European Securities and Markets Authority

MiFID II/MiFIR Review Report

on the transparency regime for equity and equity-like instruments, the double volume cap mechanism and the trading obligations for shares

16 July 2020 | ESMA70-156-2682

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1 Executive Summary

Reasons for publication

This final report covers mandates under Article 52(1) to (3) of MiFIR, which require ESMA to submit a report to the European Commission on the impact in practice of the transparency obligations established pursuant to Articles 3 to 13 of MiFIR and, in particular, on the impact of the volume cap mechanism established under Article 5 of MiFIR. In order to provide for a comprehensive and meaningful assessment, ESMA has decided at its own initiative to also include an assessment of other key transparency provisions namely, the share trading obligation (Article 23 of MiFIR) and the transparency provisions applicable to SIs (Articles 14-21 of MiFIR).

Contents

The report below focuses on the transparency regime applicable to equity and equity-like instruments. The report analysing the transparency regime applicable to non-equity instruments will be published later.

This final report (transparency regime for equity and equity-like instruments) contains proposals aiming at simplifying the structure of the transparency regime while trying to improve the overall pre- and post-trade transparency available to market participants. It is structured as follows: after a brief introduction in Section 2, Section 3 starts with the proposals for the pre-trade transparency regime for equity and equity-like instruments (3.1). In particular, the ESMA recommendations concern three main aspects of the MiFIR regime: (i) the level of pre-trade transparency and the waivers, (ii) the definition of a liquid market and (iii) the emergence of new trading systems. Section 3.2 focuses on the transparency regime applicable to systematic internalisers while Section 3.3 covers the double volume cap mechanism. Section 4 analyses the post-trade transparency regime for equity and equity-like instruments both on- and off-venue and the transparency regime applicable to third-country transactions. Sections 5 and 6 close the final report with, respectively, the trading obligation for shares and the recent development of closing auctions.

Next Steps

This report is submitted to the European Commission and is expected to feed into any review of the transparency regime in MiFIR.

ESMA stands ready to provide any additional technical advice on the legislative amendments suggested in the report.

Acronyms used

ADT	Average daily turnover
AVT	Average value of transactions
ADTNE	Average daily number of transactions
CA	Competent Authority
CP	Consultation Paper
ESMA	European Securities and Markets Authority
LIS	Large in scale
MiFID I	Directive 2004/39 of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directive 85/611/EC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC
MIFID II	Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
MRM	Most relevant market in terms of liquidity
MTF	Multilateral trading facility
NCA	National competent authority
NT	Negotiated transaction
OJ	Official Journal
RM	Regulated market
RP	Reference price
SI	Systematic internaliser
SMS	Standard market size

2 Introduction

1. MiFID II/MiFIR requires the European Commission (EC), after consulting ESMA, to submit reports to the European Parliament and the Council reviewing many provisions in MiFID II/MiFIR. This report covers the mandate relating to the impact of the transparency obligations and, in particular, the impact of the volume cap mechanism described in Article 5 of MiFIR.

2. In order to help producing informed proposals of the issues to be considered and addressed in its report to the EC, ESMA published a Consultation Paper (CP) on 4 February 2020 that provided an initial assessment of the impact of the transparency obligations for equity and equity-like financial instruments and of the double volume cap (DVC) seeking stakeholders' views on some suggested amendments to the legal texts. The consultation period had been extended to give stakeholders more time to respond in light of the impact of the Covid-19 crisis on financial markets.

3. ESMA received around 50 responses to the CP. A summary of the responses received is provided in Annex II and the feedback from market participants is also described in each specific section below.

4. Regarding the more general feedback received, the responses received shows a wide diversity of approaches and perspectives amongst respondents who expressed sometimes opposite views on aspects of the MiFID II / MiFIR regime or, more generally, EU financial markets. For instance, regarding SIs, while some members expressed concerns about their growing market share and role and the lack of transparency of their activity, others describe SIs as an essential part of a well-functioning and efficient market.

5. If many respondents considered that MiFIR has generally fostered more transparency in the EU equity markets, many highlighted the many remaining issues regarding market data that should be addressed including (i) the price of the data, (ii) the quality of the data and (iii) the access to the data.

6. Some respondents insist on the increased internalisation of retail order flow after the implementation of MiFIR and invite ESMA to reflect possible ways to limit or revert this trend by, for instance, ensuring that trading venues' systems are not designed to cater to the needs of principal and high frequency traders only.

7. Some respondents consider that this review of the equity transparency regime arrives very early after the application of MiFIR while the industry and EU markets are still adapting to this major regulatory overhaul. The impacts of the new obligations are therefore maybe not all fully clear and in particular considering that this review occurs in the very particular context of both Brexit and Covid-19 crisis.

3 Pre-trade transparency regime for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments

3.1 ESMA's assessment of the pre-trade transparency framework

3.2 General approach and legal framework

8. Although transparency has increased for some instruments, in particular, those previously outside the scope of MiFID I, the overall objective of MiFID II / MiFIR to promote market transparency and a robust price formation process has not been fully achieved.

9. At the same time, to prevent disorderly markets, MiFID II provides for a degree of protection for market participants by including a number of waivers from pre-trade transparency available to trading venues. Following the analysis presented in the CP on the practical use of the waivers where ESMA noted that the level of transparency is still limited and that there is a clear prominence of the use of the large-in-scale (LIS) and order management facility (OMF) waivers, and the use of a complex combinations of waivers, therefore ESMA presented some ways to simplify the regime and improve transparency.

10. Following feedback from market participants from different sides of the spectrum on the practical use of waivers by trading venues, the importance of the LIS waiver seems to be clear. Given that the main purpose of the waiver regime is to protect market participants from adverse market movements following the execution of large orders, the CP proposed to only allow pre-trade transparency requirements to be waived under the LIS waiver.

11. In addition, the CP proposed to maintain the OMF waiver as an order in an OMF facility ultimately becomes pre-trade transparent and therefore contributes to the price formation process.

12. Finally, ESMA proposed to keep the waiver for negotiated trades (NTs) subject to conditions other than the current market price as this waiver caters for the execution of technical trades. It applies to transactions that are by design executed at a price which does not reflect the actual market conditions and the disclosure of pre-trade information for those trades would therefore not be of use for other market participants.

13. As a consequence of the above, ESMA asked for feedback regarding the possible removal of the reference price (Article 4(1)(a) of MiFIR) and NT waivers for liquid (Article 4(1)(b)(i) of MiFIR) and illiquid instruments (Article 4(1)(b)(ii) of MiFIR). The CP described this amendment as a possible option to increase transparency and to simplify the currently complex regime of pre-trade transparency waivers in MiFIR.

14. This change would require a change in Article 4 of MiFIR and the relevant RTS 1 provisions. Furthermore, this proposal would also make the DVC redundant, hence resulting in the deletion of Article 5 of MiFIR.

15. The CP also sought market participants' views on an alternative to the complete removal of the NT and reference price (RP) waivers. ESMA presented the option to allow trading under the NT and/or the RP waivers only for orders above certain sizes. The logic is that market participants ordinarily choose execution via, for instance, a RP waiver facility to avoid a potential negative price impact from trading on the lit market.

16. However, such negative price impact should primarily occur if the order is of a significant size and there seems to be little justification for trading small orders via reference price facilities, at least from a price impact perspective. More generally, RP facilities do benefit from the price determination process on the lit market without contributing to it. There are therefore legitimate reasons to limit trading on such facilities to avoid weakening the price determination function on lit venues.

17. This is the reason why co-legislators introduced the DVC in MiFIR in the first place, and the same logic could also serve as the justification for only allowing orders from a certain size to be executed via the RP and/or the NT waiver. In the CP, ESMA suggested that the minimum order size should be below the current LIS and sought stakeholders' views in the CP on what an adequate level for such minimum order size could be.

18. ESMA has also included other measures in the CP to improve the waiver regime and promote transparency under the assumption that it maintains the current set of waivers allowed under Article 4 of MiFIR.

19. Firstly, following the results of the data analysis performed, ESMA noted a significant percentage of trades in ETFs executed under the LIS waiver. ESMA considered that pre-trade transparency would be improved, whilst keeping an appropriate protection for large trades, by an increase in the LIS threshold for ETFs from EUR 1,000,000 to EUR 5,000,000.

20. Secondly, ESMA acknowledged the importance of the DVC to achieve the objective of increasing trading in the lit markets. However, under the NT waiver, currently only NTs in instruments that are considered to have a liquid market are subject to the DVC which considerably reduces the scope of the DVC.

21. Therefore, ESMA considered amending Article 5 of MiFIR to broaden the scope of application of the DVC to waivers provided under Article 4(1)(b)(ii) of MiFIR, i.e. to also encompass NTs in illiquid instruments in order to also efficiently limit the amount of dark trading permitted for the larger part of the population of instruments within the scope of MiFIR.

22. Thirdly, throughout the application of the waiver regime, ESMA noted a significant number of waiver requests that were made for two or more different types of waivers

in combination. ESMA wondered whether those combinations of waivers were used to maximize the possibility of orders not being subject to pre-trade transparency.

23. Consequently, ESMA requested market participants' views on whether the available waivers should be used in isolation and whether trading venues should not be allowed to request waiver combinations.

24. Lastly, ESMA noted in the CP that the reporting of trading volumes under the waivers is done on an aggregate basis only which does not allow for analysing the exact distribution between different waiver types. In order to allow for such analysis to be performed, ESMA proposed to change the reporting requirements to the Financial Instruments Transparency System (FITRS) in order to be able to collect the exact volumes traded per waiver type.

3.3 Feedback to the consultation

25. In the CP, ESMA asked market participants about (i) their views regarding the removal of the RP and NT waivers; (ii) whether to include a minimum threshold above which the RP and NT waivers would be allowed; and (iii) what alternative proposals market participants can think of to improve and simplify the regime. Market participants presented mixed views on ESMA's proposals in their responses.

26. The majority of respondents were against the removal of the NT and RP waivers. The respondents presented a variety of reasons for such opposition.

27. Some argued that the current pre-trade transparency regime provides an appropriate balance allowing market solutions to meet a range of execution objectives. Similarly, according to some respondents, it appears that the price formation process is effective and efficient in the EU.

28. Furthermore, respondents are of the view that the RP and NT waivers are essential to determine the fair price of certain transactions, in particular, in illiquid shares. Finally, respondents mentioned that the implementation of the pre-trade transparency waivers was a complex and time-consuming process and the fact that some transactions continue to be executed in a manner that is not pre-trade transparent is not an indication that the MiFID II transparency framework is inadequate.

29. However, a number of respondents mainly composed of trading venues, expressed their support to ESMA's proposal to only allow orders that are LIS and in an OMF to be waived from pre-trade transparency.

30. These entities considered that such a proposal would significantly simplify market structures and reporting requirements. They also considered that the LIS threshold should be the main criterion to delineate dark trading.

31. According to most trading venues that presented their views on this question, the reduction of available waivers is the most efficient approach to incentivise lit trading

and to address concerns about the impact of dark trading on financial markets and the price formation process while contributing to a much-needed simplification of the current framework.

32. On the proposal to only allow orders under the RP and NT waivers above a certain size, the majority of respondents was opposed to this option. Only a small number of market participants made some suggestions on the possible threshold to be used. Some respondents suggested that if a minimum threshold is to be proposed, it should be set no higher than two times the standard market size (SMS) whereas one respondent considered that the relevant threshold should be at or above €30,000.

33. Respondents have not come forward with any alternative proposals to simplify the waiver regime. However, some urged ESMA to carefully consider any changes to the transparency regime applicable to trading venues as this could lead to more trades moving to SIs which would be a worse outcome in terms of overall market quality.

34. Most respondents to the CP were against ESMA's proposal to increase the pre-trade LIS threshold for ETFs. The main reason highlighted by respondents was that the heterogeneity of ETFs in terms of liquidity does not make it suitable to apply a single threshold for all types of instruments.

35. Some respondents suggested alternative approaches such as classifying ETFs in terms of their liquidity or taking the average transaction size as an indicator to determine the applicable LIS threshold. The lack of high-quality data was raised by a small number of respondents as a factor hindering the possibility to set an appropriate pre-trade threshold.

36. However, some respondents favoured ESMA's suggestion to increase the pre-trade LIS threshold based on ESMA's analytical evidence that most trades in ETFs are subject to a pre-trade transparency waiver which is against the main objectives of MiFID II to increase market transparency.

37. Some respondents also suggested that an increase of the threshold could move some trading to RFQ systems which, according to these respondents, provide for less transparency than other trading systems.

38. Respondents to the CP were largely against ESMA's suggestion to extend the scope of the DVC to illiquid instruments. According to the feedback received, the trading behaviour for liquid and illiquid instruments is different and increasing the DVC's scope and, as a consequence, the obligation to trade on lit venues, would be detrimental for the already scarce liquidity available in illiquid shares.

39. A number of respondents also raised concerns about possible detrimental effects to the trading in shares of smaller issuers resulting in increased challenges to access capital for those issuers.

40. The possibility mentioned in the CP to only allow trading venues to use pre-trade transparency waivers in isolation was not supported by the majority of market participants. Respondents indicated that the use of combinations of waivers is important to the market given that it allows members or participants of trading venues to simplify order management and execution strategies.

41. Furthermore, respondents to this question stressed that not allowing combinations of waivers could increase liquidity fragmentation as not allowing waivers' combinations would most certainly require trading venues to setup different and segregated order books (one per waiver type). Members or participants of trading venues would need to choose between two different pools of liquidity resulting in a lower likelihood and quality of execution.

42. A minority of respondents that see merits in ESMA's suggestion mention that this solution would strengthen lit trading, enhance transparency and simplify market structures.

43. ESMA had also requested respondents to provide alternatives to improve the MiFIR transparency regime. A significant number of respondents have shared their views on how to change the regime, however without being very specific. For instance, they suggested to increase pre-trade LIS thresholds and reduce post-trade deferrals or to create an economic incentive for market participants by lowering the fees to incentivize trading on lit venues.

44. Other proposals related to other topics that are covered in this final report, such as the share trading obligation, the scope of the DVC, post-trade deferrals and the emergence of new trading systems. These suggestions are addressed in the appropriate sections.

45. Some respondents have also suggested changes to the tick size regime in RTS 11[1] in order to support liquidity on all EU trading venues and to increase the quality of execution to the benefit of investors. ESMA acknowledges the comments made but notes that the tick size regime will be addressed in a separate report on algorithmic trading.

46. Finally, a number of respondents noted that the establishment of a consolidated tape would increase investors' confidence in trading on lit order books. ESMA position on the consolidated tape for equity instruments is spelled out in its first MiFID II review report published in December 2019[2].

[1] Commission Delegated Regulation (EU) 2017/588 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the tick size regime for shares, depositary receipts and exchange-traded funds

[2] https://www.esma.europa.eu/sites/default/files/library/mifid_ii_mifir_review_report_no_1_on_prices_for_market_data_and_the_equity_ct.pdf

3.4 ESMA's assessment and recommendations

3.4.1 Waivers, their combinations and reporting to FITRS

47. ESMA is aware that the proposal to remove the RP and NT waivers would have an impact on EU market structures even though the exact impact of such removal is difficult to predict. The main objective of the proposal presented in the CP was to increase the amount of pre-trade transparency available in the market, but the net gain in transparency might eventually be marginal if orders would migrate to be executed under the LIS waiver. Another result could be a migration to SI-trading resulting in increased liquidity fragmentation.

48. ESMA has taken note of the respondents' views and concerns regarding the proposal to only allow orders that are LIS and on an OMF to be waived from the pre-trade transparency requirements.

