Securities and Markets Stakeholder Group

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ADVICE TO ESMA

Transparency and trading obligations (equities) aspects of the Consultation Paper and Discussion Paper on MiFID II/MiFIR

I. Executive summary

The MiFIR and MiFID II constitute a significant step on the road to creating a standardised and unified capital market across the European Union, with improved integrity and transparency. To achieve those goals, ESMA has been mandated to draft both Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) as part of assisting the European Commission with its advice.

One of the main tasks of the SMSG is to provide a high level advice to ESMA, facilitating the preparation of all standards and proposals of delegated acts. Taking that into account and also a short timeframe, the SMSG decided to skip all detailed and technical questions, and to limit itself to principle-based ones only.

While preparing answers for the questions selected under the above conditions, the SMSG took a special care to ensure appropriate regulation with the aim of achieving efficiently and orderly functioning financial markets, preventing regulatory arbitrage and promoting a level playing field for all market participants, including investors.

Although the SMSG supports almost all of ESMA's proposals, the SMSG has tried to highlight the areas where different interpretations could result from the current wording of those proposals, with the aim of helping to achieve better clarity of wording. In some cases the SMSG proposes small modifications or even alternative solutions with the aim of building a strong and unified market, with the highest possible level of protection of both consumers and other market participants.

II. Explanatory remarks

1. The final legislative texts of the new Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) were approved by the European Parliament on 15 April 2014 and by the European Council on 13 May 2014. They were published in the Official Journal of the European Union on 12 June 2014 and entered into force on the twentieth day following their publication.

2. The European Securities and Markets Authority (ESMA) received a formal request (mandate) from the European Commission (Commission) on 23 April 2014 to provide technical advice to assist the

Commission on the possible content of the delegated acts as required by several provisions of MiFID II and MiFIR. ESMA is required to provide technical advice by no later than six months after the entry into force of MiFID II and MiFIR, i.e. by 2 January 2015.

3. MiFID II and MiFIR require ESMA to develop draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) in several areas for submission to the Commission by, respectively, 12 and 18 months from entry into force of the Directive and the Regulation, i.e. by 2 July 2015 and 2 January 2016 respectively.

4. Even before publication of MiFID II and MiFIR, on 22 May 2014 ESMA published two documents: "Consultation Paper. MiFID II/MiFIR" and "Discussion Paper MiFID II/MiFID" with discussion, proposals and several questions concerning all the delegated acts and standards to be prepared.

5. In the Consultation Paper (CP) questions on transparency and trading obligations for equities and other equity-like financial instruments are collected in the following sections:

   3.1. Liquid market for equity and equity-like instruments (Q109-Q120)

   3.3 The definition of systematic internaliser (Q122-Q127)

   3.4. Transactions in several securities and orders subject to conditions other than the current market price (Q137)

   3.5. Exceptional market circumstances and conditions for updating quotes (Q138)

   3.6. Orders considerably exceeding the norm (Q139)

   3.7. Prices falling within a public range close to market conditions (Q140)

6. In the Discussion Paper (DP) those questions are collected in the following sections:

   3.1. Pre-trade transparency – Equities (Q45-Q73)

   3.2. Post-trade transparency – Equities (Q74-Q90)

   3.3. Systematic Internaliser Regime – Equities (Q91-Q94)

   3.4. Trading obligation for shares (Article 23, MiFIR) (Q95-Q97)

   and partially:

   3.12. Transparency Requirements for the Members of ESCB (Q176-Q177)

   3.13. Article 22, MiFIR: Providing information for the purposes of transparency and other calculations (Q178-Q184)

7. Generally all the above questions may be split into two categories: (i) high-level/principles-based questions and (ii) technical questions (e.g. exact numerical thresholds and limits etc.). The main task of the Securities and Markets Stakeholder Group (SMSG) is to provide advice on high-level topics leaving more technical and detailed questions to be dealt with by other, more technically oriented

consultative groups. Taking this into account as well as the short deadline for answering this multitude of questions, the SMSG has concentrated its work on the first category, i.e. the principles-based questions.

