarding the average size, ESMA could take onto account the term notional. The number of trades is already considered when determining the "average frequency".

Q173: Do you have a view on how ESMA should approach data gathering about a product's life cycle, and how a dynamic calibration across that life cycle might work? How frequently should ESMA revisit its assumptions? What factors might lead the reduction of the liquidity of a contract currently traded on venue? Are you able to share with ESMA any analysis related to product lifecycles?

According to Article 9 EMIR, derivatives need to be reported to trade repositories. Therefore, ESMA and the national competent should have access to all relevant data in order to make an assessment about a product's life cycle etc.

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

The further regulation of OTC derivatives will lead to the result that hedging against market risks will become more expensive for market participants. It is likely that market participants will react with not protecting themselves against market risks to the same extent they did as in the past. We have the impression that the regulation may evoke new risks making financial markets less resilient.

Q175: Do you have any other comments on our overall approach?

No.

5.4. Consolidated tape providers

Q367: Should the tapes be offered to users on an instrument-by-instrument basis, or as a single comprehensive tape, or at some intermediate level of disaggregation? Do you think that transparency information should be available without the need for value-added products to be purchased alongside?

BVI strongly supports the introduction of Consolidated Tape Providers (CTP). The tape should foresee that it is offered to the users on an instrument-by-instrument basis. CTPs should also have the capacity to provide data as a comprehensive tape and data at various degrees of disaggregation. We agree that the transparency information should be available without the need for value-added products to be purchased alongside the basic service. The costs related to purchasing the core CTP data must be 'at cost' or 'at cost plus'. CTPs should not be allowed to establish discriminatory pricing systems based on the level of additional value-added products that their clients have to purchase in addition.

5.8. Non-discriminatory access to and obligation to license benchmarks

Q411: Do you agree that trading venues require the relevant information mentioned above? If not, why?

Yes.

Q412: Is there any other additional information in respect of price and data feeds that a trading venue would need for the purposes of trading?

The relevant feed should include benchmark values plus values on all components (constituencies) based on or including their weightings within an index. Otherwise benchmark replication trades may not be possible in full.

Q413: Do you agree that CCPs require the relevant information mentioned above? If not, why?

Yes.

Q414: Is there any other additional information in respect of price and data feeds that a CCP would need for the purposes of clearing?

The relevant feed should include benchmark values plus values on all components (constituencies) based on or including their weightings within an index. Otherwise benchmark replication trades may not be possible in full.

Q415: Do you agree that trading venues should have access to benchmark values as soon as they are calculated? If not, why?

Yes.

Q416: Do you agree that CCPs should have access to benchmark values as soon as they are calculated? If not, why?

Yes.

Q417: Do you agree that trading venues require the relevant information mentioned above? If not, why?

Yes.

Q418: Is there any other additional information in respect of composition that a trading venue would need for the purposes of trading?

Yes.

Q419: Do you agree that CCPs require the relevant information mentioned above? If not, why?

Yes.

Q420: Is there any other additional information in respect of composition that a CCP would need for the purposes of clearing?

Yes.

Q421: Do you agree that trading venues and CCPs should be notified of any planned changes to the composition of the benchmark in advance? And that where this is not possible, notification should be given as soon as the change is made? If not, why?

Yes.

Q422: Do you agree that trading venues need the relevant information mentioned above? If not, why?

We agree.

Q423: Is there any other additional information in respect of methodology that a trading venue would need for the purposes of trading?

There is a need to define when benchmark information after being released by the benchmark provider is in the public domain and can be used freely without license or fee requirements. ESMA needs to define that data can be used at least for end of day applications free of charge. ESMA may also want to remark that the new practice of critical benchmark providers such as Euribor or Libor to make EOD Benchmark data available for free with a delay of 24h is inhibiting the possibility for trading venues and CCPs and their users to price instruments which are based on money market rates. For the sake of clarification, according to a decision by the German Federal Court of Justice (*Bundesgerichtshof, I ZR 42/07 dd. 30. April 2009*), all benchmark name information that is used by the end user in a “descriptive form” in structured products may not have any charge and also not a “trade mark license”. This jurisprudence is in line with applicable EU law.

