



European Securities and  
Markets Authority

## **Reply form for the Consultation Paper on MiFID II/ MiFIR review report on the transparency re- gime for non-equity and the trading obligations for derivatives**



10 March 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 non-equity instruments and the trading obligations for derivatives 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\_NQT\_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\_NQT\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_CP\_MIFID\_NQT\_ESMA\_REPLYFORM or

ESMA\_CP\_MIFID\_NQT\_ANNEX1

### **Deadline**

Responses must reach us by **19 April 2020**.

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



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

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

### ***Data protection***

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



## General information about respondent

Name of the company / organisation	Bundesverband der Wertpapierfirmen
Activity	Investment Services
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

## Introduction

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

<ESMA\_COMMENT\_CP\_MIFID\_NQT\_1>

The Bundesverband der Wertpapierfirmen e.V. (bvf) is a trade association promoting the common professional interests of securities trading firms, market makers and investment firms with various other business models throughout Germany. In this capacity, we expressly welcome the possibility to comment on ESMA's Consultation Paper on MiFID II/ MiFIR review report on the transparency regime for non-equity and the trading obligations for derivatives. However, this time, we did comment on questions six and seven only, which we consider to be of particular importance for our member firms, the trading venue landscape and the continuity of the various securities exchanges throughout Germany.

<ESMA\_COMMENT\_CP\_MIFID\_NQT\_1>



**Q1. What benefits or impacts would you see in increased pre-trade transparency in the different non-equity markets? How could the benefits/impacts of such pre-trade transparency be achieved/be mitigated via changes of the Level 1 text?.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_1>  
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**Q2. What proposals do you have for improving the level of pre-trade transparency available? Do you believe that the simplification of the regime for pre-trade transparency waivers would contribute to the improvement of the level of pre-trade transparency available?**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_2>  
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**Q3. Are you supportive of ESMA's proposal to delete the pre-trade SSTI-waiver? Would you compensate for this by lowering the pre-trade LIS-thresholds across all asset classes or only for selected asset classes? What would be the appropriate level for such adjusted LIS-thresholds? If you do not support ESMA's proposal to delete the pre-trade SSTI-waiver, what should be the way forward on the SSTI-waiver in your view?**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_3>  
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**Q4. What are your views on the use of the SSTI for the SI-quoting obligations. Should it remain (Option 1) or be replaced by linking the quoting obligation to another threshold (e.g. a certain percentage of the LIS-threshold) (Option 2)? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_4>  
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**Q5. Would you support turning the hedging exemption into a limited negotiated trade waiver? If so, would you support Option 1 or Option 2? If not, please explain why.**

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**Q6. Do you agree with ESMA’s observations on the emergence of new trading systems and the proposed way forward requiring a Level 1 change and ESMA to issue an Opinion for each new trading system defining its characteristics and the transparency requirements? Would you have suggestions for the timeline and process of such Opinions? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_6>

We do not agree with ESMA’s generalized conclusion that “The description of trading systems in Annex I of RTS 2 does not appear to provide the necessary flexibility to accommodate market developments”. In fact, to be able to catch up with new developments and innovations in the trading venue landscape, was one reason – and it clearly reflects the will of the legislator – why the “catch all” category “trading system not covered up by first 5 rows” was designed in an open and flexible way, not only with respect to its scope (“Description of system”, which includes “hybrid system(s)” as well as “system(s) where the price determination is of a different nature”) but also with respect to the pre-trade transparency requirements (“Information to be made public”).

This said, we agree with ESMA that certain new developments also might raise “potentially novel regulatory issues (...) including with respect to pre-trade transparency”. However, we are not convinced whether the proposed solution based on ESMA’s Opinion regarding the “definition (of new systems) and the pre-trade information to be made public” is either feasible or desirable. Here, our concerns are twofold:

Our first concern refers to general legislative legitimacy considerations. The definition of trading systems for a regulatory purpose has a far reaching market-structural impact and it is at least doubtful whether such a competence should be transferred to a body whose main purpose is regulatory intervention and as an agency has only limited legitimacy in the field of legislation.

If such an Opinion-based approach should be implemented nevertheless, it would be of paramount importance that such an opinion making process would not be a decision made by ESMA in isolation but would involve due public consultation and stakeholder involvement, e.g. in form of a standing consultative committee.

However, this leads to our second concern which refers to the aspect of practicability. The proposed process would inevitably add an additional level of complexity to the exiting, often overly detailed and prescriptive regulatory framework while one of the core objectives of the MiFID II / MiFIR review should be simplification. It is further unclear, whether such an “Opinion” issued by ESMA would be required prior to a new system becoming operational and how the “novelty” – compared to existing systems – should be defined. Therefore, we strongly suggest that if such a process should be implemented despite our reservations, ESMA should become active and issue an Opinion only where new trading systems which would initially fall into the “trading system not covered up by first 5 rows” category exceed a certain to be defined relevance threshold which would justify regulatory intervention. Furthermore, the approach should be clearly “forward looking” only and should not try to reregulate existing trading systems which in the past have not given reason to regulatory concern.