III. Consultation Paper

Liquid market for equity and equity-like instruments (CP, Section 3.1)

8. A first quick reading of Section 3.1 may give a false impression that the definition of a “liquid market” is important for systematic internalisers (SI) only. Therefore, a more careful and scrupulous reading is necessary. This shows that Article 2(7)(17)(b) of MiFIR defines a “liquid market” for the purposes of Articles 4, 5 and 14. Among these articles however, only Article 14 relates solely to systematic internalisers. Article 4 deals with waivers to make public the information referred to in Article 3(1) for equity instruments for market operators and investment firms operating a trading venue. And Article 3 is on pre-trade transparency requirements for trading venues, which means that the definition of a “liquid market” is very important for transparency of all trading venues, including also the regulated markets.

9. The SMSG also notes that there is a link between the MiFIR definition of a liquid market, and the use of the same definition in the CSD-Regulation. CSD-R Article 7(14)(d) requires ESMA to “take into account the criteria for assessing liquidity under Article 2(1)(17) of MiFIR” when determining the post-trade settlement discipline regime, with the aim of avoiding a one-size-fits-all approach for SMEs or less-liquid securities, which may be detrimental to their liquidity and increase their cost of capital. It is not clear from the CSD-R Level 1 text or ESMA’s DP whether the MiFIR definition of liquidity (for the purposes of transparency requirements) and CSD-R definition (for the purposes of calibrating the buy-in procedures) will be the same or not. If ESMA uses the same definition, then we suggest it should perform an impact analysis to determine whether the thresholds are appropriate for use in calibrating the CSD-R settlement discipline regime.

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

10. This question may be split up into two parts. The second part is very technical and is about exact thresholds that should be meticulously calibrated. But the first part is much more general and principle-based, as it is about changing the current principle of applying four partially interchangeable liquidity criteria, namely: (i) traded daily, (ii) free float, (iii) average daily number of transactions, and (iv) average daily turnover. Under MiFID I only one of the criteria (iii) and (iv) had to be met, in combination with both criteria (i) and (ii), for a share to be deemed as liquid. ESMA is of the view that under MiFIR all four criteria should be treated cumulatively, which means that all four of them should be met.

11. The SMSG agrees with such an approach, as criteria (iii) and (iv) are not interchangeable but rather complimentary. The small number of transactions (or trades) could in themselves still contain a large number of individual shares being traded on behalf of a larger number of clients. In extreme cases one single transaction could result in a very high daily turnover, but obviously a share with only one big transaction traded per day cannot be called “liquid”. Therefore, for a share to be called liquid both criteria (iii) and (iv) should be met cumulatively.

12. However such a change, without a simultaneous recalibration of the current thresholds, might result in more shares being labelled as illiquid (if they meet only one of those two criteria rather than both). Consequently, transparency requirements for shares could drop substantially. From this reasoning follows that the specific individual thresholds should also be lowered in order to keep unchanged transparency levels.

13. There is also a further question on the free float that should also be considered. There are several cases when large blocks of shares, even if admitted to trading on a trading venue, are being held by long term investors in custody accounts without being traded, even for years. Definitely these shares cannot constitute part of the free float. This happens often with shares held by the State (and they are not traded at all) or other significant shareholders. In some cases up to 90% or even more of shares may be blocked in practice and almost never traded, which means that only 10% or less of shares admitted to trading are traded in practice and constitute a real free float. Therefore only those shares that are actually traded should be counted for the free float. For example, at the Warsaw Stock Exchange a free float is calculated as the number of shares registered for trade, but reduced by the number of "illiquid" shares, e.g. shares held by specific group of investors or bought with a specific aim (not for trade).

14. The above consideration on the free float is valid not only for shares, but for all other equity-like instruments (and for non-equities also).

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.

15. This is a tricky problem, as not all issued shares necessarily can be converted into depository receipts (DR), and those shares used to create DRs are not traded in themselves but are rather "locked up" and deposited. Additional questions to be asked in the different markets, are whether the holder of a DR can ask for its cancellation/conversion back to the underlying share or not, as that may significantly, over time, change the number of outstanding DRs. Another question to be raised relates to the proportion of given shares converted into DRs, as it is not always 1:1, so the number of DRs may differ substantially from the number of underlying shares.