49. ESMA appreciates the concerns raised by market participants. However, the risks faced by market participants in terms of price impact should only emerge if orders are above certain sizes. Therefore, ESMA proposes to limit the RP waiver to orders above a certain percentage of the pre-trade LIS threshold of the relevant instrument or to a certain multiple of the SMS. For instance, the percentage could be set as a percentage of the ADT and the ADT buckets for the sake of simplicity would be the same as those to determine the pre-trade LIS.

50. As a hypothetical example, if the share has an ADT between EUR 1,000,000 and 5,000,000 and the X% of the LIS is 50% of EUR 200,000, the order can benefit from a RP waiver only if its size is greater than or equal to EUR 100,000.

51. Last but not least, this change will partially counterbalance the removal of the DVC threshold at TV level (4%, see below).

52. These changes require an amendment of Article 4 of MiFIR and a mandate for ESMA to determine at Level 2 the appropriate methodology to set the minimum size of orders to be eligible for the RP waiver.

53. At the same time, ESMA appreciates the concerns raised by market participants in respect of the NT waiver and does not propose any changes.

54. The introduction of the waiver regime aimed at protecting market participants and should be the exception rather than the norm, as it appears to be now based on ESMA's data analysis. Many trading venues have setup complex systems which ultimately reduce the possibility of orders to be subject to pre-trade transparency. In order to simplify market structure and increase transparency ESMA requested market participant views on the possibility to prohibit trading venues to request waivers' combinations.

55. Respondents were not favourable to this suggestion. ESMA agrees that there is a risk that, instead of trading venues simplifying their systems, it can create liquidity fragmentation, as suggested by some respondents. That would be the case if trading venues decided to continue to utilise the pre-trade transparency waivers provided in MiFID II by separating order books. This result would be detrimental to liquidity and execution quality at the expense of the end clients.

56. Taking the feedback into account, ESMA does not propose to prevent trading venues from using combinations of waivers.

57. Taking into account the support by those respondents who provided feedback, ESMA will keep the proposal to change the reporting requirements to FITRS in order to be able to collect the trading volumes executed per waiver type. ESMA will pursue this proposal in a future revision of the relevant technical standards.

3.4.2 Pre-trade LIS for ETFs

58. On the proposal to increase the ETF pre-trade LIS threshold, ESMA agrees that ETFs are very heterogeneous in terms of their liquidity. However, ESMA would like to reiterate that currently close to 90% of the volume traded in these instruments are subject to a pre-trade transparency waiver.

59. Given the arguments put forward by respondents ESMA would propose a smaller increase of the pre-trade transparency threshold to EUR 3,000,000. ESMA intends to pursue this adjustment during a future review of RTS 1.

3.4.3 DVC extension to illiquid instruments

60. Finally, on the proposal to extend the scope of the DVC, and as already flagged in the CP, ESMA acknowledges that extending the DVC to illiquid instruments might be detrimental to trading in shares of smaller issuers. The responses to the CP have exacerbated this concern and therefore ESMA decided not to go forward with this suggestion to safeguard smaller issuers and protect liquidity in illiquid shares.

61. Furthermore, the main argument for this suggestion was the substantial number of illiquid shares that considerably reduces the scope of the DVC. ESMA notes that the proposal to change the definition of liquid market (see Section 3.6) reduces this concern as it expects a decrease in the number of illiquid shares that fall outside the scope of the DVC. As such ESMA considers that extending the scope of the DVC is not essential at this point.

3.5 Article 5 – Double Volume Cap (DVC)

3.5.1 Analysis of the impact of the DVC on cost of trading and market structure

3.5.1.1 General approach and legal framework

62. The purpose of the DVC is to ensure that the use of certain waivers does not unduly harm price formation by limiting the trading under the RP waiver, provided in Article 4(1)(a) of MiFIR, and the NT waiver for liquid instruments, set out in Article 4(1)(b)(i) of MiFIR.

63. In particular, Article 5 of MiFIR provides that the trading volume under the above waivers against the total volume traded on EU trading venues over the last 12 months for a specific instrument should not be higher than 4% at the level of a single trading venue, or higher than 8% for all the venues combined. Where one of these thresholds is breached, NCAs have to suspend the use of the authorised waivers for the relevant instruments for a period of 6 months.

64. From the analysis presented in the CP, ESMA inferred that the DVC led to a decrease in the use of the RP and NT waivers which was substituted by an increased use of the LIS waiver. Therefore, among the different proposals, ESMA proposed to limit the available waivers under the transparency regime to the LIS and OMF waivers which would have led to the disappearance of the DVC mechanism. As explained in Section 3.4, this proposal has been discarded. Therefore, the DVC mechanism is maintained.

65. The second proposal with regard to the DVC presented in the CP was the extension of the DVC to the waiver provided under Article 4(1)(b)(ii) of MiFIR, i.e. to also encompass negotiated trades in illiquid instruments. This proposal has also been discarded, as explained in Section 3.4.

66. Last but not least, despite the identification of positive effects of the DVC, it was acknowledged that the system is relatively complex. Therefore, ESMA proposed the three following options:

   - Option A: to keep the 4% TV level threshold and the 8% EU level threshold;

   - Option B: to eliminate the 4% TV level threshold and keep the EU level threshold at 8%.

   - Option C: to eliminate the 4% TV level threshold and reduce the EU level threshold to 7%.

67. In addition to the above, ESMA also proposed to remove (i) the requirement under Article 5(7)(b) of MiFIR which requires trading venues to monitor that the trading under the waivers does not exceed the 4% which is only technically possible at ESMA level and, (ii) the requirement for NCAs to issue the suspension notices and require trading venues, on the basis of ESMA's publication, to suspend dark trading in case of breach.

3.5.1.2 Feedback to the consultation

68. The large majority of respondents supported option B. In addition, a number of respondents provided a preference of option B as the best alternative in the case the DVC mechanism was not deleted.

69. According to some market participants the 4% cap adds unnecessary complexity to the DVC process and penalises trading venues without providing any tangible benefit to the market structure or the end investors. Furthermore, less liquid shares are usually only admitted to trading or traded on one or two dark venues despite all venues being able to list those securities if they so wished. As a result, these trading venues can reach the 4% quite quickly.

70. A large majority of respondents were supportive of removing the requirement for NCAs to issue the suspension notice and require trading venues to suspend dark trading. In particular, those who supported the elimination of such requirement claimed that this would eliminate duplicated responsibilities and would make the suspensions' system more consistent between Members States as the way and timing on which NCAs currently communicate the suspensions usually differ to a great extent.

71. The majority of regulated markets did not support ESMA's proposal, arguing that a formal communication from the NCAs reduces the probability of overlooking the issuance of suspensions.

3.5.1.3 ESMA's assessment and recommendations

72. As indicated in the CP, after the suspension of dark trading on a venue (4% breach), dark trading is re-distributed to the other dark pools, thus leading to a breach of the 8% cap. Therefore, it can be inferred that the trading venue cap does not discourage dark trading.

73. As mentioned among the respondents, the cap at trading venue level might affect mostly less liquid instruments, thus further deteriorating their liquidity.

74. Having the double volume cap complicates the processing and triggering of the suspensions which start at trading venue level and, after one or two months, move to the EU level cap. Indeed, the suspension for the trading venue where the suspension started will re-start for six months when it moves to the EU level. As a result, the supervision of the corrected implementation of the DVC suspension is more complex.

75. In conclusion, ESMA proposes to change Article 5 of MiFIR and remove the trading venue cap of 4%.

76. However, in order to compensate the deletion of the 4% ESMA proposes to lower the EU level threshold from 8 to 7%.

77. As a consequence of the above paragraphs 72 - 75, the proposal to remove the requirement for trading venues to monitor that the trading under the waivers does not exceed the 4%, is automatically accepted.

78. Regarding the removal of the obligation for NCAs to issue the suspension notice and require trading venues to suspend dark trading on the basis of ESMA's publication, considering the support of market participants to such proposal and the current availability of a file published on a monthly basis indicating the instruments to be subject to the suspension, ESMA proposes to remove such obligation and modify Article 5 of MiFIR accordingly.

3.5.2 Application of the DVC to instruments without 12 months of data

3.5.2.1 General approach and legal framework

79. MiFIR does not explicitly provide for a specific rule to suspend dark trading for new instruments for which there is no data available over a full period of 12 months.

80. In 2016, ESMA issued a Q&A clarifying that, since according to Article 5(1) of MiFIR the DVC can only apply where the relevant thresholds are breached over the previous 12 months, the suspension of trading under the waivers when the thresholds are breached can only be triggered when at least 12 months of trading data is available.

81. ESMA proposed in the CP to apply the suspensions also to instruments with less than 12 months of available data considering that the thresholds are in relative and not in absolute terms.

3.5.2.2 Feedback to the consultation

82. There was no unique response to this question. However, the majority of the respondents disagreed with applying the DVC to these instruments. Few respondents had a more nuanced response, for actual new instruments they oppose applying the DVC. However, when an ISIN changes as a result of a corporate action, it does not lead to a genuine new company, therefore they would agree in applying the DVC.

3.5.2.3 ESMA's assessment and recommendations

83. Considering the support for not changing the current approach which ESMA defined in the Q&A, ESMA does not propose any change in this regard. ESMA acknowledges that in some instance new instruments are not genuinely new instruments, but they are old issuers with new ISINs resulting from a corporate action and there would be merit to apply the DVC also without a full 12-month period. However, ESMA is not in a position to monitor all the corporate actions at EU and to include this complex change to the IT system without a solid basis that would ensure to pass a cost-benefit analysis.

3.5.3 Publication within 5 working days

3.5.3.1 General approach and legal framework

84. Since the beginning of the publication of the DVC results in March 2018, due to late submission of data and the time needed to perform all technical operations required to make the publication available, ESMA has been publishing the results with a one-month delay. The publications with a one-month delay however are stable, consistent and based on a high quality data set.

85. ESMA keeps monitoring the completeness of the data necessary for the publication after the end of the period and continues to provide information to NCAs to better monitor and ensure the data that is submitted. ESMA is also assessing the best timing to switch to the regular publication without one-month delay which should be possible in due course.

86. ESMA proposed to publish the DVC results not after 5 working days from the end of the reporting period but after 7 working days as this would provide the necessary time to check records and prepare the publication.

3.5.3.2 Feedback to the consultation

87. Almost all respondents do not foresee any issue if the publication of the DVC results occurs after seven working days instead of five. However, some respondents made their support subject to a number of conditions:

- the DVC suspensions and result files published by ESMA should be made available by ESMA on its website;

- the calendar of publication and implementation dates should be made available to market participants as it is today;

- trading venues and investment firms should have the same amount of time, as they do today, to act on the publication.

3.5.3.3 ESMA's assessment and recommendations

88. Considering that no respondent identified any issue with the ESMA proposal and that all the conditions mentioned in the feedback are already satisfied, ESMA suggests to modify Article 5 of MiFIR to set the DVC publication to seven working days after the end of the observation period.

3.5.4 Mid-month reports

3.5.4.1 General approach and legal framework

89. Article 5(5) of MiFIR requires ESMA to publish mid-month reports for instruments which have reached the thresholds of 3.75% at TV level or 7.75% at EU level. These reports should have a warning function and alert about the possibility to breach the 4% or the 8% thresholds at the end of the month, thus triggering the relevant suspension of dark trading.

90. In the CP, ESMA provided supporting evidence that being close to the 3.75% and 7.75% thresholds does not discourage trading in dark in the following period.

91. Therefore, considering that (i) the mid-month publication does not require the suspension of dark trading (ii) they seem not to fulfil their goal to alert and deter possible future breaches and (iii) this additional publication per month means additional resources are being used for insignificant benefits, ESMA proposed to remove the publication of the mid-month reports.

3.5.4.2 Feedback to the consultation

92. The large majority of respondents agreed with the proposal.

3.5.4.3 ESMA's assessment and recommendations

93. Considering that the large majority of the respondents supported the proposal and the reasons presented above to propose this change in the CP, ESMA confirms the proposal to change Article 5 of MiFIR to remove the publication of the mid-month reports.

3.5.5 Sanctions for infringements

3.5.5.1 General approach and legal framework

94. Article 5 of MiFIR requires neither NCAs nor ESMA to impose sanctions for the infringements of the obligations prescribed under this article. ESMA conducted a survey among NCAs to better understand which sanctions, if any, are in place for DVC infringements.

95. It appears that a framework to sanction DVC infringements is in place in almost all jurisdictions. However, in order to ensure convergence across countries in this regard, ESMA suggested in the CP to include in Article 70 of MiFID II the infringements of the DVC suspensions.

3.5.5.2 Feedback to the consultation

96. Almost half of the respondents were in favour of including the infringements of the DVC suspensions in Article 70 of MiFID II and considered that the amendment would be able to ensure a level-playing field across all relevant jurisdictions.

97. Only a few respondents were clearly against the proposal claiming that the breaches observed in the analysis in the CP were the result of technical issues and not indicative of a lack of supervision or enforcement and that national regulators would be better placed to take action in a pragmatic way according to the situation.

3.5.5.3 ESMA's assessment and recommendations

98. Considering the support to this proposal, ESMA suggests including the infringements of the DVC suspensions in Article 70 of MiFID II. This change would make sure that all jurisdictions will have in place a sanction regime to prevent infringements of the DVC suspensions but at the same time they will maintain a certain degree of flexibility to decide which sanction to apply and in which cases.

3.6 Definition of liquid market

3.6.1 General approach and legal framework

99. Article 2(1)(17) of MiFIR provides for the definition of a liquid market which is further specified in Commission Delegated Regulation (EU) 2017/567. The parameters to be considered cumulatively for such assessment are:

- the free float;
- the average daily number of transactions (ADNTE);
- the average daily turnover (ADT); and
- whether the instrument is traded on a daily basis.

100. The determination of instruments which have a liquid market serves different purposes: (i) to define the instruments for which SIs are subject to pre-trade transparency (up to the SMS), (ii) for the application of the different NT waivers for the on-venue trading which, in turn, also affects (iii) the application of the DVC regime that limits the use of the NT waiver to liquid instruments only.

101. In the CP ESMA made proposals to change the liquidity assessment for equity and equity-like instruments with the goal to overall simplify the regime.

102. For shares, two options were proposed:

- Option 1: assess the liquidity in accordance with the ADNTE and the ADT;

- Option 2: assess the liquidity in accordance with the market capitalisation, the ADNTE and the ADT.

103. For ETFs and DRs, ESMA proposed to assess the liquidity in accordance with the average daily number of transactions and the average daily turnover.

104. For certificates, due to the limited number of instruments, it was proposed to remove the category and integrate the instruments in the other equity-like financial instruments class.

105. For other equity-like financial instruments, ESMA proposed to deem them illiquid by default.

3.6.2 Feedback to the consultation

Shares

106. The large majority of respondents, mainly stock exchanges, is in favour of option 1. Many trading venues face issues in finding and thus providing the data related to the free float. Therefore, they prefer a simpler liquidity assessment methodology. However, the following considerations were also provided:

- the frequency of trading is a criterion used when assessing whether an institution qualifies as an SI or not. Therefore, they claimed that it seems incoherent to use different sets of criteria;

- since the new method will result in a higher number of instruments being considered as liquid, the implications with other regulations should be considered (e.g. the buy-in process under CSDR for liquid vs illiquid shares);

- the change of methodology should be addressed together with the proposal to remove the NT waiver and the possible tightening of the SI quoting obligations, including extending such obligations to illiquid shares. The change of the liquidity assessment should be considered depending on which way forward is chosen on those related topics.