Q424: Do you agree that CCPs require the relevant information mentioned above? If not, why?

We agree.

Q425: Is there any other additional information in respect of methodology that a CCP would need for the purposes of clearing?

Benchmark providers at a minimum should disclose if the index is significantly concentrated (individual constituents in excess of 10% of the whole, or 5% constituents collectively in excess of 40% of the whole) or whether there are any procedures to limit the weights of securities issued by the same issuer.

Q426: Is there any information is respect of the methodology of a benchmark that a per-son with proprietary rights to a benchmark should not be required to provide to a trading venue or a CCP?

There is no valid reason for a benchmark provider to withhold any part of the methodology of a benchmark. Given that financial benchmark providers usually delay the publication of important data, specifically the actual weightings of benchmark components, it is to be considered best practice to disclose the methodology in full to the public.

Q428: Is there any other additional information in respect of pricing that a trading venue would need for the purposes of trading?

Trading venues/CCP and their clients need the values of and the actual weightings of securities within an index to perform their obligations, especially in risk management. By all means „reporting licenses for any custodian business“ as a new means of creating additional index license fees should be prohibited.

Q429: In what other circumstances should a trading venue not be able to require the values of the constituents of a benchmark?

There are no circumstances where a trading venue should not be able to require the values of the components of a benchmark as well as the percentage weighting of the components of a benchmark. Specifically, there are no IP rights to base on a withholding of individual values of components. The mere use of numbers for reference purposes is not capable of being subject to copyright. Relevant national precedents found that individual numbers are too trivial or not original enough to constitute material that can be subject to copyright, cf. Einheitsfahrschein Judgement (*Bundesgerichtshof,* Decision I ZR 15/58 of 25 November 1958, published in GRUR 1959,p. 251-253; or Michel number case (*Bundesgerichtshof* Decision I ZR 311/02 of 3 November 2005 published at http://www.jusline.de/pdf/de/entscheidungen/I_ZR_31102.pdf). This jurisprudence is fully in line with EU law.

Q431: Is there any other additional information in respect of pricing that a CCP would need for the purposes of clearing?

Trading venues/CCP and their clients need the values of and the actual weightings of securities within an index to perform their obligations, especially in risk management. For all means „reporting licenses for any custodian business“ as a new means of creating additional index license fees should be prohibited.

Q432: In what other circumstances should a CCP not be able to require the values of the constituents of a benchmark?

There are no circumstances where a trading venue should not be able to require the values of the components of a benchmark as well as the percentage weighting of the components of a benchmark. Specifically, there are no IP rights to base on a withholding of individual values of components. The mere use of numbers for reference purposes is not capable of being subject to copyright. Relevant national precedents found that individual numbers are too trivial or not original enough to constitute material that can be subject to copyright, cf. Einheitsfahrschein Judgement (Bundesgerichtshof,

Decision I ZR 15/58 of 25 November 1958, published in GRUR 1959,p. 251-253; or Michel number case (Bundesgerichtshof Decision I ZR 311/02 of 3 November 2005 published at http://www.jusline.de/pdf/de/entscheidungen/I_ZR_31102.pdf). This jurisprudence is in line with the applicable EU law.

Q435: Is there any other information that a trading venue would need for the purposes of trading?

Trading venues, CCPs and their users also need the performance history in terms of the value of the index at regular intervals in the past (ideally daily for liquid markets, at a minimum monthly) and historic data or estimates on turnover rates as a result of market moves which result in the deletion or addition of securities in benchmark composition as a result of periodic rebalancing.

Q437: Do you agree with the principles described above? If not, why?