16. All this leads to the conclusion that the number of shares issued in the issuer's home market would not necessarily give a correct picture of the free float as such. Therefore it makes more sense to only look at the number of DRs outstanding at any given time as the maximum available free float in DRs. This may include a free float of shares issued in the home market, but only those shares that may be easily converted into DRs, taking into account the conversion ratio. Additionally it should be taken into account that some shares may be converted into DRs without the shares actually, as such, being traded in the issuer's home market.

17. Therefore an assessment independent of the underlying equity could be more suitable. Perhaps the proper solution would be to ask the depositary banks to regularly publish the number of DRs in issue, tracking the creation and redemption changes. This quantity can then be used along with the price of the DR as a measure of the free float market capitalisation of the DR independent of the underlying equity.

Q111. Do you agree with the proposal to set the liquidity threshold for depositary receipts at the same level as for shares? Please provide reasons for your answer.

18. On principle, the SMSG agrees with the ESMA proposal, but other thresholds for the average daily number of transactions could be examined more thoroughly, as the proportion of shares converted into depository receipts may differ from the 1:1 proportion.

Q113. Do you agree that the criterion of free float [for ETFs] could be addressed through the number of units [of ETFs] 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.

19. The answer to this question should take into account the challenge as described in our answer to Q109. The number of units issued for trading might as such be an overestimation of the free float , as high numbers of units might be "frozen" if held by long term investors. On the other hand, the free float for ETFs (in this case units issued for trading) is not an exhaustive characteristic of an ETF's liquidity, given that the liquidity of an ETF depends on the liquidity of the underlying basket. ETFs are designed by issuers in a way that they are always liquid instruments. The defining characteristic of a liquid ETF is the presence of at least one market maker that supports its trading.

Q116. Can you identify any additional instruments that could be caught by the definition of certificates under Article 2(1)(27) of MiFIR?

20. In May 2007 a Report on the Proportionality Principle in the European Union[1], an external study commissioned by the European Commission in 2006, was published. On pp. 8, 20, 30 and 67 "depository certificates" ("certificaten van aandelen" in Dutch) are discussed, which escape the definition of depositary receipts specified in Article 4(1)(45) of MiFID II, as they represent ownership of the securities of a domiciled issuer (instead of a non-domiciled one specified in MiFID II). They are known in Benelux countries, but are used almost only in The Netherlands, and they were devised to break connection between shares and voting rights, as they are issued without voting rights that remain connected with the underlying shares deposited at a "stichting" (i.e. some kind of a foundation). They were typically used for management incentive programmes in unlisted companies, but have also been used for listed vehicles. They are however not very popular anymore as they are seen as too protective and thereby reducing shareholder value. There have also been some legal changes that give the holder of "certificaten" some protection, so they cannot be diluted etc. As those depository certificates escape the definition of depository receipts, it should be checked whether they are caught by the definition of certificates under Article 2(1)(27) of MiFIR.

Q119. Do you agree that the criterion of free float could be addressed through the issuance size? If yes, what *de minimis* issuance size would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.

21. The SMSG agrees with the ESMA proposals for the free float of certificates to be addressed through the issuance size. However all the consideration on the free float of shares and depositary receipts presented above should be taken into account.

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[1] Report on the Proportionality Principle in the European Union,
http://ex.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf

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?

22. The SMSG advises strongly that such a discretion permitted to Member States should be retained for shares and that in addition it should also be extended to equity instruments other than shares, as markets (size, liquidity, complexity etc.) and variety of financial instruments differ considerably between more and less mature markets in the European Union.

The definition of systematic internaliser (CP, Section 3.3)

Q123. Do you support calibrating the threshold for the systematic and frequent criterion on the liquidity of the financial instrument as measured by the number of daily transactions?

23. Without opining on the actual levels and details of thresholds, the SMSG supports the principle of calibrating this threshold based on the number of daily transactions, as it seems to be the best measure of frequency in this context. However a question arises what will happen when during some period demand for a specific financial instrument disappears. Will the investment firm lose its status as a systematic internaliser (SI)? A solution in such circumstances could be in exercising the opt-in possibility, but it would require constant tracking of the total liquidity by systematic internalisers.