107. Only a few respondents were in favour of option 2. They raised the following points:

- the market capitalisation is particularly relevant in the case of new large cap IPOs that would be immediately captured;

- the number of liquid shares under option 1 could exceed 2,300 shares, well above the current figure of 1,500. As such, this will present difficulties as it would increase obligations where stocks are trading under the DVC since, whenever the NT waiver for liquid instruments is applied it will fall under the DVC.

108. Furthermore, only a few respondents would prefer not to change the liquidity assessment methodology as both options present drawbacks. In their view, option 1 would potentially increase the number of incorrectly categorised illiquid shares as liquid. This could be triggered by aspects such as a liquidity/corporate event, a spike in volatility, or any other cyclical event which could see traded activity in shares increase exponentially over short periods of time, before reverting to thinly traded volumes. The market capitalisation criterion used in option 2 instead is not considered to necessarily be an indicator of liquidity, as opposed to the free float. The market capitalisation includes the portion of stocks that is held by large investors and is de facto illiquid.

109. Last but not least, those respondents who did not express a preference, provided the following remarks:

- the percentage of days traded is a important indicator to assess liquidity;
- the benefits of categorising shares from small and medium-sized enterprise ("SME") that trade very infrequently as liquid should be clarified;
- the average daily number of transactions, which also reflects the frequency of trading, is a critical measure. A value of 20 (which corresponds to a trade on average every 25 minutes, ignoring auctions) is too low. For them, an ADNTE no smaller than 100 (i.e. a trade every 5 minutes) would indicate that an instrument is sufficiently liquid to be well suited to trading on continuous order books. With regard to average daily trade frequency, the median trade frequency should be used, not the mean, in order to smooth out distortions in trade frequency brought about by volatility, market events etc.

ETFs and DRs

110. Market participants were split regarding ESMA's proposal for ETFs and DRs. Whilst half of respondents welcomed the proposal arguing that the ADT and the average daily number of transactions should be sufficient criteria for the liquidity assessment of ETFs and DRs, the other half of respondents suggested arguments against such change.

111. Those not in favour of the proposal claimed that the liquidity of the underlying would be a better criterion to assess the liquidity of ETFs and DRs and that a more granular regime would have been more appropriate.

Certificates

112. While a number of market participants agreed with ESMA's proposal as it would simplify to a great extent the current regime, the majority of respondents were either against the proposal or did not have strong views.

113. Some respondents mentioned that it was not clear which would be the regime for certificates if such category would not exist anymore.

114. Others not in favour of the proposal mentioned that ESMA should rather focus only on clarifying the definition of certificates. Furthermore, they claimed that removing such category of instruments would not be in line with the MiFID II goals of extending the transparency regime to a wider set of instruments, which should also include certificates.

Other equity-like financial instruments

115. The majority of respondents expressed support for ESMA's initiative, arguing that this would simplify the current regime and would be consistent with the approach taken on the non-equity side.

116. However, among those not supporting the proposal, some argued that they could not provide feedback because there is no clear definition of "other equity-like financial instruments".

117. Among all respondents, it is evident that it is unclear what instruments are caught by this category. Other respondents supporting the proposal argued that, given that "other equity-like financial instruments" include mainly interim shares, share warrants, subscription rights and paid subscribed shares" (all with a temporary nature), there should not be a major impact from excluding these instruments from the liquid category.

3.6.3 ESMA's assessment and recommendations

Shares

118. From the feedback received it is clear that there is a majority supporting option 1. However, some additional elements needed to be considered before taking a final decision could be made and they are analysed here below.

119. Regarding the frequency of trading, ESMA considers that the criterion used to determine if an investment firm qualifies as an SI is different from that of the liquidity assessment which measures the frequency of trading of an instrument rather than the frequency of trading of an investment firm in a certain (class) of instrument(s).

120. Secondly, the measure used for the SI test is an average frequency and does not require to trade on a daily basis (i.e. one trade every day) but on average on a daily basis (i.e. at least five trades over a week, excluding the week-end). Last but not least, considering that more instruments will qualify as liquid, more stringent conditions will have to be met in order to become an SI in those instruments. Therefore, this will result in a lower probability to become an SI for certain instruments.

121. Regarding the SI quoting obligation, 10% of the SMS is considered to be a small amount for a quote, irrespectively from the liquidity of an instrument. Indeed, considering that most of the liquid instruments fall in the smallest AVT bucket, the minimum quoting size results in EUR 1,000. Consequently, the minimum quoting size

is increased to 100% of the SMS. Therefore, the change of the liquidity test should not be related to this proposal. However, the change of the system to determine the SMS might tighten the transparency obligations since the change of the liquidity test increases the number of liquid instruments and those might be subject to a higher SMS.

122. Regarding the implications related to the regime applicable to the buy-in process under Regulation (EU) No 909/2014 (CSDR), the mandatory buy-in process is triggered after fewer days following a settlement fail for liquid shares than for illiquid ones. Additionally, if the buy-in fails or is not possible, the receiving participant can choose to defer the execution of the buy-in for a shorter timeframe for liquid shares compared to illiquid ones.

123. Another consequence in the context of the implementation of CSDR is the application of a higher cash penalty rate for settlement fails concerning liquid shares, compared to illiquid shares. Therefore, more stringent rules will apply to shares that are currently illiquid but will be deemed liquid according to the new methodology. However, the change of the liquidity assessment should not lead to truly illiquid instruments being classified as liquid and only sufficiently liquid instruments will have to comply with more stringent rules.

124. In conclusion, considering (i) the affected provisions by the change of the liquidity test for shares, (ii) the difficulty of market participants to provide accurate information on the free-float, which might result in a false negative assessment of instruments because of missing or inaccurate information of this parameter and (iii) the support for a simpler approach to the liquidity assessment of shares, ESMA suggests to amend Article 2(1)(17)(b) of MiFIR so that only the ADT and the average daily number of transactions are considered to deem a share liquid.

ETFs and DRs

125. ESMA acknowledges that the use of the underlying instrument(s) would be a possible alternative approach to determine the liquidity of ETFs and DRs. However, such change would depart from the current methodology and would entail additional IT costs, on top of the difficulty of having appropriate information on the underlying instrument and implementing such methodology in the case of ETFs based on multiple instruments or indices for which there is no liquidity assessment.

126. Therefore, backed by the support of half of the respondents, ESMA proposes to assess the liquidity of ETFs and DRs using only two parameters: (i) the ADT and (ii) the average daily number of transactions. As a consequence, the free-float and the requirement of being daily traded should be removed from Article 2(1)(17) of MiFIR for these instruments.

Certificates

127. Considering the opposition to this proposal, ESMA would not propose to delete such category.

128. However, ESMA intends to propose to align the liquidity assessment to that of shares, DRs and ETFs by using only two parameters: (i) the ADT and (ii) the average daily number of trades. Therefore, the free-float and the requirement of being traded daily should be removed from Article 2(1)(17) of MiFIR for these instruments.

129. As far as the definition of certificates is concerned, ESMA clarifies that these instruments are defined in Article 2(1)(27) of MiFIR. Despite Q&A 8 in the pre-trade transparency waiver section[3] clarifying how certain instruments (mentioned in the feedback as among those for which the classification is unclear) should be classified, ESMA sees merit in clarifying the definition of certificates further.

Other equity-like financial instruments

130. It is important to note that "other equity-like financial instruments" is a category created to catch newly invented instruments that do not fit in the definition of shares, ETFs, DRs or certificates.

131. Furthermore, none of the instruments mentioned in the responses considered as other equity-like financial instruments should be deemed as such. Indeed, interim shares are assumed to be shares, as well as, paid subscribed shares and subscription rights as mentioned in Q&A 8 in the pre-trade transparency section waiver section[4]. As far as share warrants are concerned, those instruments are expected to be classified as non-equity instruments, more specifically as securitised derivatives.

132. In conclusion, supported by the majority of market participants, ESMA proposes to deem other equity-like instruments illiquid by default also considering that this category is expected to include a limited number of instruments. This requires a change to CDR 2017/567[5].

3.7 Emergence of new trading systems - Frequent Batch Auctions (FBA)

3.7.1 General approach and legal framework

133. Frequent Batch Auction (FBA) systems for equity instruments are a new type of periodic auction trading systems. Most FBA systems do not operate under a waiver from pre-trade transparency and apply the pre-trade transparency requirements for 'periodic auction trading systems' as provided in table 1 of Annex I of RTS 1.[6]

[3] https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf
[4] https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf
[5] Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions
[6] See the final report on the call for evidence on FBAs for further details on the functioning of FBAs. https://www.esma.europa.eu/sites/default/files/library/esma70-156-1035_final_report_call_for_evidence_periodic_auctions.pdf

134. To ensure the consistent application of the relevant requirements by FBAs across the Union and the disclosure of meaningful pre-trade transparency information by FBAs, ESMA published an Opinion[7] providing further clarification regarding the application of the pre-trade transparency requirements by FBA systems and the price determination process of FBA systems in October 2019.

135. In order to better reflect the characteristics of FBAs, to avoid that FBAs may be used to circumvent the DVC, as well as acknowledging the limits of specifying the expectations towards FBA systems in a non-binding ESMA opinion, ESMA suggested in the CP to develop a dedicated definition for FBA systems, including tailored pre-trade transparency requirements, in RTS 1. In particular, ESMA suggested that all orders (volume and price) submitted to FBAs should be disclosed to meet the MiFIR pre-trade transparency requirements.

136. Moreover, in order to ensure that pre-trade transparency ensures a meaningful price formation process, ESMA proposed amending Article 4 of MiFIR to ensure that any non-price forming trading system would always have to operate under a pre-trade transparency waiver. ESMA suggested to accompany such an amendment with a Level 2 mandate to further specify the definition and characteristics of a non-price forming system to ensure a convergent application of this provision.

3.7.2 Feedback to the consultation

137. A majority of respondents to the CP were in favour of ESMA's proposal to introduce a separate description for FBA systems. In general, feedback received from most trading venues not operating FBA systems, proprietary traders and some buy-side institutions agreed to differentiate FBA systems from conventional periodic auctions in order to better reflect the specificities of the former.

138. Other respondents, mainly from the buy and sell side as well as trading venues operating FBA systems, viewed FBAs as a well-established, valued and widely used trading mechanism and did not see the need to have separate definitions for conventional auctions and FBAs.

139. Concerning the applicable pre-trade transparency requirements for orders in FBA systems, views were split. There was a slight majority in favour of having different pre-trade transparency requirements for FBAs and conventional periodic auctions.

140. However, some respondents in favour of tailored pre-trade transparency requirements for FBA systems raised concerns that order-by-order disclosure might be inappropriate and lead to information leakage and/or requested further details on this proposal before expressing a firm view. Some respondents suggested to disclose the executable price and volume and the side and size of any order imbalance. Another

[7] ESMA70-156-1355

group of respondents, mainly from the buy and sell side, did not consider it necessary to change the pre-trade transparency requirements for FBA systems.

141. Concerning non-price forming systems, a slight majority of respondents, in particular trading venues, supported the proposal requiring non-price forming systems to only operate under a waiver from pre-trade transparency. Other respondents noted that requiring more transparency may lead to information leakage and be detrimental to the clients' interests. Those respondents stressed that mid-point transactions may contribute to price formation and that therefore a clear distinction between price-forming and non-price forming systems cannot be made.

142. Overall, most respondents across the whole spectrum of activities, welcomed further discussion on the distinction between price and non-price forming transactions. A number of stakeholders suggested to focus less on non-price forming systems but rather on non-price forming transactions and requiring trading models allowing for the execution of such transactions to operate under a waiver from pre-trade transparency. Those respondents recommended to further specify the types of non-price forming transactions. Finally, responses from trading venues recommended to specify in the Level 1 text that technical trades should be allowed without a waiver.

3.7.3 ESMA's assessment and recommendations

143. After careful reflection of the feedback provided, ESMA maintains its proposal to separate the descriptions of conventional periodic auctions and FBA systems in order to better tailor the applicable pre-trade transparency requirements. ESMA therefore intends to develop a tailored definition for FBA systems in RTS 1 when the standard is reviewed the next time.

144. ESMA takes note of the concerns raised by some stakeholders on the proposal to require the disclosure of all orders and will further reflect on the appropriate pre-trade transparency regime for FBA systems. In any case, proposals to amend RTS 1 would be subject to public consultation, thereby ensuring that views from market participants are appropriately taken into account.

145. Concerning the way forward on non-price forming systems, ESMA continues to consider that such systems do not contribute, or only in a very limited manner, to the price formation process. Since the objective of pre-trade transparency consists in ensuring an efficient price formation process, in consequence non-price forming systems should only be authorised to operate under a waiver from pre-trade transparency.

146. Nevertheless, ESMA shares the view expressed by many stakeholders that the concept of non-price forming systems/transactions needs to be further elaborated on and considers that an approach focussing on specifying non-price forming transactions may be more practicable than defining non-price forming systems as such.

147. Therefore, ESMA suggests complementing Article 4 of MiFIR by requiring that trading models executing non-price forming transactions should only be operated under one of the waivers specified in Article 4(1) of MiFIR. Furthermore, ESMA recommends adding a Level 2 mandate empowering ESMA to specify the types of non-price forming transactions.

148. To ensure a consistent approach towards non-price forming transactions and being mindful that RTS 1 already provides for three lists of non-price forming transactions (under Article 4(1)(b), 20 and 23 of MiFIR), ESMA recommends streamlining those lists. For instance, one list could cover technical transactions and another list could cover price-taking transactions. Transactions on both lists would be considered non-price forming and could only be executed under a waiver from pre-trade transparency.

3.8 The Systematic Internaliser Regime

3.8.1 General approach and legal framework

149. MiFID II increased the scope and relevance of the SI regime with the aim to make transactions executed outside of a trading venue more transparent and level the playing field between rules applicable to trading venues and to SIs. MiFID II introduced a quantitative threshold to determine the conditions under which an investment firm should register as an SI and SIs were declared as an eligible execution place to comply with the Share Trading Obligation (STO).

150. However, despite the scope of the SI regime being extended beyond shares to include other equity instruments as well as non-equity instruments, the number of trades subject to pre-trade transparency remains limited, as SIs only need to make public firm quotes in equity and equity-like instruments that are traded on a trading venue and for which there is a liquid market. In addition, MiFIR requires SIs to comply with pre-trade transparency requirements when dealing in sizes up to the SMS and to make public quotes for sizes of at least 10% of the SMS.

151. From the analysis already presented in the CP, most of the liquid instruments are in the smallest AVT classes and therefore, a significant amount of trading activity in the market falls outside the scope of transparency. This fact, added up to the increasing importance of SIs in the equity trading landscape, has led ESMA to propose amendments to the SI regime.

152. The first ESMA proposal was to increase the transparency available under the SI regime by increasing the minimum quoting size from 10% to either 50% or 100% of the SMS, due to the existing low applicable SMSs.

153. The second proposal was extending the regime to illiquid instruments as well, in order to increase the number of instruments subject to pre-trade transparency.

154. Thirdly, given that the market impact of trading larger sizes in liquid instrument should be less important than for illiquid instruments, ESMA proposed to amend the methodology to determining the SMS based on the ADT instead of the AVT. In this case, two options were presented:

- Option A (only possible if illiquid instruments were included in the SI regime): the SMS was determined by using different calibrations for illiquid and liquid instruments so that less onerous transparency requirements can apply to illiquid instruments.

- Option B: the SMS was determined for liquid instruments by using a new table calibrated based on the ADT.