We do not agree in full. Benchmark providers usually enforce license terms of their choosing through threating the cut off of essential data delivered e.g. through vendors. Therefore, non-discriminatory access to benchmarks needs to be secured on two fronts. On the pricing side the same pricing schedules need to apply to all trading venues, CCPs, and their users based on comparable objective criteria applicable to all (e.g. such as quantity) but not for example criteria only applicable within one class of users such as assets under benchmark management. Secondly, the data license conditions need to be non-discriminatory in the sense that they apply to all trading venues, CCPs, and users and are not construed in a way that prevents effectively signing of a license agreement because the legal liability to the licensee is too large.

Thirdly, benchmark providers split the market into buy and sell side users. This practice has led to a considerable license increase (besides the huge administration cost of individual permissions at the user level) that cannot be seen as warranted. Benchmark providers through this permission mechanism try to gain direct access to individual users. Providers try to increase the license volume by forcing via email a declaration of usage by a user employee combined with the threat that the user is switched off data.

Benchmark providers also use excessive limitations on their liability while requiring full liability of the user even in case of minor omissions. Benchmark providers require audit rights which are excessive in terms of the permissible required detail of information or the amount of work which needs to be put into the audit. Additionally, benchmark providers tend to cut and slice the scope of the licenses in a way that the user needs to take out multiple processing and reporting licenses to cover a particular area of use. For example FTSE requires besides license for the download and internal processing of benchmark data further licenses to report benchmark data to clients and an additional license to post information on the internet. ESMA should not tolerate slicing and dicing of licenses but insist on a simply to use license covering the whole value chain of trading venues, CCPs, and their users in order to reduce financial and operating risk.

It is important that this licensing practice is at least regulated on a European consolidated level. Global regulation would be further appreciated as the client base of larger banks is international and focusing on a particular country on exchange leads only to creating of “additional licenses” for the benchmark providers.

Q438: Do users of trading venues need non-publicly disclosed information on bench-marks?

Trading venues/CCP and their clients need the usually not disclosed values of and the actual weightings of securities within an index to perform their obligations, especially in risk management.

Q439: Do users of CCPs need non-publicly disclosed information on benchmarks?

Trading venues/CCP and their clients need the usually only non-publically disclosed values of and the actual weightings of securities within an index to perform their obligations, especially in risk management.

Q440: Where information is not available publicly should users be provided with the relevant information through agreements with the person with proprietary rights to the benchmark or with its trading venue / CCP?

It is not economical to require hundreds and thousands of users of trading venues and CCPs to sign individual agreements with the benchmark providers on top of the agreements they have with the venues and CCPs themselves. Master agreements to be concluded by trading venues and CCP should cover the distribution of data to users without the need for additional end users agreements, audits etc. As there are at least 80 trading venues and about 20 CCPs in the EU 100 end user agreements per user would be required with a single benchmark provider. Given that each agreement needs to be reviewed by legal staff, this would easily lead to legal cost of millions of Euros for essentially a 100fold duplication of one set of terms and conditions.

Q441: Do you agree with the conditions set out above? If not, please state why not.

There needs to be a clear prohibition on the index provider to terminate the delivery of information to trading venues/CCP and their clients during the time of dispute resolution in order to avoid disruption of the trading, clearing and any follow on processes. Benchmark providers usually enforce license terms of their choosing through threating the cut off of data delivered e.g. through vendors.

Q444: Which specific terms/conditions currently included in licensing agreements might be discriminatory/give rise to preventing access?

Please see our answer to Q437.

Q445: Do you have views on how termination should be handled in relation to outstanding/significant cases of breach?

Please see our answer to Q441.

7.2. Positions Limits

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

As for the aggregation requirements, the focus of aggregation should be on trading control rather than on corporate control. Therefore, if entities within the same corporate group do not share trading decisions and do not coordinate trading in commodity contracts (e.g. they have information barriers or operated independently of the subsidiary/parent), their positions should not be required to be aggregated. The key element here is that corporate control, taken alone, is not indicative of trading control. This should apply to both corporate groups (including wholly-owned entities), as well as individual companies (or persons).