In summary, while we acknowledge that technological changes in the trading environment are further accelerating and therefore, we have some understanding that ESMA desires to be able to react to changes in the trading landscape in a more timely way, we still would conclude for now that the concerns outweigh the potential merits of the process proposed based on a far reaching authorization of ESMA. We therefore think that the current process of – if need be – amending RTS 2 in a due legislative process (which could be based on a sufficiently short periodic review process) should be maintained.

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_6>

**Q7. Do you agree with the proposal for the definition of hybrid system? Are there in your view trading systems currently not or not appropriately covered in RTS 2 on which ESMA should provide further guidance? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_7>

While we accept the need to periodically review the typology of market models as defined in Annex 1 of RTS 2 in order to keep track with the emergence of new trading systems (as already discussed in our answer to Question 6), adjustments should be made by introducing new categories of trading systems (as it was already the case with the “request-for-quote trading system” and the “voice trading system”), leaving the proven “catch all” category of “trading systems not covered by first 5 rows” (which as matter of convenience is often referred to as “hybrid system” category but in fact covers not only hybrid – in the sense of combined – systems but also systems with a “price determination process (...) of a different nature”) untouched in order not to unduly hinder innovation and – equally important – not to jeopardize the continued future existence of well established, legally and regularly sound market models which currently fall into this category.

We further cannot follow ESMA’s conclusion that “a trading system that falls within two or more of the five rows (...) does not qualify as a hybrid system”. Such an assumption would clearly contradict the wording of RTS 2: “a hybrid system falling into two or more of the first five rows...”. Therefore, e.g. a combination of a “periodic auction trading system” with a “continuous order book trading system” – without doubt – would qualify as a “hybrid system for the purpose RTS 2, Annex I, Row 6. However, where the combination of different trading systems is purely sequential in nature – as in the example given in the consultation paper, we agree that in such a case “adequate information” should be best understood by the (sequential) application of pre-trade transparency obligations as defined in the relevant rows of RTS 2, Annex I.

Furthermore, to the extent that ESMA talks in a critical tone about “significant leeway to trading venues to decide on the level of pre-trade-transparency” (paragraph 92) and “bespoke pre-trade transparency obligations” (paragraph 95), this gives the impression of arbitrariness, where we see rather potential implementation deficits of the existing rules than a structural deficiency of RTS 2, Annex I. In so far, the definition of adequacy of information to be made public should not be left to the trading venue alone but be also monitored and assessed by the responsible NCA who grants a trading venues authorization. In so far, we would be supportive for any clarification if needed.

We would also like to emphasize that market models falling into the “trading systems not covered by first 5 rows” category, remain of significant importance for trading on all German exchanges and remain the prevailing form of trading aside from continuous open limit order book trading.

In this context, it should be further mentioned that securities exchanges in Germany operate within a clearly defined dense legal framework governed by public law, whereby each market model (and changes of existing market models), including provisions on pre-trade transparency, need to be authorized by an Exchange Council (whose members are elected on a periodic basis) and require a final approval by the federal securities exchange supervisory authority (as the responsible NCA) of the federal state in which the securities exchange is located.

While they might differ in nuances, the general characteristic of these long established market models could be described (technically, not in the legal sense of RTS 2, Annex 1) as auction based systems with market maker support, whereby investment firms are assigned to be responsible for the management of order books for specific financial instruments (equities and non-equities alike). These order book mandates enclose high standard performance requirements in terms of the frequency and quality of published quotes, strict neutrality ensured by close monitoring by independent publicly authorized trade surveillance offices (“Handelsüberwachungsstellen”) and the obligation to provide liquidity by employing an investment firms’ own capital on a frequent and predictable basis.

It should also be noted that, partly as a result of the design of “best execution” requirements introduced with MiFID I and extended to non-equity asset classes by MiFID II / MiFIR (with the speed of execution together with the overall price being the core benchmark for “best execution” when executing retail orders), the importance of market making activities within these systems has grown continuously and significantly and in particular in less liquid instruments, self-dealing today is the predominant form of order execution.

In a legal sense, for the purpose of RTS 2, Annex I – and this needs to be emphasized – these market models are not “hybrid systems” but “system(s) where the price determination process is of a different nature”, in particular because the order-, respectively auction driven component lacks the qualifying criteria “without human intervention” (which became part of the definitions by a clear legislative intent to narrow the application of auction trading systems) and because published quotes in the strict legal sense usually remain “indicative” in nature. However, there are strict rules to insure that the pre-trade information made available is of high quality and reflects prevailing market condition, not only on the particular exchange but



– if applicable – also might include real-time information from reference markets like Xetra or the home markets in case of foreign securities traded.

Therefore, it would be clearly inappropriate to require these markets to fulfill pre-trade requirements for categories of trading systems which do not formally apply to them and it remains crucial that the flexibility of the current definition of pre trade requirements for “trading systems not covered by first 5 rows” remains unchanged– following the original legislative intent. Otherwise, this could lead to unnecessary and expensive technical and legal adjustments or, in last consequence, could even threaten the future existence of long-established market models, which have historically proven their resilience even in the most difficult market phases such as during the financial crisis and have not given rise to any regulatory concern.