3.8.2 Feedback to the consultation

155. The large majority of respondents were supportive of a higher minimum quoting size set to 100% of the SMS.

156. However, more diverging views were expressed in relation to the extension of the SI regime to illiquid instruments. Those not in favour considered that this proposal could entail negative effects such as i) lower activity levels in such instruments (in particular, affecting SME shares), (ii) increased reporting and market data costs and (iii) difficulties in stock sourcing to meet the demand for illiquid instruments.

157. Lastly, no clear majority emerged among respondents on amending the methodology to determine the SMS. Whilst determining the SMS for shares using the ADT instead of the AVT, was supported by trading venues and some trade associations, sell-side firms and fund managers were predominantly opposed.

158. Those who were against the proposal stressed that SIs are fundamentally different in nature from trading venues and that increasing the SMS so that SIs had to quote in large sizes, beyond the best bid/offer in the order book, would put them at a competitive disadvantage to on-venue participants as these could quote different price levels.

3.8.3 ESMA's assessment and recommendations

159. ESMA has received support for increasing the minimum quoting size for SIs to 100% of the SMS. Considering that most of the instruments fall in the smallest bucket which results in SIs required to quote at a minimum of EUR 1,000 only, this leads to very limited transparency. ESMA is therefore proposing to amend Article 14(3) of MiFIR and increase the minimum quoting size to 100% of SMS.

160. ESMA acknowledges that SIs might be subject to stricter conditions in case the SI regime was extended to illiquid instruments, given that no waivers from pre-trade transparency are available. Furthermore, these quoting obligations might reduce liquidity for instruments for which it is already scarce. Last but not least, the extension

of the SI quoting obligations to illiquid instruments would require further calculations of the SMS for those additional instruments subject to the regime.

161. In conclusion, ESMA considers that there is not enough evidence justifying to go ahead with this proposal and is therefore not proposing to extend the SI quoting obligations to illiquid instruments.

162. Considering the split views on the new methodology to determine the SMS, ESMA proposes to change the methodology to determine the SMS and determine it on the basis of the ADT according to the following Table 1 for shares and DRs and Table 2 for ETFs and certificates to ensure a more adequate setting of the SMS.

163. The SMS values for each ADT bucket and instrument type will be determined in a revised RTS 1 according to the ADT buckets in the tables below, which are valid for liquid instruments (the smallest ADT bucket is the minimum required to classify the instrument as liquid). The SMS values will be determined considering the percentage of instruments which will increase the SMS compared to the current SMS as provided in Annex III, which shows the distribution of shares, DRs and ETFs across different ADT-AVT buckets.

164. This approach allows to align the measure used to determine the LIS threshold, namely the ADT, to also determine the SMS. This change requires the amendment of Article 14(4) of MiFIR and a future amendment of RTS 1.

TABLE 1 – SHARES AND DRS

ADT range	SHRS	DPRS
1,000,000 =< ADT < 5,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
5,000,000 =< ADT < 25,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
25,000,000 =< ADT < 50,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
50,000,000 =< ADT < 100,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
ADT >= 100,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined

TABLE 2 – ETFS AND CERTIFICATES

ADT range	ETFS	CRFT
500,000 =< ADT < 1,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
1,000,000 =< ADT < 5,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
5,000,000 =< ADT < 25,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
25,000,000 =< ADT < 50,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
50,000,000 =< ADT < 100,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined
ADT >= 100,000,000	EUR value for the SMS to be determined	EUR value for the SMS to be determined

4 Post-trade transparency regime in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments

4.1 Assessment of the post-trade transparency framework for trading venues

4.1.1 General approach and legal framework

165. In line with the approach taken for pre-trade transparency requirements, MiFIR expanded on the provisions already set out in MiFID I and created a regime intended to promote post-trade transparency, market efficiency and facilitate the price formation process. Article 6 of MiFIR requires market operators and investment firms operating a trading venue to make public the price, volume and time of the transactions executed in equity and equity-like instruments. These details should be made public as close to real time as technically possible.

166. In order to protect market participants, NCAs can authorise trading venues to provide for deferred publication of the details of certain transactions according to their type or size in accordance with Article 7 of MiFIR. In particular, deferred publication can be authorised for transactions that are large in scale when compared to the normal

size for that instrument. The qualifying size and additional technical details that should be satisfied are specified in Level 2, more specifically in RTS 1.

167. The authorisation process for deferred publication is fundamentally different than that for pre-trade transparency where ESMA is required to issue a non-binding opinion. For deferrals, trading venues need to request approval from their NCA and clearly disclose their arrangements to market participants and the public. In this case, ESMA is only required to monitor the application of those arrangements and not to assess the compatibility of the deferral with the requirements established under RTS 1.

168. Following the analysis presented in the CP, ESMA concluded that only a small portion of large trades benefits from deferred publication and that it appears that in general the MiFIR deferral regime has delivered on its objectives. There is a difference though in terms of shares and DRs on the one hand, and ETFs on the other hand.

169. For shares and depositary receipts, ESMA considers the percentages of volume of on-venue transactions having been subject to a deferral to be a satisfying outcome. Therefore, ESMA proposed in the CP to maintain the current requirements in place.

170. Regarding ETFs, the volume of transactions subject to deferred publication is significantly higher than for shares and DRs, amounting to 40% of the total volume of ETF transactions executed on-venue. As noted in the CP, ESMA would see merit in revisiting the threshold set out for ETFs to ensure that the proportion of deferred transactions is more closely aligned with the other types of equity instruments and in particular shares and DRs. More specifically, ESMA proposed in the CP to increase the minimum qualifying size for benefitting from a 60-minute delay from EUR 10,000,000 to EUR 20,000,000.

4.1.2 Feedback to the consultation

171. Respondents to the CP largely agreed with the assessment by ESMA that the conditions for deferred publication for shares and DRs should not be subject to amendments. Many stakeholders agreed with the statement made by ESMA that the MiFIR deferral regime has delivered on its objectives.

172. There were several suggestions nonetheless as to follow-up issues for improvement, amongst which a more harmonised European regime for deferrals or a review of the deferral regime for illiquid instruments. It was also suggested to promote greater transparency levels.

173. A majority of respondents disagreed with ESMA’s proposal to require real-time publication for ETFs transactions below 20,000,000 EUR. Some respondents raised concerns that the proposal does not accurately reflect the liquidity of individual ETFs and their constituent instruments. Additionally, concerns were expressed that increasing the qualifying size will likely lead to reduced liquidity.

174. Stakeholders supporting ESMA's proposals argued that aligning ETFs with shares and DRs will help increase will help to increase the timely availability of ETF post-trade data and should be helpful in the future as and when the consolidated tape is delivered.

4.1.3 ESMA's assessment and recommendations

175. While ESMA acknowledges the feedback given by some stakeholders that some improvements could be made, and even greater transparency levels for shares and DRs could be advocated, ESMA also considers that this is currently not a high priority item for follow-up in the review of MiFID II / MiFIR.

176. In view of the current satisfying outcome, and of the large majority of stakeholders agreeing with that assessment, ESMA remains of the opinion that the regime for shares and DRs should not be subject to substantial amendments.

177. Nonetheless, considering the objective to achieve a high level of real-time transparency, ESMA does see merit in revisiting the threshold levels set out for ETFs and increasing the number of ETF transactions subject to real-time publication.

178. After careful consideration of the feedback received to the CP and taking into account the objections towards a revised threshold of EUR 20,000,000, ESMA would like to settle on a compromise and proposes to modify the threshold to EUR 15,000,000.

179. As stated in the CP, ESMA highlights that this proposal would require a change of Level 2 legislation. ESMA intends to pursue this adjustment during a future review of RTS 1.

4.2 Assessment of the post-trade transparency framework for OTC transactions

4.2.1 General approach and legal framework

180. Article 20 of MiFIR stipulates provisions for OTC transactions relating to post-trade transparency. As such, OTC trades on instruments that are traded on a trading venue are subject to the same post-trade transparency requirements as on-venue transactions. Investment firms are required to make their transactions public through approved publication arrangements (APAs). As with transactions undertaken on a trading venue, deferrals are also possible. Article 20(2) provides for deferred publication for certain categories of transactions.

181. ESMA's first proposal in the CP related to the general assessment of the level of post-trade transparency for OTC transactions. Results of the analysis performed by ESMA showed that the turnover of deferred transactions is significantly higher on the

OTC segment compared to the on-venue segment while the number of transactions is the same (in percentage terms).

182. The turnover of transactions benefitting from a deferral for OTC transactions stands at 35% while it is only 15% for on-venue transactions. This difference seems to indicate a difference in terms of distribution of transactions between on-venue and OTC trading. However, ESMA also noted that the deferral thresholds for OTC and on-venue transactions are the same and considered that there is no reason to apply different ones. Hence, ESMA suggested in the CP that the applicable deferrals thresholds for OTC and SI transactions should remain aligned to those applied on-venue.

183. ESMA's second proposal for the OTC transparency framework concerned the reporting and flagging of transactions which are not subject to the share trading obligations but subject to post-trade transparency and to reporting to FITRS. Considering amongst others that the percentage of OTC trading for shares seems to be high considering the trading obligation for shares, ESMA proposed that the transactions not subject to the trading obligation for shares but subject to post-trade transparency requirements should be reported to FITRS and flagged and be considered for the transparency calculations i.e. the liquidity assessment, the determination of the LIS and SMS thresholds as well as the determination of the tick size regime.

184. Lastly, ESMA considered in its CP the definition of "real-time" publication. Article 14 of RTS 1 defines "as close to real-time as technically possible" to be one minute after the relevant transaction at a maximum. Article 14 refers to transactions both on a trading venue and outside of a trading venue. With regard to this definition, ESMA asked for feedback on the experience of market participants in relation to this technical specification. In particular, ESMA asked whether the definition of "real-time" as maximum one minute from the time of the execution of the transaction is considered as appropriate, too stringent or too lenient.

4.2.2 Feedback to the consultation

185. Vis-à-vis the first proposal, most respondents agreed with ESMA's assessment of the level of post-trade transparency for OTC transactions. Some of the respondents specified in their answers that they agree on aligning the deferred reporting thresholds for OTC and on-venue transactions, whilst some others emphasised the general need to improve data quality for OTC trades. Many answers addressed both points.

186. A majority of stakeholders is in favour of ESMA's second proposal regarding the reporting and flagging of transactions not subject to the share trading obligation but subject to post-trade transparency to FITRS. However, they ask for flags granular enough to allow market participants to distinguish addressable versus non-addressable liquidity. Furthermore, they believe that non-price forming activity (e.g. give-up/give-in trades) should not be included in transparency calculations (e.g. liquid market, SMS).

Last but not least, it is noted that market stakeholders have been addressing these issues in industry working groups.

187. Respondents who do not agree with ESMA's proposal claim that this information is already available and that transactions are already reported under the post-trade transparency regime and under the transaction reporting regime of Article 26 of MiFIR and flagged with "TNCP", i.e. transactions not contributing to the price discovery process for the purposes of Article 23 of Regulation EU No 600/2014. Furthermore, some of them agree that easier identification of trades not subject to the share trading obligation or otherwise not price-forming would help in having more accurate information, however they believe that changes should be made as a priority to the post-trade reporting regime and not to FITRS to benefit investors.

188. In response to the third question of the definition on "real-time" in the CP, the vast majority of market participants agreed that allowing for a maximum of one minute from the time of execution to the time of publication is appropriate. Most of these respondents, in particular trading venues, believe that in technological markets the reporting of transactions should be (and in most cases is) just a few milliseconds for most of the trades. However, given that there is also an obligation to report technical trades and trades subject to the NT waiver, the one minute maximum is considered appropriate.

189. There is also an agreement amongst stakeholders that the regulation should not allow for any deliberate or artificial delay once the trade is captured. It was stressed that the requirements for OTC/SI reporting should be the same as those for trading venues, e.g. to avoid that OTC/SI trades take longer to report which can withhold important price sensitive information thus being detrimental to market integrity.

190. There were a number of market participants that are of the view that allowing for a maximum of one minute is too stringent. The main argument is that for negotiated trades, it is considered technically impossible to comply with this requirement.

4.2.3 ESMA's assessment and recommendations

191. The feedback to the CP broadly confirmed ESMA's conclusion that there is no need to apply different thresholds for OTC and on-venue transactions. A key issue that still remains for OTC post-trade data, which was also addressed by respondents to the CP, relates to the availability and quality of data. ESMA is of the view that there are significant shortcomings on data quality in particular for OTC trades and work needs to be and is done by ESMA in this area. This report however does not further develop this issue given that it was covered in the MiFID II / MiFIR Review Report No.1.

192. With regard to the proposal to report and flag transactions which are not subject to the share trading obligation but subject to post-trade transparency to FITRS, ESMA acknowledges that the post-trade information flow is important for investors and that efforts should be focused on the improvement of such flow. However, considering that market participants are advocating for better post-trade data, ESMA can better

understand the data quality issues on the post-trading flow if accessible through FITRS which is designed to receive such trade flow. Therefore, considering the support to this proposal, ESMA intends to pursue these adjustments during a future review of RTS 1.

193. Considering the feedback to the CP on the question of real-time publication, ESMA believes there is currently no need to change the relevant legislation. The current requirement balances between the demand for quick publication and the need of sufficient room for manoeuvre for technical trades. In response to the concerns expressed regarding equal treatment of investment firms and trading venues, ESMA wishes to highlight that the requirements in Articles 6 and 10 of MiFIR as further specified in Article 14 of RTS 1 and Article 7 of RTS 2 apply to both trading venues and investment firms. ESMA also refers to its previously published Q&A (Q&A 8 of section 2 of MiFID II Q&As on transparency topics, ref. ESMA70-872942901-35) and underscores the need for appropriate enforcement.

4.3 Transparency Requirements applicable to third country transactions

4.3.1 General approach and legal framework

194. The post-trade transparency requirements applicable in Article 20 of MiFIR require EU investment firms to make information on transactions in financial instruments traded on a trading venue public through APAs. However, Articles 20 and 21 of MiFIR do not clarify whether this obligation applies also to transactions concluded on a third-country trading venue.

195. In order to provide clarity and prevent different supervisory approaches across NCAs in the application of the transparency provisions, ESMA published an Opinion on determining third-country trading venues for the purpose of transparency under MiFID II / MiFIR in December 2017. The opinion sets out four criteria that a trading venue should meet in order to be considered as a trading venue for the purposes of the MiFIR transparency regime. ESMA subsequently assessed third-country venues against those criteria.

196. On the basis of this assessment, the opinion was updated in June 2020 and includes, in an annex, the list of trading venues for which the criteria listed in the opinion are met. From 3 October 2020, the requirement for EU investment firms to publish via an APA their transactions in ToTV instruments traded on third-country venues will only apply to transactions executed on third-country venues absent from that list.

197. ESMA acknowledges that a clear Level 1 mandate would have ensured further legal certainty for market participants and trading venues. However, even in the absence of such a mandate, ESMA considers that the use of its supervisory tools, i.e. an Opinion, has allowed to achieve the objectives of the legislation whilst promoting supervisory convergence within the EU. Therefore, it does not see the need to amend

Level 1 provisions for this specific purpose. In the CP, ESMA asked stakeholders if they agreed with ESMA's approach.

4.3.2 Feedback to the consultation

198. A large majority of respondents across all categories of stakeholders explicitly supported ESMA's approach to third-country trading venues for the purpose of transparency requirements under MiFIR. Most respondents supporting ESMA's approach, including most trading venues, also considered that no further action and Level 1 change was needed.