Q125. Do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of shares traded? Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.

24. The first question that should be answered here results from the wording of Article 4(1)(20) of MiFID II, and which could be understood in different ways. ESMA is of the opinion that "the total trading of the investment firm should include all transactions executed in any capacity and executed on any trading venue or OTC" and "the size of total trading in the Union should include trading carried out OTC and on any EU trading venue for that financial instrument". The SMSG supports such an understanding as other interpretations could lead to strange results in some specific cases.

25. For the exact thresholds the ESMA's proposal is based on the turnover, calculated as quantity multiplied by price. The SMSG points out that the other proposal, based on the volume, i.e. number of shares/units traded, would be better as it is more neutral on price movements. As the thresholds discussed here are based on the percentage, both methods will give more or less similar results, but with strong price movements (and different or opaque OTC prices) the percentage of total turnover may be much more difficult to assess properly. Therefore out of two similar methods the less complex should be chosen, as at the same time it also helps in avoiding some difficulties arising from price movements (or even inaccessibility to exact price information).

Q127. Do you consider a quarterly assessment of systematic internaliser activity as adequate? If not, which assessment period would you propose? Do you consider that one month provides sufficient time for investment firms to establish all the necessary arrangements in order to comply with the systematic internaliser regime?

26. For the developed markets both periods (three months for assessment and one month for establishing necessary arrangements) look quite reasonable. However in less developed markets both those periods could be too short, especially the second one, especially as some inexperienced investment firms could require more time than just one month to establish all the necessary arrangements after entering into the systematic internaliser regime.

Transactions in several securities and orders subject to conditions other than the current market price (CP, Section 3.4)

Q137. Do you agree with the definition of portfolio trade and of orders subject to conditions other than the current market price? Please give reasons for your answer?

27. This question consists of two separate questions. The first one is about portfolio trades, i.e. transactions in several financial instruments traded in a single lot against a specific reference price. As it would be too complicated and practically impossible to apply all price conditions to all individual transactions within a lot with a high number of different instruments, it is natural that such trades could be exempted from strict requirements and this is why such a possibility is provided in Article 15(3) of MiFIR. The SMSG is of the opinion that some limitations should still be set to prevent abusive situations, e.g. combining only two trades into one artificial portfolio, not because it would actually constitute a real portfolio, but just to escape the stricter regime that two individual trades would separately fall under. While the SMSG does not propose an exact number it agrees that the proposed threshold of 10 financial instruments seems to be a reasonable way forward.

28. The second question is about "orders that are subject to conditions other than the current market price", as it is worded in Article 15(3) of MiFIR. The SMSG agrees with the explanations given by ESMA in point 5 on page 200 of the CP that there are some specific trades of that kind, and they are specified in point 2 of the Draft technical advice at page 201. However the wording of that advice is not fully clear, so there is a doubt whether in ESMA's proposal the three therein specified criteria are to be treated as individually sufficient or whether they should be applied on a cumulative basis. The SMSG is of the opinion that they should be individually sufficient, and thus proposes that the wording of the Draft technical advice should be improved to make such an understanding clear.

Exceptional market circumstances and conditions for updating quotes (CP, Section 3.5)

Q138. Do you agree with the list of exceptional circumstances? Please give reasons for your answer. Do you agree with ESMA's view on the conditions for updating the quotes? Please give reasons for your answer.

29. And again, this question consists of two questions. The SMSG supports the proposal for a non-exhaustive list of five exceptional market circumstances (individually sufficient) under which a systematic internaliser should be allowed to withdraw its quotes.

30. However the fifth condition (the total number and/or the volume of orders sought by clients exceeds the norm) should be revisited, as the second part of it (and where the systematic internaliser decides

to limit the number of transactions from different clients) might be interpreted in such a way, that SI could differentiate treatment of its different clients, e.g. execute all orders of one client, and only selected orders (or no orders at all) of another client. The SMSG is of the opinion that such a possibility would go against Article 15(1) of MiFIR, as it allows only for withdrawing quotes, and not for limiting in any way the number of transactions executed for SI's clients.