Therefore, we emphatically urge ESMA not to change the proven, sound and resilient framework for “trading systems not covered by first 5 rows”, including “hybrid systems”, but – if need be – to address concerns with respect to newly emerging trading systems by extending the market model typology by defining specific new categories as “lex specialis” with appropriate pre-trade transparency obligations for these new types of trading.

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_7>

**Q8. Do you agree with ESMA’s proposal to require SIs to make available data free of charge 15 minutes after publication? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_8>

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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_8>

**Q9. Would you see value in further standardising the pre-trade transparency information to increase the usability and comparability of the information? Please explain.**

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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_9>

**Q10. Do you agree with ESMA’s assessment of the level of post-trade transparency and with the need of a more streamlined and uniform post-trade regime which does not include options at the discretion of the different jurisdictions? If not, please explain why and, where available, support your assessment with data.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_10>

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**Q11. Do you agree with this proposal? What would be the appropriate level of such a revised LIS-threshold in your view?**

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**Q12. In your view, should the real time publication of volume masking transactions apply to transactions in illiquid instruments and above LIS waiver (Option 1) or to transactions above LIS only (Option 2 and Option 3). Please elaborate. If you support another alternative, please explain which one and why.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_12>  
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**Q13. Do you agree with the publication of the price and volume of all transactions after a certain period of time, such as two calendar weeks (Option 1 and 2) or do you support the two-steps approach for LIS transactions (Option 3)? Please explain why and provide any alternative you would support. Which is the optimal option in case a consolidated tape would emerge in the future?**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_13>  
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**Q14. Do you agree with ESMA's proposed way forward to issue further guidance and put a stronger focus on enforcement to improve the quality of post-trade data? Are there any other measures necessary at the legislative level to improve the quality of post-trade data? What changes to the transparency regime in Level 1 could lead to a substantial improvement of data quality?**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_14>  
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**Q15. What would be the optimal transparency regime to help with the potential creation of a CTP?**

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**Q16. Do you agree with ESMA's above assessment? If not, please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_16>  
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**Q17. Are you of the view that the interpretation of TOTV should remained aligned for both transparency and transaction reporting? If not, please explain why.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_17>  
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**Q18. Which of the three options proposed, would you recommend (Option 1, Option 2 or Option 3)? In case you recommend an alternative way forward, please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_18>  
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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_18>

**Q19. What is your view on the proposal to delete the possibility for temporarily suspending the transparency provisions? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_19>  
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**Q20. Do you have any remarks on the assessment of Article 28 of MiFIR? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_20>  
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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_20>

**Q21. Do you have any views on the above-mentioned criteria and whether the criteria are sufficient and appropriate for assessing the liquidity of derivatives? Do you consider it necessary to include further criteria (e.g. currency)? Do you consider that ESMA should make use of the provision in Article 32(4) for asset classes currently not subject to the trading obligations? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_21>  
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**Q22. Do you agree that a procedure for the swift suspension of the trading obligation for derivatives is needed? Do you agree with the proposed procedure? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_22>



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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_22>

**Q23. Do you have a view on this or any other issues related to the application of the DTO?**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_23>  
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**Q24. Do you have any views on the functioning of the register? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_24>  
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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_24>

**Q25. Do you agree that the current quarterly liquidity calculation for bonds is appropriate or would you be of the view that the liquidity determination of bonds should be simplified and provide for more stable results? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_25>  
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**Q26. Do you agree with ESMA proposal to move to stage 2 for the determination of the liquidity assessment of bonds? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_26>  
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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_26>

**Q27. Do you agree with ESMA proposal not to move to stage 2 for the determination of the pre-trade SSTI thresholds for all non-equity instruments except bonds? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_27>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_CP\_MIFID\_NQT\_27>

**Q28. Do you agree with ESMA proposal to move to stage 2 for the determination of the pre-trade SSTI thresholds for bonds (except ETCs and ETNs)? Please explain.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_28>  
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<ESMA\_QUESTION\_CP\_MIFID\_NQT\_28>

**Q29. What is your view on the current calibration of the ADNA and ADNT for commodity derivatives? Are there specific sub-asset classes for which the current calibration is problematic? Please justify your views and proposals with quantitative elements where available.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_29>

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**Q30. In relation to the segmentation criteria used for commodity derivatives: what is your view on the segmentation criteria currently used? Do you have suggestions to amend them? What is your view on ESMA's proposals SC1 to SC3? In your view, for which sub-asset classes the "delivery/cash settlement location" parameter is relevant.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_30>

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**Q31. What is your view on the analysis and proposals related to the pre-trade LIS thresholds for commodity derivatives? Which proposal to mitigate the counterintuitive effect of the current percentile approach do you prefer (i.e. keep the current methodology but modify its parameters, or change the methodology e.g. using a different metric for the liquidity criteria)? Please justify your views and proposals with quantitative elements where available.**

<ESMA\_QUESTION\_CP\_MIFID\_NQT\_31>

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