199. Amongst the other stakeholders that also supported the approach, a couple of them suggested that ESMA publishes a negative list of third country trading venues, which was considered as more efficient than a long positive list.

200. Some stakeholders suggested to amend the Level 1 and reduce the scope of transparency and potentially other requirements under MiFIR to European instruments, instruments with their most liquid market in the European Union or shares traded on an official list or on a trading venue with the consent of the issuer.

4.3.3 ESMA's assessment and recommendations

201. Although acknowledging that a clear Level 1 mandate would have ensured further legal certainty for market participants and trading venue, ESMA also notes that a large majority of stakeholders concurred with the view expressed in the CP that the use of ESMA supervisory tools, i.e. an Opinion, has allowed to achieve the objectives of the legislation whilst promoting supervisory convergence within the EU. ESMA will therefore continue with this approach without requiring a clear Level 1 mandate.

202. ESMA also believes that the publication of a positive list (and no negative list) of third-country trading venues is appropriate as the publication of a limited number of non-eligible third-country trading venues would put unnecessary focus on those venues. ESMA believes that a positive list provides for an exhaustive and conclusive list of trading venues that meet the relevant criteria.

203. ESMA noted the suggestions made by some stakeholders to amend the Level 1 and reduce the scope of transparency and potentially other requirements under MiFIR to European instruments, instruments with their most liquid market in the European Union or shares traded on an official list or on a trading venue with the consent of the issuer. However, ESMA sees no rationale for excluding some instruments admitted to trading or traded on EU trading venues from the scope of transparency requirements.

204. The approach designed by ESMA in relation to third-country trading venues for transparency purposes aims at avoiding double trade reporting whilst ensuring that trades executed by EU investment firms are indeed subject to post-trade transparency. Disapplying transparency requirements altogether for certain categories of instruments

admitted to trading or traded on EU trading venues would create an unlevel playing field across instruments and issuers that does not appear to have any sound basis or justification. The scope of the share trading obligation is discussed separately below.

5 Trading obligation for shares (STO)

205. Article 23 of MiFIR requires investment firms (IFs) to conclude transactions in shares admitted to trading on a regulated market or traded on an EU trading venue on RMs, MTFs, SIs or third-country trading venues assessed as equivalent by the Commission. In the CP, ESMA explained that even if this provision was not explicitly mentioned in the MiFIR review clauses (Article 52 of MiFIR), it was necessary to include it in the review of the transparency regime for equity instruments considering its far-reaching implications for market participants and the implementing challenges it has raised for both market participants and European supervisors during the first years of application of MiFIR.

206. ESMA received numerous responses from all types market participants (buy side, trading venues, industry associations, issuers, etc…) on the questions asked regarding the STO demonstrating the importance of this provision and the wide impact it has on EU markets and validating the ESMA's choice to include this topic in its review report to the Commission.

5.1 Scope of the trading for shares

5.1.1 General approach and legal framework

207. While ESMA had not received a specific mandate for reviewing the STO, ESMA decided to include this topic in its review report considering the attention this provision still draws amongst market participants. If some issues have been addressed through ESMA's and Commission's supervisory guidance, ESMA considers that tackling possible remaining challenges would require some targeted amendments of the Level 1 text. Pending these amendments, the current scope of application of Article 23 would continue to apply with potential issues arising, in particular, in the context of the UK's withdrawal from the EU. The prospective legislative changes highlighted in this paper also serve to illustrate the limitations ESMA is facing when attempting to address issues associated with the STO based only on ESMA guidance.

208. In the CP, ESMA raised questions regarding the wide scope of application of the STO. Article 23 of MiFIR applies indeed to all shares available for trading on at least one EU trading venue without taking the actual liquidity available in these shares into account and without differentiating between EU and non-EU shares.

209. ESMA noted that the STO proved challenging to apply in practice regarding non-EU shares with their main pool of liquidity in a third country and, in particular, when this third country is not covered by an equivalence decision. In addition, some more ad hoc events such as the decision of the UK to leave the Union or the non-renewal of the

equivalence decision for Switzerland have created practical issues for EU investors subject to the obligation to execute transactions on EU trading venues or SIs.

210. The guidance provided by ESMA and the Commission regarding the scope of application of Article 23 and, more specifically, the scope of the exemption provided under Article 23(1)(a) when trading in a share is “non-systematic, ad-hoc, irregular and infrequent”, has somewhat alleviated the issues that had emerged. ESMA nevertheless considered that there is benefit in reflecting further about the added value to maintain in the scope of the STO shares which have their main pool of liquidity on a third-country trading venue and asked for views regarding a possible exemption from the scope of Article 23 of such non-EU shares.

211. However, such an exemption would also require establishing a methodology that allows to differentiate third-country shares from other shares remaining under the STO. ESMA has used an approach in the past based on the first two letters of the shares’ ISIN-code. However, as noted in the CP, while this method allows for a simple and relatively accurate way to identify shares with a main pool of liquidity outside the EU, it does not work in all cases. Including shares in the scope of the STO where there is very limited liquidity in the EU could have a detrimental effect on EU market participants. In the CP, ESMA asked for market participants views on those misclassified shares and on possible ways to easily identify them.

5.1.2 Feedback to the consultation

212. Respondents to the consultation expressed unanimous support for revising the scope of the STO but with noticeable differences regarding the magnitude of the necessary changes. While some respondents agreed with ESMA to focus on excluding third-country shares, others (dealers and buy side in particular) supported a more radical approach and proposed to simply remove the STO from MiFIR.

213. Respondents often referred to the issues that emerged in relation to Brexit and the non-renewal of the equivalence for Switzerland. Those events are seen to have acted as a catalyst shedding light on the shortcomings of the STO, i.e. the difficulty for EU investors to access liquidity pools or the risk of overlapping obligations for branches in particular.

214. Respondents expressed a general concern about the lack of clarity regarding the scope of application of the STO. They invited ESMA to therefore avoid an overly complex solution and to rather focus its efforts on improving certainty and predictability regarding the application. Some consider that ESMA should be used as a central source of information and publish the list of ISINs subject to this obligation.

215. Many respondents also questioned the interplay between the STO and the best execution obligation. For those respondents, best execution should take precedence over the STO and they therefore invite ESMA to clarify that best execution should always prevail over the STO (in particular for shares also listed outside the EU).

216. Regarding the identification of third-country shares, respondents generally support using the ISIN's two first letters as a starting point. The majority of respondents acknowledged the limitations this approach has and agreed to complement it with other criteria.

217. The most commonly supported criterion is about whether the issuer has actively sought listing. Respondents do not think that this criterion would be used to circumvent MiFIR since a listing on a third country venue implies stringent reporting obligations for the concerned issuer which are not easy to comply with.

218. This criterion, which was suggested by ESMA as a possible alternative, is envisaged differently by the various respondents: (i) either in combination with the ISIN approach to define shares that fall within the scope of the STO or (ii) as another criterion to exempt some EU ISINs from the scope of the STO. Regarding the latter approach, respondents also proposed variations: (i) to exclude dual-listed EU ISINs from the STO, (ii) to continue applying the STO to dual listed shares but allowing trading on the third-country venues where the issuers has actively sought listing (transactions executed on those third country venue remaining subject to post-trade transparency), (iii) to analyse dual-listed EU ISINs on a case-by-case basis also taking volumes executed in the EU into account, (iv) to only exempt dual-listing EU ISINs where issuers have sought listing on the third country venue before 31 December 2019 to avoid circumvention and regulatory arbitrage, etc… Another recommendation is to consider bringing non-EU ISINs back into the scope of the STO where the issuer has only sought listing in the EU.

219. Another alternative advocated for in the CP was to allow trading on third-country trading venues when undertaken in the third-country domestic currency. Only a few respondents were in favour of this currency approach while some other respondents stressed that this would for instance not solve the problem for some Irish shares listed on the LSE (e.g. Ryanair, Kingspan, Bank of Ireland and AIB).

220. Some respondents stressed existing shortcomings of the MiFIR equivalence regime with respect to the STO. Respondents consider that delays in adopting equivalence decisions, the limited number of them and the non-renewal of the Swiss equivalence have amplified the issues inherent to the application of the STO. Some propose to amend the equivalence decision process making it more transparent (timeline, etc…) and giving more power to ESMA to grant ad hoc equivalence for identified trading venues where necessary. Others suggest to simply remove this equivalence regime and focus on adjusting the scope of the STO.

221. A few respondents suggested, in light of the increasing trading volume in ETFs, to include those instruments within the scope of the STO.

222. One respondent invited ESMA to reconsider its guidance regarding overseas branches of EU investment firms to facilitate the activity of those entities and avoid them being subject to conflicting laws (i.e. EU and third country laws).

223. Lastly, some respondents recommended making a link between the STO and the tick size regime, suggesting to also exempt third country instrument from the scope of Article 49 of MiFID II.

5.1.3 ESMA's assessment and recommendations

224. ESMA welcomes the broad support to its proposal to reduce the scope of the STO and to limit it to EU shares, i.e. shares with their main pool of liquidity in the EU. ESMA takes note of the request made by certain respondents to simply remove the STO from MiFIR but believes that, while it is important to address the shortcomings identified, Article 23 MiFIR itself remains necessary to achieve the objectives established by co-legislators and ensure in particular that "more trading takes place on regulated trading venues and systematic internalisers" (Recital 11 of MiFIR). ESMA therefore focuses its efforts on adequately calibrating the scope of application of the STO.

225. While ESMA agrees that Brexit and the non-renewal of the equivalence decision for Switzerland have highlighted some difficulties with the application of the STO, ESMA considers that the scope of the STO should not necessarily be revised only in light of these two events but more generally with a view to provide legal certainty and facilitate the application for market participants and regulators alike.

226. ESMA does not agree that the obligation to ensure best execution should take precedence over the STO and would not recommend establishing a specific hierarchy amongst those obligations which should therefore continue to be applied in parallel as initially envisaged by co-legislators. In addition, making the STO subject to a best execution caveat would not increase legal certainty but would rather risk turning the STO into an empty shell.

227. Regarding the identification of third-country shares, there is broad support for continuing to use the ISIN as a main criterion. However, respondents expressed a large spectrum of opinions during the consultation on how to finetune this ISIN-based assessment and not only regarding the criteria that could be used but more generally regarding which shares should be excluded from the STO. Some respondents favoured a wide exemption regime while others supported more targeted exclusions.

228. In the CP, ESMA asked more specifically for views regarding the possibility to complement the ISIN approach considering, for instance, whether the issuer has actively sought to have its shares admitted to trading on a trading venue in a third country. While respondents generally welcomed this idea, they expressed again a wide range of views regarding how this criterion should be taken into consideration making it difficult for ESMA to reconcile those views.

229. In addition, while ESMA acknowledges that the admission to trading might be used as a relevant indicator of where liquidity is located, the responses have not fully addressed all the challenges that the concept raises when used to define the scope of a provision like the STO.

230. ESMA notes for instance that responses received refer to the concept of “listing” rather “admission to trading”. This indirectly illustrates the difficulties that applying the MiFID II concept of “admission to trading” to third-country trading venues would raise. While the concept of “admission to trading” is well defined within the MiFID II framework (while “listing” is a concept not used in MiFID II), it is not necessarily used in non-EU jurisdictions and therefore an adequate description that could be applied to third-country jurisdictions would need to be identified.

231. Respondents also insisted on the stringent reporting standards for issuers that an admission to trading on a third-country trading venue represent for an issuer. ESMA agrees that this would make it more difficult to use an admission to trading in a third country for the sole purpose of circumventing the STO.

232. From a more supervisory standpoint, ESMA is concerned that the concept of admission to trading might lead to rendering the equivalence regime of Article 25(4)(a) of MiFID II somewhat redundant. If admission to trading on a third-country trading venue would automatically provide an exemption from the MiFIR STO a positive equivalence decision would only appear to add that shares can also be traded on third-country trading venues without the consent of the issuer or on certain MTF-type of platforms.

233. Taking all those points into consideration and being mindful that it is difficult to find a solution here which could possibly address all concerns from different stakeholders ESMA considers the following as the best way forward.

234. ESMA considers that the clearest and least complex way to determine the scope of the STO is to rely on the first two letters of the ISIN. Shares with an ISIN associated with an EEA country are within the scope of the STO while all others are outside the scope.

235. ESMA acknowledges that this approach can lead to misclassifications in a limited number of cases. ESMA therefore suggests complementing the approach by also allowing trading in shares on third-country trading venues where transactions are executed in the third-country domestic currency. Those shares would however remain within the scope of the STO and OTC trading in those shares would therefore not be allowed, except with SIs in the Union.

236. In other words, ESMA considers that for shares with an EU ISIN, trading on third-country trading venues should be permitted in the national currency of the concerned third country. This would allow EU market participants to access additional pools of liquidity while limiting any unfair competition with EU trading venues. Trading in the local currency is often mainly targeted at domestic investors of the concerned third country who do not necessarily have access to EU trading venues while EU investors would continue to generally trade EU shares using the domestic currency of the issuer.

237. In addition, trading in a third-country currency introduces a currency risk for EU investors. This added risk of the currency would be a determining factor for EU investors when deciding where to trade. ESMA therefore considers that allowing trading on third-country trading venues in the third-country domestic currency does not introduce a significant risk of regulatory arbitrage.

238. As a conclusion, ESMA recommends amending Article 23 MiFIR to clarify that the STO only applies to shares with the main pool of liquidity in the EU based on the ISIN of the share. In addition, trading on third-country trading venues should be deemed in compliance with the EU STO when undertaken in the third-country domestic currency.

5.2 Maintaining SIs as eligible execution venues under Article 23 of MiFIR

5.2.1 General approach and legal framework

239. In the CP, ESMA asked for views regarding whether SIs should remain an eligible execution place under the STO. ESMA noted in particular that the volumes executed by SIs in shares remain relatively high (18% of turnover for liquid shares and 33% for illiquid shares) and that, after the start of application of MiFIR, the number of SIs in shares had increased from ten, mostly from the UK, to above 70 with a much wider geographical distribution.

5.2.2 Feedback to the consultation

240. A large majority of respondents did not support removing SIs as eligible execution places for the purposes of the STO. SIs have been an important source of liquidity in the past and have a crucial role in providing efficient trading alternatives to EU investors and ultimately reinforcing the competitiveness of EU trading venues. Removing this trading alternative for EU investment firms trading in shares was therefore seen as detrimental to EU investors.

241. Other respondents recommended retaining SIs as eligible execution places for the purposes of the STO but limiting the activity to trades above LIS. Below LIS, this type of execution should be operated by a trading venue, under non-discretionary and non-discriminatory rules, and in compliance with the tick size and transparency regimes.

242. Lastly, a minority of respondents were in favour of removing the SIs as eligible execution places for the purposes of the STO. They argue that the growth and proliferation of SIs since the introduction of MiFID II has fostered the fragmentation of liquidity, impaired the price-formation process and created significant challenges for IFs attempting to deliver best execution for their clients, with no corresponding benefits to the wider market to counterbalance these disadvantages.

5.2.3 ESMA's assessment and recommendations

243. ESMA acknowledges the majority of respondents' support for maintaining SIs as possible execution places for the purposes of Article 23 of MiFIR. ESMA agrees that SIs remain an important alternative source of liquidity. The responses received however raise the question about whether trading with SI in shares should be further limited and only permitted for trades above the LIS thresholds.

244. While ESMA agrees that SIs constitute a crucial alternative source of liquidity for large trades, there seems to be fewer supporting arguments justifying the maintenance of SI trading for smaller trades. MiFIR and RTS 1 provide for a variety of trading systems and waivers which should facilitate execution of smaller transactions on-venue.