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

We generally agree with the U.S. CFTC's proposed approach to "economic equivalence." Under the CFTC's proposed approach, the position limits would apply to a pre-determined list of 28 commodity futures contracts (core reference futures contracts) and economically equivalent derivatives. The CFTC's proposal defines economic equivalence to include contracts that are linked to or settled on the price of the core contracts, and specifically excludes from position limits commodity index swaps that may include one or more of the single commodity contracts that are subject to position limits (unless the index is comprised of prices of commodities that are the same, or if the contract is used solely to circumvent position limits). This same concept should also apply under MIFID. In addition, contracts that are economically equivalent should be permitted to be netted against equivalent and correlated commodity derivatives.

As a general matter, the proposed EU position limits regime should be harmonized as much as possible with the CFTC's position limit proposal. Global operating investment fund management companies will have significant challenges in complying with two (or more) different sets of rules to the extent that they trade under both regimes. Therefore, ESMA should take into consideration the CFTC proposal aligning the position limits regime on a global basis in order to avoid any regulatory arbitrage and additional cost to market participants.

7.3. Position Reporting

Q532: Do you agree that, in the interest of efficient reporting, the data requirements for position reporting required by Article 58 should contain elements to enable competent authorities and ESMA to monitor effectively position limits? If you do not agree, what alternative approach do you propose for the collection of information in order to efficiently and with the minimum of duplication meet the requirements of Article 57?

We support ESMA's and the competent authorities' efforts to monitor position limits effectively. However, it is important that the reporting requirements established by ESMA are aligned with and similar to analogous requirements imposed in other jurisdictions, namely the U.S. CFTC. Accordingly, reporting requirements should be efficient and minimize duplicative reporting of the same positions by multiple entities. Reporting firms should consist of the trading participants of the trading venue and as such are primarily responsible for reporting their customer positions. In the case that additional information is required regarding a specific investment firm `s positions, the trading venue or the competent authorities should make an inquiry to the specific customer of the reporting investment firm (trading participant of the trading venue), only on an "as needed" basis.

8. Market data reporting

8.1. Obligation to report transactions

Q558: Which option do you believe is most appropriate for flagging short sales? Alternatively, what other approaches do you think ESMA should consider and why?

UCITS are not allowed to conclude short selling transactions according to Article 89 UCITS directive (2009/65/EG). Therefore, regulated investment funds (UCITS) should not be required to provide the investment firms or different brokers with the relevant information on short selling transactions.

8.3. Obligation to maintain records of orders

Q596: Do you foresee any difficulties with the proposed approach? Please elaborate.

We believe that it is one of the most challenging requirements to categorise correctly whether a party to a transaction concluded outside the United Kingdom acts in Agency Capacity or in Principal Capacity. Inspite of ESMA´s guidance in chapter 8.1 (para 64), we have doubts that market participants are able to determine a clear “P” or “A” in each and any possible constellation. ESMA needs to provide further guidance on this aspect.

8.5. Synchronisation of business clocks

Q603: Do you agree with the requirement to synchronise clocks to the microsecond level?

No. We believe that it is not reasonable to require a microsecond level from market participants who are not engaged in HFT.

9. Post-trading issues

9.1. Obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP)

Q605: What are your views generally on (1) the systems, procedures, arrangements supporting the flow of information to the CCP, (2) the operational process that should be in place to perform the transfer of margins, (3) the relevant parties involved these processes and the time required for each of the steps?

The existing systems allow trading and confirmation in a timely manner. All collateral management processes can be supported. Investment fund management companies rely in terms of timing aspects and on all post-trading and post-affirmation processes on the custody bank´s verification and release processes

Q606: In particular, who are currently responsible, in the ETD and OTC context, for obtaining the information required for clearing and for submitting the transaction to a CCP for clearing? Do you consider that anything should be changed in this respect? What are the current timeframes, in the ETD and OTC context, between the conclusion of the contract and the exchange of information required for clearing on one hand and on the other hand between the exchange of information and the submission of the transaction to the CPP?

Frontoffice/trading departments should be responsible. All relevant information is available as soon the trade is agreed between the two counterparties. After the trade is matched, the trade with all relevant information can be sent to the CCP. No changes in operations are necessary.