31. It should be remembered that systematic internalisers trade on their own account, so their resources are limited and they might be exposed to excessive risk of going out of those resources. This may be the case with strong price movements where all or almost all clients want only to buy or only to sell a specific financial instrument. To cope with such a risk an SI should be allowed to stop trading completely for some period of time, or to trade in one direction only – to buy the instrument if almost all its stock has been just sold, or to sell it when almost all financial resources assigned for trade have been spent. Therefore stopping the trade completely or one-sidedly is consistent with MiFIR, but possibility of selecting specific orders from specific clients to be executed would go against MiFIR as it could lead to discrimination of specific clients or groups clients.

32. When it comes to the second part of the question, the SMSG supports an explanatory specification of situations when a systematic internaliser should be able to update its quotes "as soon as market-wide or instrument-specific circumstances change or following any transaction executed with a client". However the SMSG considers it practically useful adding another possibility (individually sufficient) for systematic internalisers to update their quotes when no trade is executed for a specific time period. There are situations when no trade is executed simply because the spread between the quotes is too broad or in other ways not adjusted properly to the current market circumstances. Waiting too long for market conditions to change or for a transaction to be executed would not be the best solution, therefore a systematic internaliser should be allowed (or even encouraged) to "improve" its quotes with the aim of raising liquidity.

Orders considerably exceeding the norm (CP, Section 3.6)

Q139. Do you agree that each systematic internaliser should determine when the number and/or volume of orders sought by clients considerably exceed the norm? Please give reasons for your answer?

33. The SMSG supports the proposal that each systematic internaliser should determine such thresholds individually, as this is a subjective measure related with the SI itself, depending on its size, scale of business and several other individual conditions. However, all such thresholds should certainly be set out in writing and made available easily to clients and potential clients to avoid any possibility of their discriminatory treatment.

Prices falling within a public range close to market conditions (CP, Section 3.7)

Q140. Do you agree that any price within the bid and offer spread quoted by the systematic internaliser would fall within a public range close to market conditions? Please give reasons for your answer.

34. From the ESMA proposal one can devise that systematic internalisers would be allowed to execute orders almost freely at any price within their bid and offer quotes at their own preference. Such a freedom would lead to a practice of "price improvement" for their selected clients at their sole discretion, which is not compatible with the requirement to provide firm quotes and execute solely at

these quotes. This would not be fair but rather discriminatory, not only towards their clients but also towards trading venues. This could be a case, as according to Article 4(2)(a) of MiFIR, the reference price "shall be established by obtaining the midpoint within the current bid and offer prices of the trading venue". It should be noted that Article 15(2) of MiFIR authorises SIs to execute some orders at a better price, but "in justified cases" only. If there were no strict restrictions one could easily imagine a case where an SI executed all orders of its specific client at a price only one tick better than its publicly disclosed quotes. Such prices would naturally be worse for the SI, but not drastically worse, and this could be recognised as a hidden incentive for such a client. Definitely such a case would not fall under MiFIR condition of a "justified case".

35. It should be also noted that any price within the bid and offer spread quoted by the systematic internaliser does not necessarily mirror "a public range close to market conditions". "Public range" is stressed here as it may differ essentially from "market" conditions assessed in a specific situation of a specific systematic internaliser. Such internal (for that specific SI) "market" conditions might be even specified with an abusive aim, especially when the bid and offer spread is set very broadly. Therefore not all the prices inside such a spread should be recognised as public market conditions, but only those prices that are really close to the average market price at such a specific moment.

36. To prevent any possibility of such an abusive interpretation of market conditions and to limit the possibility provided by MiFIR to only well "justified cases" the SMSG presents another proposal where a price would fall within a public range close to market conditions if: (i) the price is set at the precise midpoint of the bid and offer spread of that SI (or is very close to that midpoint, but then it should be examined what could be defined as "very close"), or (ii) the price falls within the narrowest spread of all (or of the most important) trading venues, and not only within the broad spread of that specific SI.