245. From a more general standpoint, it is an objective of MiFIR to have more equity trading on transparent multilateral systems. ESMA notes in this respect the concerns expressed by certain respondents about the general misalignment of SIs' and trading venues' requirements (e.g. transparency obligations, non-discriminatory access, etc…) which has led to SI volumes remaining high and even increasing for certain instruments or transactions since the advent of MiFID II.

246. It is important to note that amendments to MiFID II / MiFIR have already been adopted to ensure a more level playing field between SIs and trading venues. For instance, co-legislators have recently approved an amendment extending the tick size regime to SIs. This report also includes some recommendations to strengthen the transparency regime applicable to SIs and further align it with the one applicable to trading venues. Some noticeable differences will however remain in place. This is typically the case for non-discriminatory access provisions which apply to trading venues but appear more difficult to be extended to SI trading leaving SIs with more choice regarding the order flow they can execute against.

247. Considering the feedback received during the consultation and the broad support for maintaining SIs as possible execution places for the purposes of Article 23 of MiFIR, ESMA does not recommend excluding SIs as eligible execution venues under the STO.

5.3 Exemptions listed under paragraphs (a) and (b) of Article 23(1)

5.3.1 General approach and legal framework

248. Article 23(1) offers two possible exemptions to the trading obligation for shares, excluding from the scope transactions that (a) are non-systematic, ad-hoc, irregular and infrequent and (b) are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process.

249. In the CP, while ESMA noted that the second exemption appears adequate, it questioned whether the exemption of Article 23(1)(a) should be maintained.

250. The possible reduction of scope of Article 23 and the exclusion of third-country shares would address most of the issues identified so far in relation to the STO. In this case, there would therefore be fewer reasons to maintain an exemption authorising EU investment firms to trade OTC. Shares subject to the STO would consist only of shares with significant meaningful addressable liquidity available on EU execution venues and there is no obvious reasons why EU investment firms could not access this liquidity.

251. In case the exemption was nevertheless maintained, ESMA suggested to at least introduce a mandate in Level 1 to specify the concept of “non-systematic, ad-hoc, irregular and infrequent” trading which appears very unspecific creating diverging understanding amongst EU investment firms and NCAs.

252. Lastly, ESMA recommended simplifying the legal text of the second alternative by deleting “carried out between eligible and/or professional counterparties” and ESMA is looking for feedback on how market participants are using this exemption.

5.3.2 Feedback to the consultation

253. Respondents were split regarding whether the first exemption of Article 23 of MiFIR should be deleted with a slight majority for maintaining it.

254. Those advocating for retaining the exemption noted that it has provided crucial flexibility regarding the application of the STO. It has not only allowed ESMA to address issues that have appeared in relation to the STO through guidance but it has also provided flexibility to market participants regarding the application of the STO and, for instance, to execute transactions OTC in exceptional circumstances. Many of those respondents note that further clarification might however be beneficial.

255. Other respondents recommended for ESMA to delete the exemption to ensure a more harmonised application of the STO and particularly in light of the considered reduction of scope for the STO which could render this exemption redundant.

256. Respondents did not express specific concerns regarding the simplification of the second exemption and the deletion of the reference to transactions “carried out between eligible and/or professional counterparties”.

5.3.3 ESMA’s assessment and recommendations

257. Regarding first the proposed simplification of the second exemption of Article 23 of MiFIR, considering that no concerns were raised during the consultation, ESMA recommends the Commission to implement the proposal and delete the reference to transactions “carried out between eligible and/or professional counterparties” in Article 23(1)(b) of MiFIR. There seems to be no obvious reasons to limit this exemption in such

a way and the proposed deletion would simplify application and supervision of the exemption.

258. As far as the first exemption is concerned (Article 23(1)(a) of MiFIR), more diverse views were received. Not only were respondents split in respect of the deletion of the exemption, but the consultation also revealed that the exemption was considered necessary for different reasons shedding somehow light on the diverging application of the legal text.

259. Some members, for instance, recommended keeping the exemption because it provides flexibility to investment firms to execute transactions OTC when they are not satisfied with the liquidity available on-venue. ESMA does not consider such practice to be in line with the exemption as provided under Article 23 MiFIR with respect to “non-systematic, ad-hoc, irregular and infrequent” trading.

260. More generally, the responses confirmed that, if this exemption has provided necessary flexibility during the first years of application of MiFIR, it has also been a clear source of diverging application of a crucial MiFIR provision. It is clear that this exemption should therefore at least be specified to ensure more convergent application of Article 23 of MiFIR in the EU.

261. ESMA also considers that MiFIR offers many possible on-venue possibilities to trade in shares, both in terms of systems (CLOB, periodic auction, RFQ) and available waivers (negotiated transactions in particular) catering for the need of all EU investment firms trading in shares subject to the STO, including the less liquid ones.

262. ESMA also notes that Article 23 of MiFIR only applies to EU firms that are authorised as investment firms under MiFID II and which have typically the necessary arrangements to undertake even ad hoc trading in shares on-venue.

263. After having carefully considered the arguments provided, ESMA remains of the view that, should the scope of Article 23 be reviewed in line with the recommendations above, it would also be justified to delete the first exemption of Article 23(1) of MiFIR.

264. ESMA recommends deleting the available exemption for trades that are “non-systematic, ad-hoc, irregular and infrequent” in case the scope of the STO is modified as described above.

6 Closing auctions

6.1.1 General approach and legal framework

265. Closing auctions comprise a call phase of roughly five minutes during which orders are accumulated in the order book without immediately giving rise to a transaction. Those orders are then all uncrossed at the same closing price.

266. In the CP, ESMA highlighted developments in the trading of shares in closing auctions, which increased steadily over the last few years on all the main European regulated markets, sometimes exceeding 40%. A study prepared by the AMF links the rise in closing auctions to four main factors:

- The expansion of passive management (ETFs in particular) as the mechanism for creating and cancelling units generally uses the net asset value (NAV) at the end of the day and which requires trading at the closing price for exact replication

- The entry into force of MiFID II in January 2018 increased fund managers' best execution obligations concerning the information provided to clients about the analysis of transaction costs and market impact. Trading at closing auction prices facilitates compliance with these requirements and might create further incentives for fund managers (or any market participants subject to best execution requirements) to participate in closing auctions;

- Closing auctions may limit the exposure to high-frequency traders, whose presence in closing auctions has traditionally been limited.

- The increasing use of algorithms to execute orders may amplify the use of closing auctions as they tend to trigger trades when liquidity is historically highest. VWAP-like (Volume Weighted Average Price) algorithms adapt their execution volumes to that of the market in general. In other words, liquidity attracts liquidity.

267. ESMA asked stakeholders whether they agreed with these factors and whether they consider that ESMA should take actions to influence this market trend and if yes which ones.

6.1.2 Feedback to the consultation

268. Respondents broadly agreed with ESMA's observation of a steady increase in the market share of closing auctions and to the four key factors presented driving this trend. In addition, respondents highlighted the use of the closing price as a reference price (e.g. for a number of financial instruments, corporate actions, tax matters and the determination of settlement prices). Some respondents considered that the low volatility environment over the last years helped to increase trading on closing auctions and observed that the market share of closing auctions has decreased since mid-March 2020 due to high volatility. Finally, a few respondents noted that in the EU closing auctions take place following the end of the continuous session, whereas in the US CLOB trading and closing auction run in parallel, which might explain the higher market share of closing auctions in Europe compared to the US.

269. Concerning the need to take action to influence this trend about half of the respondents to the CP did not recommend taking action at this stage but rather recommended to monitor developments in the next 12-18 months first. A number of respondents highlighted that tools to influence this trend may be limited.

270. Respondents recommending action made a number of proposals ranging from market driven measures (e.g. shortening of trading hours, letting the market develop alternative trading models to facilitate intraday trading) to regulatory measures (e.g. allowing funds to use a VWAP reference unwind price across multiple venues rather than the official closing price, develop new methodologies for an official regulated closing price based on prices across multiple venues to promote competition, further specify best execution obligations).

6.1.3 ESMA's assessment and recommendations

271. In view of the feedback provided by stakeholders, ESMA considers that regulatory action would be premature at this stage. ESMA agrees with the view provided by many stakeholders that the evolution of closing auctions should be closely monitored and that possible negative impacts may be addressed by market participants via market driven measures. Should the market share of closing auctions continue to strongly increase, ESMA may reflect on potential regulatory measures.

7 Summary of ESMA's assessments and recommendations

Area	Amendment	Legal text to be modified
Pre-trade transparency	Reference price waiver applicable only to orders with a size greater than or equal to a certain size which will be a percentage of the LIS threshold or a multiple of the SMS.	Change of Article 4 of MiFIR and inclusion of a mandate for ESMA to determine in Level 2 the appropriate methodology to set the minimum size of orders to be eligible for the RP. This will be reflected in a change of RTS 1.
Pre-trade transparency	Increase of the pre-trade large in scale threshold for ETFs from EUR 1,000,000 to EUR 3,000,000	RTS 1
Pre-trade transparency	Change the reporting requirements to FITRS in order to be able to collect the trading volumes executed per waiver type and not in aggregated form	RTS 3/ Reporting Instructions
Pre-trade transparency	Reduce the parameters to be used to assess the liquidity of shares, ETFs, DRs and certificates to two, namely averaged daily turnover and average daily number of trades.	Article 2(1)(17)(b) of MiFIR
Pre-trade transparency	Deem other equity like financial instruments illiquid by default.	CDR 2017/567
Frequent batch auctions (FBAs)	Definition of FBA and of the relative transparency requirements.	Change of RTS 1 to provide for a tailored the pre-trade requirements for FBAs.
Non-price forming trading systems	Define of non-price forming transactions	Level 1 change mandating ESMA to develop a list if non-price forming transactions; RTS 1 change for the list of non-

		price forming transactions and streamlining of the various lists
Systematic internaliser (SI)	Increase the minimum quoting size from 10% to 100% of the SMS	Article 14(3) of MiFIR
Systematic internaliser (SI)	SMS determination based on ADT instead of AVT. The SMS values will be determined in a future revision of RTS 1.	Article 14(4) of MiFIR and RTS 1.
DVC	Removal of threshold at TV level of 4% and related obligation of TVs to monitor that dark trading at TV level does not reach 4%	Article 5 of MiFIR
DVC	Application of the DVC to instruments without 12 months of data	Article 5 of MiFIR
DVC	Publication of DVC results after 7 instead of 5 working days from the end of the reporting period	Article 5 of MiFIR
DVC	Removal of the publication of the mid-month reports	Article 5 of MiFIR
DVC	Inclusion of infringements of the DVC suspensions in the sanctions article of MiFID II	Article 70 of MiFID II
Post-trade transparency	Increase of the post-trade large in scale threshold for ETFs benefitting from a 60-minute delay from EUR 10,000,000 to EUR 15,000,000	RTS 1
Post-trade transparency	Report and flag transactions which are not subject to the share trading obligations but subject to post-trade transparency to FITRS	RTS 1

STO	Limit the scope of application of the STO to EU shares. For this purpose EU shares should be identified based on the two first letters of their ISIN-code (i.e. shares with an ISIN associated with an EEA country are within the scope of the STO while all others are outside the scope). In addition, for shares within the scope of application of the STO, trading on third-country trading venues should be permitted in the national currency of the concerned third country.]	Article 23(1) of MiFIR
STO	Delete the exemption of Article 23(1)(a) of MiFIR for trades that are “non-systematic, ad-hoc, irregular and infrequent”. Remove the reference to transactions “carried out between eligible and/or professional counterparties” in Article 23(1)(b) of MiFIR.	Article 23(1) of MiFIR

8 Annexes

8.1 Annex I

Opinion of the Securities and Markets Stakeholder Group

272. The SMSG believes that the evidence and the proposals presented by ESMA are very important and require in depth review and discussion in order for appropriate actions to be taken by regulators and co-legislators to ensure the proper functioning of markets. The SMSG has agreed to include only common views in this advice; areas where members have different views will be set out by (the organisations of) those members in separate responses to the consultation paper.

273. The SMSG agrees that an efficient equity market structure is a prerequisite for a successful CMU and must include the possibility for retail investors to be active participants in the equity market.

274. The SMSG agrees to ESMA's proposal to keep the waiver for large in scale orders and order management facility since we believe it is important to protect large orders from market impact. SMSG members have different views as to the waivers for reference price orders and negotiated trades.

275. The SMSG is in favour of a simplification of the double volume cap mechanism, if maintained at all, such as for example moving to just one EU wide cap and introducing an only monthly calculation. The SMSG considers that such simplification would not negatively change the positive effect, if any, of the DVC, but rather limit some of the negative effects of DVC. Simplifying the DVC to one Volume Cap for of the entire EU would limit the administrative burdens for investment firms, trading venues, competent authorities and ESMA to provide correct data (which was a huge problem to start with), calculate and keep abreast of the relevant cap.

276. The SMSG agrees to ESMA's conclusions and proposals in the area of post-trade transparency.

277. The SMSG believes that the scope of the share trading obligation in Article 23 of MiFIR should be reduced and not include third-country shares, since EU regulation should not have extraterritorial reach. The ISIN should be used as the first basis for this assessment. However, as recognised by ESMA, this approach is not suitable in all cases and complimentary criteria are therefore necessary, and a clear priority order should be established.

278. The SMSG recognises that the volumes have increased at closing auctions. It can be assumed that the increase is due to market participants' interest in having access to as much liquidity as possible. It is likely that the increase in passive investment strategies is another reason for the concentration of orders in closing auctions. The SMSG advises that ESMA should not take action at this time, but should

continue to study the issue of increasing proportions of daily trading volumes in closing auctions.

279. Lastly, the SMSG is of the opinion that quality and consistency of reporting and flagging are necessary in order to improve the levels of transparency available to market participants. In order to achieve this, the SMSG advises to extend the Market Model Typology (MMT) to all execution venues under ESMA's governance in order to ensure that proper flagging takes place. The SMSG is also of the opinion that investors need to get better access to pre- and post-trade data published by APAs. A first step would be to have an easily found list of all APAs on ESMA's and the NCA's webpages, including a link to each APA. Furthermore, a standard for the APA's publication should be agreed upon both as regard content (e.g. actual name of instrument) and searchability.

8.2 Annex II

Feedback on the consultation paper

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

280. Respondents expressed mixed views on ESMA's proposal. However, a great majority of the them opposed to the removal of RP and NT waivers. These entities (including associations, law firms, asset managers, investment banks and trading venues) argued that the current regime has generally worked quite well and has provided an appropriate balance allowing market solutions to meet a range of execution objectives. At the same time, it was mentioned that the implementation of the pre-trade transparency waivers has been a complex and time-consuming process and that it is too early to contemplate major changes.

281. Few asset managers also mentioned that such changes would lead to an increase to the trading costs of asset managers, eroding investor returns and potentially accelerating a move to passive investment strategies (with an impact especially on small retail investors).

282. Among these stakeholders, a limited number opposed only to the NT waiver removal, arguing that a potential removal of such waiver would have a negative impact as it is essential in the way some smaller markets conduct their equity business. In addition, the NT waiver should not be limited in usage as this waiver is an important tool in small markets and markets with lower liquidity levels and to the benefit of retail investors.

283. Most respondents against the removal of RP/NT waivers considered that a threshold would not be needed. However, some stakeholders stressed that, if a threshold needs to be imposed, a potential solution would be a threshold no higher than two times SMS or €30,000 or above.