Q607: What are your views on the balance of these risks against the benefits of STP for the derivatives market and on the manner to mitigate such risks at the different levels of the clearing chain?

This is more a question for clearing members than for investment fund management companies. In general, there are rules for providing collateral in place on CM/CCP level which seems to work fine. On the other hand there is yet no experience with huge collateral volumes.

Q608: When does the CM assume the responsibility of the transactions? At the time when the CCP accepts the transaction or at a different moment in time?

With the “take-up” of the trade by the clearing member.

Q609: What are your views on how practicable it would be for CM to validate the transaction before their submission to the CCP? What would the CM require for this purpose and the timeframe required? How would this validation process fit with STP?

The early submission of the trade to the CCP makes sense as the CCP makes a first eligibility check of the trade. This would avoid the risk that a CM performs an extensive risk check after the CCP rejects the trade. This procedure ensures that extensive risk checks are only performed on CM and CCP level after a first eligibility check. A change of this would not lead to a higher performance of the process. The eligibility checks are performed normally within a few seconds.

Q610: What are your views on the manner to determine the timeframe for (1) the exchange of information required for clearing, (2) the submission of a transaction to the CCP, and the constraints and requirements to consider for parties involved in both the ETD and OTC contexts?

All required information is available at the time the trade is agreed between the two counterparties. The following trade submission can be done without delay after the trade matching.

Q611: What are your views on the systems, procedures, arrangements and timeframe for (1) the submission of a transaction to the CCP and (2) the acceptance or rejection of a transaction by the CCP in view of the operational process required for a strong product validation in the context of ETD and OTC? How should it compare with the current process and timeframe? Does the current practice envisage a product validation?

The current process ensures an ongoing sufficient intraday risk management process at CCP level during the standard business hours. The existing risk management processes are designed to perform ongoing incremental risk checks for all existing and new trades. A sufficient validation process is already implemented.

Q612: What should be the degree of flexibility for CM, its timeframe, and the characteristics of the systems, procedures and arrangements required to supporting that flexibility? How should it compare to the current practices and timeframe?

The current practices and timeframes should be the benchmark for further processes. We observe that custodians, collateral managers, clearing members and CCPs apparently do not work towards in efficient “new” trading and CCP market. Currently, there is a mixture of retaining “old” operating models used by market participants in the OTC space on which a CCP structure is put on top. This leads to operational inefficiencies and risk as well as substantial costs.

Q613: What are your views on the treatment of rejected transactions for transactions subject to the clearing requirement and those cleared on a voluntary basis? Do you agree that the framework should be set in advance?

A rejection should give the involved counterparties the ability to check and amend their trade or to change the CCP. A maximum of harmonization between pre- and post-affirmation processes can be ensured.

9.2 Indirect Clearing Arrangements

Q614: Is there any reason for ESMA to adopt a different approach (1) from the one under EMIR, (2) for OTC and ETD? If so, please explain your reasons.

We have the impression that “Indirect Clearing Arrangements” are a theoretical issue. It would be beneficial for the market if ESMA could publish an example for an arrangement to fulfill the criterions applicable for indirect clearing arrangements.

Q615: In your view, how should it compare with current practice?

We have the impression that “Indirect Clearing Arrangements” are a theoretical issue. It would be beneficial for the market if ESMA could publish an example for an arrangement to fulfill the criterions applicable for indirect clearing arrangements.

II. Consultation Paper

3. Transparency

3.1. Liquid market for equity and equity-like instruments

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

Yes, we agree.

Q110: Do you agree that the free float for depositary receipts should be determined by the number of shares issued in the issuer’s home market? Please provide reasons for your answer.

No, because there is no real connection between the liquidity in depositary receipts and the local shares.

Q111: Do you agree with the liquidity thresholds ESMA proposes for depositary receipts? Would you calibrate the thresholds differently? Please provide reasons for your answers.

No, please see our answer to question Q110.