37. The second condition (ii) specified above is consistent with the ESMA proposal formulated in the Discussion Paper (point 11 at page 96, under the topic "Prevailing market conditions"), "according to which a quote or quotes reflect prevailing market conditions when they are close in price to comparable quotes for the same share on other trading venues". Therefore not all SIs' quotes "fall within a public range close to market condition", but only those quotes which are close to quotes on other trading venues. Definitely quotes with a spread much broader that on other venues are not "comparable" to those other quotes, so not all prices inside such a broad spread could be named as "close to market conditions".

IV. Discussion Paper

Pre-trade transparency – Equities (DP, Section 3.1)

Q56. Do you agree that the same ADT classes should be used for both pre-trade and post-trade transparency? Please provide reasons for your answers.

38. The SMSG assumes this question to be principles-based, as it is not about specific thresholds, but about the general rule how those thresholds should be classified. The average daily turnover (ADT) is an important factor for several purposes and it is recognised broadly and universally. Therefore it is crucial to set all ADT classes in a clear and universal way for all their applications. That said, the con-

clusion is obvious: the same ADT classes should be used for both pre-trade and post-trade transparency.

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.

39. The answer to this question seems to be obvious, as turnover is one of the four criteria applied to measure liquidity. A specific financial instrument may be traded simultaneously on several trading venues (TD), but practice shows that only one of those TDs is the main one, with then the highest turnover, and other TDs are rather supplementary only. The SMSG supports also the ESMA explanations that it can easily use data received from TDs in order to establish the most relevant market and to measure the highest level of liquidity. This is a clear and easily understandable solution, so no other arguments are necessary.

Post-trade transparency – Equities (DP, Section 3.2)

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

40. The SMSG supports the ESMA's definition of "normal trading hours" on trading venues, specified as the market opening hours published by the market operator. Based on this information, all investors reasonably expect that their orders will be executed immediately just as long as the opposite order is present in the trading book. And if no opposite order is present, their orders will be displayed in the order book as ready for an immediate transaction. This is a natural way investors recognise trading hours, so this should be consistent with their formal definition.

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.

41. Article 6(1) of MiFIR requires market operators and investment firms operating a trading venue to make details of all executed transactions public as close to real-time as is technically possible. ESMA explains in the Discussion Paper that under current MiFID I regime post-trade information has to be available in any case within three minutes of the relevant transaction. Taking into consideration that most trading venues in the EU are operated with the use of advanced computer systems and transactions are executed within seconds only or even within nanoseconds, three minute delay might seem to be much too long. From the technical point of view for such order book systems, there should be no problem in displaying post-trade information also in seconds only, so shortening of the maximum permissible delay from 3 minutes to 1 minute could be well justified.

42. However, also having regard to the diversity of trading and execution systems operated within Europe, including hybrid markets, off-book on-exchange markets, OTC trades or when participants need to input trade reports manually for complicated portfolio transactions, for some participants involved in markets operating in this way, a move to 1 minute reporting may be challenging. As such ESMA may need to investigate whether in certain circumstances a longer delay would be appropriate.

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

43. ESMA explains that the current MiFID I regime allows for deferring publication of the transactions under two cumulative conditions, one of them specifying that only information on transactions between an investment firm that deals on its own account and a client of the investment firm may be deferred. Therefore ESMA proposes for such a condition to be retained which means that information on other large in scale transactions (e.g. between "normal" investors or clients on both sides of the transaction) could not be deferred. The SMSG agrees with ESMA's explanation that deferred publication would not be appropriate for those other types of transactions where offsetting trades are not required, as the delay would unnecessarily deny the market price-forming information.

44. However, the SMSG have some concern that this proposal might be inconsistent with the Article 7(1) of MiFIR which sets condition for deferred publication of the details of transactions based on their type or size. A thorough reading of the whole Article 7, and especially of the detailed conditions set in Article 7(2) may lead to the conclusion that "type and size" may be based only on classes of financial instruments or their liquidity profile, but not on the different types of investors being part of the transaction. If so, the answer to Q84 could be only negative.

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.