284. Finally, those entities made few general suggestions inviting ESMA to introduce a maximum of four order types a trading venue may offer as exchanges offer too many order types that are not for the benefit of the end-investor, and to carefully analyse the consequences of making any changes to the waivers, as more trades moving to SIs would be a worse outcome for the overall market quality.

285. In parallel, a consistent part of the respondents (mainly trading venues) expressed support for ESMA's proposal to allow LIS orders and orders in an OMF to be waived from pre trade transparency while removing the RP and NT waivers. The

main reason seems to be the removal of DVC which would no longer be relevant and this, according to those entities, would considerably simplify market structure and reporting requirements.

286. Along the same line, several trading venues considered that the reduction of waivers would be the most efficient option to incentivise lit trading and to address concerns about the impact of dark trading on financial markets and the price formation process while contributing to a much-needed simplification of the current framework. However, one association showed concerns that the volume that previously would have traded via the NT/RP waiver ends up being traded somewhere else than the LIT market.

287. Lastly, few associations mentioned that their members have mixed views (i.e. some supported ESMA's proposal and some others recommended to keep the current number of pre-trade transparency waivers) on this topic.

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

288. Among those who supported the increase of the threshold to EUR 5,000,000, some claimed that improving the transparency regime would be indispensable, especially regarding RFQ systems, as ETF trading in such platforms would be increased if the threshold is finally raised.

289. However, the majority of respondents has shown to be against the proposal (especially negative feedback received from regulated markets and companies on the sell side) and all negative responses have highlighted that the heterogeneity of ETFs in terms of liquidity (which would depend on the liquidity of the underlying asset) does not make it suitable to apply an unique threshold level to the whole category.

290. Instead, some respondents proposed different ways of calibrating the threshold, mainly based on the assessment of ETFs as liquid or illiquid, or as one respondent claimed, taking the average transaction size as a guidance to set a threshold as the number of transaction reaching EUR 5 million would be quite limited.

291. Another set of responses that would not support the proposal highlighted the lack of quality data to be used for conducting a higher-level assessment and obtaining a more accurate calibration of the threshold. Therefore, in line with those views, ESMA should focus on improving post-trade data quality or designing a special transparency regime for ETFs before proposing any level change.

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

292. Most respondents did not agree with the proposal of extending the scope of application of the DVC to systems that formalise NT for illiquid instruments. This lack of support for the proposal is also reported by some respondents who are in favour of

the total removal of the DVC system, but who also argue that, in the event that the DVC mechanism is retained, its scope should not be extended to the abovementioned systems.

293. These respondents argue that the trading behaviour for illiquid instruments is very different to that for liquid instruments. Illiquid instruments are in fact more difficult to execute and the NT waiver is widely used for trading where liquidity is often thin in lit order books. Limiting their trading to 'lit' or on-exchange trading, means that investors will have access to less liquidity in instruments in which liquidity is already scarce. As a result, there would be a risk that costs for end-investors may rise.

294. Moreover, it is argued that an extension of the DVC to illiquid instruments will be especially detrimental to trading shares in smaller issuers. If extended, it would work counter-intuitively to promoting SME growth markets by hindering the ability of smaller issuers to gain access to capital.

295. On the contrary, a minority of respondents agreed with the proposal motivated by the need to ensure that the NT waiver is not overused and/or abused.

296. Few respondents did not express their view on the topic, stating that they are in favour of removing the RP and NT waivers, while only allowing orders that are LIS and orders in an OMF to be waived from pre-trade transparency.

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

297. Answers to this question showed a clear preference for retaining the possibility to apply combination of waivers.

298. The great majority of respondents, composed by both trading venues and investment services providers, indicated that the current functioning of combination of waivers is beneficial and therefore opted against its deletion. According to these respondents' experiences, combinations of waivers offer operational efficiencies for venue participants by simplifying order management and execution strategies. A respondent noted that combinations of waivers tend to exist on trading venues offering both price-improvement and reduced execution fees relative to the lit primary markets; whilst another one indicated that, quite often, LIS and RP waivers need to be combined to deal with larger orders which are split up for the purpose of best execution.

299. The main argument used to support the retention of combinations of waivers is that the removal of such option would lead to liquidity fragmentation, in stark contrast with MIFIR objectives and consequently, negative outcomes for end investors. This argument is based on the observation that the current usage of pre-trade waivers allows a greater variety and number of trading participants to interact in the same orderbook, which helps increase liquidity and drive better execution outcomes for the benefit of the end investor. If combinations of waivers were to no longer be allowed,

this could lead to a situation where trading venues setup two distinct orderbooks (e.g. one for RP and another for LIS, or one for NT and one for LIS) and investors would be forced to choose between separate liquidity pools with individual waivers, thus increasing fragmentation. Furthermore, the fragmentation would result in a lower likelihood of execution and the associated degradation in execution quality.

300. Another point which was made in favour of retaining waiver combinations is that pre-trade transparency waivers result in trading venues being able to offer order-books designed to cater for a variety of different trading objectives, allowing for flexibility of trades to be done under different circumstances.

301. Furthermore, some respondents noted that the existence of pre-trade transparency waivers provides relative consistency in terms of availability of trading mechanisms with other global markets.

302. In addition, few respondents pointed to the lack of data supporting the solution to remove the possibility for combination of waivers. One respondent highlighted that no data is available regarding volumes executed using a combination of waivers, and therefore a decision on the point would be taken in absence of a full analysis. Similarly, another respondent pointed out that there is no evidence that combinations of waivers are damaging market efficiency or market transparency.

303. Only a minority of respondents, composed almost entirely of trading venues, reported to be in favour of removing the possibility to apply combinations of waivers. These respondents argued that the solution would strengthen lit trading, with a consequent enhancement of transparency and a simplification of market structure.

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

304. The large majority of the respondents are in support of the proposal that would allow ESMA to better assess the use of the waivers. Few respondents also claimed that the current system that requires the aggregation of data is rather complex and that if only the LIS waiver remains this change will be less relevant.

305. Only few respondents are against such proposal and do not see the need of further changes to the reporting system. Finally, few other respondents did not express a preference.

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

306. Market participants proposed several measures that in their view could incentivise lit trading as well as safeguard trading robustness, transparency and ultimately investor protection of the price determination mechanism. The following are the most commonly supported measures:

- removing SIs as eligible execution venues for shares subject to the share trading obligation for both liquid as well as illiquid instruments;
- restricting SI trading to above LIS thresholds to incentivise lit trading;
- repealing the DVC mechanism to strengthen the use of NTs so that NTs are considered to be on-venue trades when reported under the rules of a trading venue;
- ensuring that FBAs are price forming with full pre-trade transparency;
- maintaining only LIS and OMF waivers and removing the RP and NT waivers (for liquid names): the waivers needed are for LIS and OMF as trading participants can replicate this behaviour in their systems without trading venue provided functionality and those trades that are technical in nature (i.e. subject to conditions other than current market price);
- increasing pre-trade LIS thresholds and minimizing post-trade deferrals;
- establishing a consolidated tape that will increase investor confidence in trading in the lit order book throughout the day;
- creating an economic incentive for market participants by lowering the fees to incentivize trading on lit-venues;
- revising RTS 11 so that shares in the EU face tick sizes which support liquidity and volumes on all EU trading venues and increase the execution quality to the benefit of investors. The following changes should be be considered to achieve these goals:
    - turnover velocity (turnover/free float market capitalisation) is a better proxy for liquidity than average number of trades;
    - behavioural consequences/dynamics should be taken into account more frequently, i.e. by updating the appropriate tick size quarterly, instead of yearly;
    - each venue (most liquid/the incumbent exchange) should be able to determine the relevant tick size based on a tick size table with 3 options. The tick size should be respected by all (particularly relevant if the proposed new tick size table is two dimensional like the FESE tables or if creating options for the most liquid market is not doable);
- clarifying the definition of OTC in order to restrict what is allowed OTC;
- providing a Level 3 clarification on STO in order to define the coverage of the STO;
- classifying Exchange-Traded Notes not as debt instruments.;

– paying attention to products like warrants and certain (structured) products such as sprinters, turbos, warrants (and also CFDs): these may appear liquid and transparent to individual investors, but such liquidity is effectively being controlled by a single issuer-affiliated price setter/market maker (and subject to change, in some cases arbitrarily). The conflicts of interest inherent to how such structured products are issued and traded may threaten best execution and investor protection standards.

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

307. The large majority of respondents, mainly stock exchanges, is in favour of option 1. Indeed, many of them are facing difficulties in providing the data related to the free-float. Therefore, they prefer a simpler liquidity assessment methodology. However, the following considerations were also provided:

308. the frequency of trading is a criterion used when assessing whether an institution qualifies as SI or not; it seems possible but incoherent to use different sets of criteria for this test and the liquidity assessment;

309. the new method will result in a higher number of instruments being considered as liquid therefore the implications with other regulations (e.g. different regime applicable in the buy-in process under CSDR for liquid vs illiquid shares) should be considered;

310. this question should be addressed together with the proposal to remove the NT waiver and a possible tightening of SI quoting obligations (e.g. extending SI quoting obligation to illiquid shares).

311. Very few respondents are in favour of option 2. The arguments in support of this option were the following:

- option 2 is particularly relevant in the case of new large cap IPOs that would be immediately be captured;

- the number of liquid shares under option 1 could exceed 2,300 shares, well above the current figure of 1,500; as such, this will present difficulties as it would increase obligations where stocks are trading under the DVC.

312. Few respondents would prefer not to change the liquidity assessment methodology. According to them option 1 would potentially increase the number of incorrectly categorised illiquid shares as liquid. This could be triggered by aspects such as a liquidity/corporate event, a spike in volatility, or any other cyclical event which

could see traded activity in shares increase exponentially over short periods of time, before reverting to thinly traded volumes. With regard to option 2, they claim that the market capitalisation is not necessarily an indicator of liquidity, given it takes into consideration the portion of stocks that is held by insiders and is therefore illiquid de-facto. Free float, on the other hand is a better indicator of liquidity.

313. Last but not least, those respondents who did not express a preference provided the following insights:

- the percentage of days traded is a significant indicator to assess liquidity;

- the benefits of categorising small and medium-sized enterprise ("SME") stocks that trade very infrequently as liquid should be clarified;

- the average daily trade frequency is a critical measure. Furthermore, it is suggested that a value of 20 (which corresponds to a trade on average every 25 minutes, ignoring auctions) is too low. At least a value of 100 (a trade every 5 minutes) as a threshold is deemed relevant to determine whether an instrument is sufficiently liquid and well suited to trading on continuous order books. With regard to average daily trade frequency, the median trade frequency should be used, not the mean, in order to smooth out distortions in trade frequency brought about by volatility, market events etc.

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

314. The views around this proposal were very split. Whilst half of the respondents welcomed the proposed criteria for assessing the liquidity of ETFs and DRs arguing that these should be sufficient, the other half was against this proposal. Few responses were neutral.

315. Among those in favour of this proposal, there was a majority of regulated markets. In the negative responses, it was argued that these instruments should not be assessed by using a single approach but that instead, the liquidity of the underlying asset and the availability of hedging instruments should be taken into account, as the liquidity of ETFs usually do depend on the constituent instruments. Therefore, these should be treated in a way as if they were similar to derivative instruments. A more granular regime was claimed. In general, arguments focused on the suitability of these criteria for ETFs, excluding DRs from the analysis.

316. Few respondents also claimed that the free-float criteria should still be considered as valid for assessing the liquidity of these instruments and another respondent highlighted the importance of including a requirement of trading on a near-to-daily basis.

317. Few responses also remarked a preference for the current regime unless a more in-depth assessment is conducted passing through a reformulation of these proposals towards a more granular approach.

318. On the contrary, another respondent claimed that there should not be adjustments per sub-classes of instruments and that instead, there should be a single approach for all equity instruments.

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

319. Most responses were either against the proposal or showed to have no strong views. Few respondents did not provide their assessment, mentioning that it was not clear which would have been the alternative regime for certificates if proceeding. Therefore, this could have discouraged them from identifying their preference.

320. Some of the participants supporting ESMA's proposal claimed that the removal of certificates from the equity-like transparency scope could have required the modifications of other provisions, e.g. the definition of the transparency regime that would therefore apply to certificates (i.e. what would be their liquidity status) or how certificates should be categorised for reporting purposes (to FIRDS/FITRS, i.e. should they be reported as other equity-like financial instruments).

321. A number of participants agreed with ESMA's proposal because it would simplify to a great extent the current regime. However, the majority of respondents encouraged ESMA to focus on clarifying the definition of these instruments. Furthermore, those also claimed that the removal of the category of certificates would be in contradiction with MiFID II goals of extending the transparency regime to a wide set of asset classes.

322. Few respondents mentioned that a single regime should apply for all equity and equity-like instruments so that consistency is kept and therefore, no sub-class exemptions from transparency should be proposed. Furthermore, another participant mentioned that the criteria for assessing liquidity of certificates shall also be the average daily number of trades and ADT as for EFTs and DRs.

323. Finally, another participant rejected ESMA's proposal but proposed instead a partial solution which would consider certificates as equity-like instrument but deem them as illiquid by default.

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

324. The majority of the respondents supported ESMA's initiative, arguing that this would simplify the current regime and deeming these instruments as illiquid would have very little impact on price formation processes. In addition, this would be consistent with the approach taken for other non-equity instruments.

325. However, out of those responses opposing the proposal, few were not conclusive by arguing that an assessment cannot be issued without having included a definition of "other equity financial instruments". Another response pointed out the lack

of evidence to deeming these instruments as illiquid. Last but not least, few participants stated that each instrument should be assessed according to its own characteristics, instead of applying a criterion by default.

326. Among those supporting this proposal, there was confusion on the kind of instruments that would possibly belong to this category (e.g. interim shares).

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

327. The views of market participants were split both in terms of the need to adjust and separate the definition of FBAs and conventional auctions and the proposal to require the disclosure of all orders submitted to FBAs.

328. Most trading venues and some buy-side institutions that responded to this question agreed that the definition of FBAs should be differentiated from conventional periodic auctions. The operation of conventional auctions (such as opening and closing auctions) by trading venues is well established and widely used and there is merit in differentiating those with FBAs. Despite having similar mechanisms, their purpose is very different. Some trading venues suggest one distinction to be made could be whether the auction includes an element of price formation or not, along with other features like the length of the call phase and the level of pre trade transparency.

329. Other market participants, such as buy and sell-side firms and trade associations view FBAs as a well-established and valued trading mechanism that is widely used by market participants. These respondents do not see a need to separate the definition as in essence FBAs and conventional auctions share the same characteristics.

330. On the requirement to disclose all orders, there were again split views with most trading venues agreeing with ESMA's proposal. However, most trading venues mentioned that they would require further information in order to assess the feasibility of such requirement. Furthermore, some buy-side firms were of the view that FBAs should not disclose the size of the orders.

331. On the other hand, most sell-side institutions and buy-side trade associations argued that the transparency requirements currently applicable to FBAs are sufficient. These respondents further suggested that FBAs are very important for the execution of orders at mid-point which is agreed as a global standard that ensure costs of execution are split and therefore EU regulators should not prevent this possibility. Full disclosure of orders would be detrimental to EU markets because significant and harmful information leakage could occur according to some respondents.

332. A number of buy-side firms are of the view that FBAs increase the level playing field in EU markets as latency is not an important factor and it eliminates the race for speed and in that sense, they suggest that ESMA should not undertake any changes.

333. Some respondents suggested there is no evidence that FBAs are detrimental to investors and have proven useful since the application of MIFID II given they allow mid-point execution. Finally, a number of sell side firms view FBAs as a legitimate market mechanism that offers differential liquidity.