Q112: Do you agree with the liquidity thresholds ESMA proposes for depositary receipts? Would you calibrate the thresholds differently? Please provide reasons for your answers.

No, the current ruling is reliable and should be kept.

Q113: Do you agree that the criterion of free float could be addressed through the number of units issued for trading? If yes, what *de minimis* number of units would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.

We support the aim to extend further the transparency regime for ETFs. ETFs are already subject to the highest level of standards in terms of investor protection and transparency obligations. ETFs provide investors with many features and advantages at low investment costs. Transparent and liquid ETFs are an essential feature to the decision making process by the investors. We are of the opinion that as many ETFs as possible should be qualified as liquid financial instruments.

However, we do not agree with ESMA`s proposal on the definition of liquidity for ETFs. The criterion used for free float as “number of units issued for trading” is not a practicable indicator to define the liquidity of the ETF. Due to the nature of an ETF, the liquidity is also derived by the liquidity of the underlying financial instruments (e.g. equities and bonds). Furthermore, liquidity can also be obtained through the “Subscription and Redemption process”, enhancing the option to create liquidity.

Therefore, we are of the view that the definition of the liquidity for ETFs could also take into consideration the liquidity of the underlying baskets.

Q115: Do you agree with the liquidity thresholds ESMA proposes for ETFs? Would you calibrate the thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).

Our members as asset managers support the aim to extend further the transparency regime for ETFs. ETFs are already subject to the highest level of standards in terms of investor protection and transparency obligations. ETFs provide investors with many features and advantages at low investment costs. Transparent and liquid ETFs are an essential feature to the decision making process by the investors. We are of the opinion that as many ETFs as possible should be qualified as liquid financial instruments.

However, we do not agree with ESMA`s proposal on the definition of liquidity for ETFs. The criterion used for free float as “number of units issued for trading” is not a practicable indicator to define the liquidity of the ETF. Due to the nature of an ETF, the liquidity is also derived by the liquidity of the underlying financial instruments (e.g. equities and bonds). Furthermore, liquidity can also be obtained through the “Subscription and Redemption process”, enhancing the option to create liquidity.

Therefore, we are of the view that the definition of the liquidity for ETFs could also take into consideration the liquidity of the underlying baskets.

Q120: Do you think the discretion permitted to Member States under Article 22(2) of the Commission Regulation to specify additional instruments up to a limit as being liquid should be retained under MiFID II?

Yes, we agree to keep the discretionary room to Member States.

4. Data Publication

4.3. Reasonable commercial basis (RCB)

Q154: Would these disclosure requirements be a meaningful instrument to ensure that prices are on a reasonable commercial basis?

Improved disclosure is welcomed but will not be sufficient on its own.

Data cost have increased over the past few years due to various reasons. One source of price increases are the exchanges. In a survey which we also brought to the attention of the Market Data WG of the ESMA Securities Markets Stakeholder Group, we found that exchanges increased pricing in 2012 in all observed cases ,and in the vast majority of 2013 cases, sometimes even by 100%. Only in 2 cases there were decreases.

2012 Price In(De)creases	More than 100%	More than 10%	More than 5%	More than 1%/	Number of Exchanges/Venues
23 (0)	0	21	1	1	23

2013 Price In(De)creases	More than 100%	More (less) than 10%	More than 5%	More than 1%/	Number of Exchanges/Venues
37 (2)	4	28 (2)	9	6	39

Similar developments could be verified for the 2009 to 2014 period. As of late an analysis of Euronext/ICE pricing increases for L1/L2 feeds for fixed income (FI), equity and indices (Eq & In), and commodities (comm) der(ivatives) shows increases in 2014 of up to 328%.

Based on the above evidence we expressly disagree with the analysis and the recommendation of the trading venue commissioned OXERA report cited at CP 4.3 Para 6 that there is no justification for regulating venues data prices.