45. ESMA presents two options for adopting the CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets (CESR/10-802). In that advice, CESR proposed a radical and universal shortening of the deferral periods – with the maximum deferral until the end of third trading day after trade (for some classes of shares) shortened to the maximum deferral until the opening of trading on the next trading day if trade occurs after 15:00 (option A) or to the maximum deferral to noon of the next trading day (option B). Out of those two options the SMSG believes option B to be better as it gives some necessary flexibility for late transactions (executed at last trading hours), particularly in illiquid securities.

46. However some SMSG members are concerned that such a radical shortening of all deferral periods may not work adequately for shares of less-liquid/SME companies, for which three day deferred publication could be justifiable. On the LSE for example, whilst only 8% of delayed trades by value in the FTSE 100 are for periods longer than noon of the next day, in the FTSE Small Cap index, 74% of delayed trades by value are for longer periods. Therefore, such members would hesitate to support a regime which prevents investors from executing block trades against market makers, especially in SMEs. Consequently, longer delays (till the end of the second or third trading day) should be preserved for less-liquid securities/SME, to prevent a potential increase in the cost of capital for issuers and transaction costs for investors.

Systematic Internaliser Regime – Equities (DP, Section 3.3)

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

47. As to the principle, the SMSG agrees with maintaining the existing definition. A thorough analysis is presented in para 34-37 above, in the answer to Q140 of the Consultation Paper.

Trading obligation for shares (Article 23, MiFIR) (DP, Section 3.4)

Q95. Do you consider that the determination of what is non-systematic, ad-hoc, irregular and infrequent should be defined within the same parameters applicable for the systematic internaliser definition? In the case of the exemption to the trading obligation for shares, should the frequency concept be more restrictive taking into consideration the other factors, i.e. 'ad-hoc' and 'irregular'?

48. The SMSG fully agrees with the ESMA's opinion worded in point 6 at page 101 of the Discussion Paper, that lack of the definition "what is non-systematic, ad hoc, irregular and infrequent" may "raise the risk of lack of legal certainty in terms of interpretation and result in different interpretations across competent authorities".

49. However the SMSG also agrees with the ESMA's observation that ESMA is not mandated to specify those definition for the purposes of Article 23(1) of MiFIR, where two circumstances for trades characteristics are listed:

    (a) the trades are non-systematic, ad hoc, irregular and infrequent; or

    (b) the trades are carried out between eligible or professional counterparties and do not contribute to the price discovery process.

50. Article 23(3) of MiFIR mandates ESMA only to specify the underlined part above, namely "the particular characteristic of those transactions in shares that do not contribute to the price discovery process", but not to specify the other circumstances described above. Therefore the SMSG agrees with the ESMA's opinion that the only possible solution under such conditions is to apply here a reasonable interpretation that those thresholds are the same thresholds as those that are set for systematic internalisers. Consequently, more restrictive frequency concept cannot be applied here.

51. As a side-note, the SMSG would also like to point out a necessity of defining what constitutes an "internal matching system", since this is a key element of the trading obligation, but is not defined in MiFIR. If MiFIR is not clear, there is a risk, for example, that back-to-back trading would be allowed in bilateral systems. In the SMSG's opinion, this has all the characteristics of a trading venue's matching engine, but without a better definition it may be possible that BCN-type activity will continue to exist in the MiFID II world (despite rejection of the OTF as an equity trading venue). Therefore ESMA could consider issuing some guidelines to provide clarity on what is an internal matching system, or provide advice to the Commission on its own initiative.

Q96. Do you agree with the list of examples of trades that do not contribute to the price discovery process? In case of an exhaustive list would you add any other type of transaction? Would you exclude any of them? Please, provide reasons for your response.

Q97. Do you consider it appropriate to include benchmark and/or portfolio trades in the list of those transactions determined by factors other than the current valuation of the share? If not, please provide an explanation with your response.

52. The SMSG supports both lists as specified above with no item excluded from either of the lists. However there is an open question remaining in the SMSG's view whether those lists should be fixed or the examples listed there should be exemplary only and should constitute non-exhaustive lists. The non-exhaustive lists would leave some freedom and flexibility, but on the other hand would lead to the lack of legal certainty with future extensions.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

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