We also assume that as a matter of principle, regulation of “reasonable commercial basis” of trade data services should be driven by the fact that prices are made between the transacting parties and therefore their economic value should primarily belong to them. Trading venues therefore should not be considered to be able to own the prices in an economic sense. Trading venues should be considered as service providers to the transacting parties which must publish prices on a timely basis and within the limits set by regulation. In this context ESMA should firstly and critically review the price schedules provided by trading venues and in particular encourage that there is no unjustified price premium for real time trading data. Real time trading data prices should be priced essentially at the same level as a delayed data. The cost of production and dissemination/delivery of trading data in (near) real time is not an argument for charging higher prices than for delayed data. By definition trading is real time and trading data therefore is produced and the corresponding data is managed real time. Twenty years ago in a still paper dominated world, the production and dissemination of real time data may have been a technological and vastly expensive challenge compared to traditional delayed data publication in the newspapers. Not anymore today as we live in an internet based world in which the normal standard of technology and delivery of information is real time.

With this caveat, we accept that the production and distribution of high quality market trading data as well as the consumption thereof involve costs. In order to clearly understand the various offerings and their costs more standardised disclosure requirements for all trading venues as regards trading data license content and fee schedules is needed. At a minimum, ESMA needs to insure that the prices are displayed in a one for one standard allowing a true comparison of net trading fees of different venues on an instrument by instrument (ISIN by ISIN) basis. In particular, bundling of price information for trading data with price information on other services such as research, data, and in particular index products should not be allowed. Such price information should be displayed separately. Also price

information on trading data should clearly differentiate on an ESMA standardized basis by different volume bands (1 instrument to n number of instruments) as well as speed of delivery (real time – delayed- end of day (EOD)- Later than EOD).

Costs for the buyside user – besides internal operating costs - incur through the fact that multiple layers of data administration license policies (data contracts) as well as the corresponding data prices policies levied by the data sources – the trading venues - are complex. For example, more and more stock exchanges require now direct contractual relationships with endusers while previously, the users main data vendor (e.g. ThomsonReuters), managed the contractual relationship with the stock exchanges data sources. Fragmentation of markets due to such behavior leads to additional administration, legal and other cost (e.g. translation) on the user side given that there are over 70 trading venues in the EU alone. Furthermore, ESMA should also be aware that trading venues and market data vendors often use a combination of modification of data licenses by “slicing and dicing” the usage option in order to be able to charge for data already delivered to the client, in addition to direct price increases. For example, stock exchanges as providers of derived trading data in the form of indices redefine it product offerings and increase prices, sometimes like in the case of STOXX leading to 70 or more percent increase in data source cost. STOXX also changed the scope of the data policies from “Europe” to “Global” and increased prices thereby at the same time as users did not want the global index family but were interested mainly in the well-known European indices only .Also it is not possible to obtain index data for a single index but usually you have to buy the full index family package. The users are usually not able to resist these tactics because they need the trading and index data of a specific stock exchange or other trading venue.

Q155. Are there any other possible requirements in the context of transparency/disclosure to ensure a reasonable price level?

In the end, competition is the only means to ensure reasonable price levels. Given that there are monopolies for many data, this cannot be ensured at all circumstances. Also technology and license barriers to use trading venue data independent of specific data vendor systems need to be broken down to prevent monopolies. A case at point is the prevention of matching data in internal systems with the help of widely used securities identifiers. For example, the RIC code provided by ThomsonReuters - a leading identifier on tradable equity - cannot be used effectively for matching trade data in other vendor information systems such as Bloomberg or Morningstar. A recent EU competition commitment decision unfortunately failed to allow for a sufficiently broad scope of matching services (cf. CASE COMP/D2/39.654 – REUTERS INSTRUMENT CODES (RIC SYMBOLS)). The decision is now challenged in the European courts.
ESMA should support the efficient use of trading data in all systems throughout the value chain of asset management and provide that trade and instrument identifiers shall be used license and fee free.

Q156. To what extent do you think that comprehensive transparency requirements would be enough in terms of desired regulatory intervention?

Full and standardised transparency of price listings and changes are only a starting point as described above. At a minimum standard disclosure of data license content needs to accompany the relevant pricing disclosure.

Q157. What are you views on controlling charges by fixing a limit on the share of revenue that market data services can represent?

We think that this option may be helpful if Option A does not succeed. A meaningful cap on the share of revenue, however, needs to encompass not only the provision of trading data but should also include bundled and derived data, especially stock exchange index data products.

Q158. Which percentage range for a revenue limit would you consider reasonable?

No detailed answer is possible. The impact of the regular index market data cost increases on the buyside is probably of higher importance compared to price increases on stock exchange real time trading data feeds. Given the importance of index revenues for trading venues they should not be excluded from the definition of the market data services subject to the revenue share cap. The limit should be set in a way in order to concentrate trading venues on their core business of providing trading services. It definitely cannot be accepted that trading venues which fulfill a public utility function became market data vendors in their own right and which make more money from data than from trading. A case at point is Deutsche Börse which is proud of making more money from index, trading and other market data than from stock trading (cf. Interview CEO Francioni - Die Welt 18.2.2010, p.22). Based on the own admission of the stock exchange, we would like to repeat that we expressly disagree with the analysis and the recommendation of the trading venue commissioned OXERA report that there is no justification for regulating venues data prices.

Q159. If the definition of "reasonable commercial basis" is to be based on costs, do you agree that LRIC+ is the most appropriate measure? If not what measure do you think should be used?

Yes

Q160. Do you agree that suppliers should be required to maintain a cost model as the basis of setting prices against LRIC+? If not how do you think the definition should be implemented?

Yes

Q161. Do you believe that if there are excessive prices in any of the other markets, the same definition of "reasonable commercial basis" would be appropriate, or that they should be treated differently? If the latter, what definition should be used?

Yes

Q162. Within the options A, B and C, do you favour one of them, a combination of A+B or A+C or A+B+C? Please explain your reasons.

Option A should be the one to start with including the improvements suggested above. If market prices do not improve further measures in particular a combination of A+B (with B covering all market data services, including indices) should be pursued in the future.

Q163. What are your views on the costs of the different approaches?

C is more complex than A and therefore more expensive. B involves the least costs as it simply needs a limit to be set in regulation and corresponding compliance checks by the supervisory authorities. Trading venues would not need to adapt their data licences and price schedules or disclosure thereof as they could simply be required to redistribute to clients on a pro-rata basis the illegal excess revenue above the threshold in the following year. Option B may lead to somewhat higher trading fees but as competition for liquidity among venues and market participants is very strong that is an acceptable risk.

Q164. Is there some other approach you believe would be better? Why? Per-user pricing model of market data

The per user-model is a welcome option to reduce the current multiple charging or the provision of the same data through multiple channels. However it still entails complicated licenses which may lead to additional cost, in particular excessive onsite audits. Therefore additionally a single enterprise license covering all data and all delivery channels is required.

Q165. Do you think that the offering of a 'per-user' pricing model designed to prevent multiple charging for the same information should be mandatory?

The offer should be mandatory to have an additional option to choose from for the client.

Q166. If yes, in which circumstances?

See Q165.

7. Commodity derivatives

7.1. Financial instruments definition – specifying Section C6, 7 and 10 of Annex I of MiFID II

Q213: Do you agree with ESMA's approach on specifying contracts that "must" be physically settled and contracts that "can" be physically settled?

We agree that the criteria for the definition of a commodity derivative should be based on the term "physically settled". However, with respect to the scope of products covered, the Directive states that positions limits are to be implemented "in order to prevent market abuse, including cornering the market, and to support orderly pricing and settlement conditions including the prevention of market distorting positions." Based on these objectives, position limits should be focused on trading activity in the spot month for a predetermined set of commodity futures contracts.

The CFTC proposal relating to position limits specifically excludes contracts that are based on diversified commodity indices because they previously determined that such contracts do not "involve a separate and distinct exposure to the price of a referenced contract's commodity" price. This specific exclusion should apply under the MIFID definitions.