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

334. A slight majority of respondents are of the view that non-price forming systems should only operate under a pre-trade transparency waiver. Some of these respondents, mainly trading venues, also stressed that their view is that the RP waiver should not be available anymore and hence this system should not be able to operate (unless they qualify for the LIS or OMF waiver).

335. On the other side of the argument, market participants, mainly buy and sell-side firms note that requiring more transparency than currently applicable to FBAs will risk information leakage which would be detrimental to the clients' interests. Furthermore, a number of respondents note that mid-point transactions do not necessarily mean they do not contribute to price formation and therefore a distinction cannot be made.

336. What tends to be an overall agreement is that there is a need to further specify which transactions should be considered as non-price forming (including some respondents suggestions to update the RTS 1 list of transaction not subject to current market conditions) and have the possibility, spelled out in Level 1 that technical trades should still be allowed without a waiver. Most market participants, across the all spectrum of activities welcome further discussion on the distinction between price and non-price forming transactions.

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

337. A vast majority of the respondents supported ESMA's proposal to amend the minimum quoting size determined in Article 14(3) of MiFIR. However, there was not a uniform view on what the new minimum quoting size should be. Among the two options proposed the great majority of respondents considered that the increase of the minimum quoting obligation to 100% of the SMS (option 2) would be preferred. Those stakeholders pointed out that the current level (10% of SMS) is too low to fulfil these objectives outlined by ESMA.

338. However, few trading venues supporting option 2, mentioned that in order to achieve a simplified market structure concept, SI activity should be confined to above LIS only. In such a scenario, the question of the minimum quoting size for SIs becomes irrelevant. In addition, a trading firm supporting option 2 stressed that SIs should be removed as eligible execution venues for shares subject to the STO.

339. In parallel, few respondents, mainly associations, expressed their support for increasing the minimum quoting obligation to 50% of the SMS (option 1), pointing out

that the alternative option seems an undue burden for SIs as they are entering into risk taking transactions. On the other hand, a limited portion of stakeholders expressed support for ESMA's proposal to amend the minimum quoting size without providing any specific preference for option 1 nor option 2. Differently, an association stressed that a third option should be introduced, and the minimum quoting size should be set between 10 and 50% of the SMS.

340. Separately, few respondents stressed that no amendment of the minimum quoting size is needed. An asset management firm considered that increasing the proportion of SI activity that becomes pre-trade transparent could be detrimental to overall market quality. The same entity suggested that, rather than increasing the amount of SI activity which becomes pre-trade transparent, it should be considered whether trades below standard market size should be eligible for execution with SIs. Another asset management firm mentioned that increasing the minimum quoting size would have an adverse impact for investors, as it would lead to an increase in the bid-ask spread.

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

341. Views in the market diverge on this question. A number of respondents including trading venues, trade associations and buy and sell side firms, agreed with extending the SI transparency regime to illiquid equity instruments. The main argument in favour of the extension was the development of a level playing field between different execution channels. A respondent noted that a condition for agreeing with an extension would be that SIs are granted flexibility in terms of price and size quoted in order to adequately manage their risk.

342. However, a slight majority of respondents including buy and sell side firms, trade associations and trading venues, was of the view that the transparency obligations should not be extended. The reasons provided include: (i) a possible dilution of the definitions of and differences between liquid and illiquid instruments, (ii) the low level of volume of illiquid instruments and the general issue of sourcing liquidity in these instruments, (iii) the complexity of ensuring that a firm can source sufficient stock to meet demand, in particular in light of CSDR developments, (iv) lack of continuous reference market and complexity of determining the appropriate price, (v) the fact that SIs put their own capital at risk when publishing prices, (vi) the decrease in facilitation activity in illiquid names if the risk profiles are not sustainable, (vii) a negative impact on participation that would particularly affect shares of small and medium size companies, (viii) a possible increase in reporting and market data costs.

343. Some respondents suggested that alternatively, more instruments should be classified as liquid and subject to transparency obligations.

344. Several trading venues proposed to simplify the market structure by restricting SI activity to above the LIS threshold, and conversely, confine below LIS trading to RMs

and MTFs exclusively. The LIS threshold would be used as the main tool to delineate lit and dark trading.

345. A couple of respondents suggested that to resolve the unintended consequences of the SI regime, SIs should be removed as eligible execution venues for shares subject to the STO.

346. A number of trading venues additionally highlighted the following regarding the SI regime: (i) the importance of making the system of flags for SI trades clear and consistent at EU level to enhance data consistency and contribute to the increase of regulatory oversight of SI activity, (ii) the need to review operations and transactions of SIs to monitor the risk that trading takes place on a multilateral rather than bilateral basis, (iii) include in the registration process of an SI the specific details of the operation of the business model, comparable to what RMs and MTFs have to provide.

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

347. Stakeholders were almost evenly split in their responses.

348. Some trading venues suggested that for ETFs, table 2 (the SMS for liquid instruments) should also be used for illiquid instruments. The argument made was that the liquidity of an ETF is primarily determined by the liquidity of the underlying market rather than by its ADT. Correspondingly, ETFs tracking similar underlying markets typically demonstrate similar liquidity profiles in terms of average spreads. Hence, both liquid and illiquid ETFs with the same ADT should be subject to the same SMS This will also contribute to a simpler regime, reducing the operating burdens and risks.

349. Some respondents supporting ESMA's proposal also suggested that SIs should only be allowed to trade above LIS, whilst trades below LIS would have to be executed on lit RMs or MTFs. One respondent suggested replacing the SMS with the SSTI along the lines of RTS 2 thereby harmonising the approach between equities and non-equities.

350. Stakeholders opposing ESMA's proposal were mainly sell-side firms and fund managers. The main argument was that the proposal fails to recognise that SI venues are fundamentally different in nature from trading venues that do not facilitate trades using their balance sheet. ESMA is invited to limit the unintended consequences for the ultimate clients and the end investors deriving from costs' increase and reduced liquidity further hampering the possibilities to trade.

351. A respondent further stressed that, should SIs be required to quote in large sizes beyond the best bid/offer in the order book, they would be put at a disadvantage as they would have to quote a single price complying with the tick size regime whereas on-venue participants are able to quote different price levels. Although opposed to switching to ADT, one respondent recognised that the current SMS buckets are unsatisfactory with too many instruments ending up in the lowest bucket and suggested

that existing SMS buckets are recalibrated to introduce a more meaningful and better-aligned SMS scale in liquid instruments.

352. Few respondents stated that they could support an extension of the quoting requirements for SIs but combining it with a significant increase in the SMS level potentially gives SI operators the choice of publishing uncompetitive quotes or taking on excessive risk.

353. Finally, it was also suggested that if ESMA's intent is to align the methodology in determining the SMS and the LIS, this should be done by changing the LIS to have it based on multiples of the AVT.

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

354. Respondents were split among different options:

- Option A - no change to DVC;
- Option B - eliminate the 4% TV level thresholds which was the option supported by the majority;
- Option C - eliminate the 4% TV level threshold and reduce the EU level threshold to 7%;
- Option D - eliminate the DVC;
- Option E - eliminate the DVC, if not we prefer option B;
- Option F - eliminate the DVC, if not we prefer option C;
- Option G - eliminate the DVC, if not we prefer option A, if not we prefer option B.

355. The majority of the respondents to this question would prefer the removal of the DVC. However, as a second-best option in the case the DVC would not be removed, they supported option B.

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

356. The vast majority of respondents across all spectrums of the market infrastructure are of the view that the DVC should be removed.

357. Few respondents do not see that any significant changes are needed to the DVC structure.

358. Those respondents who would like to keep the DVC claim that any change would potentially disrupt financial markets and that significant resources have already

been expended by the industry on the application and implementation of the DVC. The only change envisaged by these respondents was to remove the 4% threshold and keep only the EU wide suspension.

359. Respondents suggested different approaches as alternatives to the DVC. Most trading venues are of the view that dark pools should be limited to execution above LIS and suggested ESMA to remove both the RP and NT waiver in its entirety and only allow execution of orders below the LIS thresholds on lit trading venues. Any execution above LIS could either be made on a dark trading venue or on SIs.

360. A trading venue suggested that lit trading does not need regulatory support given that there is a demand for that, the same way that dark trading is important and therefore the DVC should be removed, and all current waivers should remain available.

361. Some large buy-side firms suggest the deletion of the DVC and are of the view that pre-trade transparency would be best addressed by the existence of an EBBO, a better SI regime and a consolidated tape with high data quality. Other buy-side firms agree that dark trading should be limited to the LIS waiver (with some also including the OMF) as the DVC is not effective.

362. Sell-side firms, encourage regulators to let investors choose what the best methods for execution are and claim that the DVC is not the answer. They referred to the DVC as an arbitrary system to limit dark trading which is unlikely to benefit transparency. Furthermore, the EU is a global outlier in this type of mechanism and that dark pools are used to limit the market impact of orders and therefore an important tool for investors.

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

363. Most participants supported ESMA's proposal. Among those who supported eliminating the obligation for NCAs to issue suspension notices, it was argued that this would avoid duplicated responsibilities and would make the communication of suspensions more consistent as currently the way and timing on which NCAs communicate the suspensions differ to a great extent (from formal notices to just sending the ESMA's link to its website).

364. However, the majority of regulated markets who responded to this question did not support ESMA's proposal, arguing that a formal communication from the NCA reduces the probability of overlooking the issuance of suspensions (with the consequent impact on liquidity from the suspension of NT waivers). Respondents therefore claimed that trading venues do rely on NCA's formal notices and these should be maintained.

365. In particular, it has been mentioned that in the case that ESMA decides to eliminate the obligation for NCAs, it would be necessary to make sure that suspensions

are communicated in a clear and consistent way from ESMA (setting up automatised processes and publication through FITRS, for example).

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

366. In general, respondents supported this proposal given the technical challenge of aggregating EU volumes under waivers. They also considered that an effective monitoring can be conducted from trading venues. One respondent highlighted that the current industry standards are very inefficient and subject to data quality issues. Therefore, this requirement should be eliminated from MiFIR.

367. Only two arguments against the proposal were mentioned: (i) that in the case that the 4% threshold is finally eliminated, there is no need of removing Article 5(7)(b) from MiFIR and (ii) that such deletion would increase trading venues' costs which would be ultimately translated to clients (although these answers failed to provide further clarification on how and why costs would increase).

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

368. The extremely limited number of responses was not sufficient to assess the impact of the DVC on the cost of trading.

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

369. There is no unanimous response to this question. A number of respondents indicated that they agreed.

370. Others disagreed to applying the DVC to instruments with less than a full 12-month period of data. Among those respondents, a few had a more nuanced response. For actual new instruments they opposed applying the DVC. However, when ISIN changes (resulting from a corporate action) would not lead to a genuine new company, they would agree to apply the DVC.

371. A few other respondents, mainly consisting of trading venues, responded that the question was irrelevant because they advocate for a removal of the DVC. Nonetheless, also here a respondent stated that where an instrument has a new ISIN resulting from a corporate action, the effectiveness of the DVC is undermined.

372. Last but not least, it was recommended that ESMA makes it clear which period of time would be considered as a replacement to the existing 12-month timeframe.

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

373. Almost all respondents answered that they do not foresee any issue if the publication of the DVC results occurs after 7 working days instead of 5.

374. Some respondents reported that certain conditions must be met:

- no change in the way DVC suspensions and results files are made available on ESMA's website;
- the calendar of publication and implementation dates is made clearly available to market participants as it is today;
- trading venues and investment firms have the same amount of time, as they do today, to act on the publication.

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

375. The majority of respondents agreed with the proposal or would agree if their preference for the removal of the DVC would not be accepted. Accordingly, there is broad support to remove the requirement for the publication of mid-month reports. Only one respondent disagreed with the proposal.

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

376. Almost half of the respondents were in favour of including in Article 70 of MiFID II the infringements of the DVC suspensions, considering that the amendment would ensure a level-playing field across all relevant jurisdictions.

377. It was however pointed out that the infringements identified were due to technical issues, and not intentional. This should be taken into account in any supervisory actions and may not require amendments of MIFID II.

378. Only a couple of respondents were against the proposal. The first explained that since the breaches observed were the result of technical issues and not indicative of a lack of supervision or enforcement there is no need to include the infringement of the DVC suspensions in Article 70 of MiFID II. The second respondent considers national regulators better placed to act in a pragmatic way according to the situation in the case of an infringement of the DVC suspension.

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

379. A large majority of respondents, across the different categories of market participants and trade associations, agrees with ESMA's assessment. Many indicated that the MIFIR deferral regime has delivered on its objectives.

380. There were some suggestions nonetheless as to follow-up issues: (i) promoting of even greater transparency levels, (ii) a review of the deferral regime for illiquid instruments, (iii) a more simplified and harmonised regime for deferrals, to avoid

burdensome national procedures and to promote a level playing field, (iv) the idea that delayed data (stale data) within a real-time consolidated tape could represent some risk to users (depending on the respective use cases).

381. A limited number of respondents either indicated they had a neutral approach or disagreed. For these respondents, the above-mentioned issues (plus the general need to analyse the deferral thresholds) provided reason to disagree with ESMA's overall assessment.

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

382. A majority of respondents mainly representing sell side firms and their trade associations but also a fund manager association and some trading venues, disagreed with ESMA's proposal. The main argument made was that ESMA's proposal does not accurately reflect the liquidity of individual ETFs and their constituent instruments. The ETF market should be viewed and analysed in a slightly more granular manner than as a single bucket classification.

383. More specifically, concerns were expressed that increasing the qualifying size will likely lead to market makers, who play a key role in the ETF market, stepping back from pricing larger blocks, or otherwise widen spreads to account for increased market risk, thereby reducing liquidity. Increasing transparency at the expense of liquidity would not be desirable because it would most likely increase costs to end investors and increase the risk of front running in illiquid underlyings.

384. Respondents also noted that applying an excessive level of transparency on ETFs relative to the underlying instruments would introduce undue hedging risk and potentially additional volatility in the market for the underlyings. Although ETFs have some of the characteristics of shares, ETFs are fundamentally different to DRs and shares, with respect to the fact that they can track lesser liquid securities and ESMA should avoid amending the regime solely on the basis of more closely aligning ETF deferral statistics to those of DRs and shares.

385. One respondent further noted that it is not evident from the data presented by ESMA in the CP that the current levels of transparency in ETFs are damaging price formation and would prefer that improvements are made to post-trade data quality and time be given to accumulate an appropriate data set before changes are considered further.

386. Stakeholders supporting ESMA's proposals mainly included regulated markets as well as major asset management companies. The argument made was that aligning ETFs with shares and DRs will help increase the timely availability of ETF post-trade data and should further help in the future as and when the consolidated tape is delivered. It was also noted that pre-trade transparency processing on ETFs is straight forward on RFQ platforms (technical "flash" on their platform) and it is not "threshold

sensitive". One of those stakeholders further urged the tightening of end-of-day reporting to bring it in line with close-of-market reporting (i.e. one hour after market close) as, often, end-of-day reporting takes place sporadically overnight and often shortly before markets open the following day.

Q27: Do you agree with ESMA's assessment of the level of post trade transparency for OTC transactions?

387. The great majority of respondents agreed with ESMA's assessment of the level of post trade transparency for OTC transactions. Some of the respondents specified in their answers that they agree on aligning the deferred reporting thresholds for OTC and on-venue transactions, whilst others emphasised the general need to improve data quality for OTC trades.

388. Some respondents, comprising both trading venues and investment service providers, pointed to the lack of reason for different thresholds for OTC (including SI) and on-venue transactions.

389. Furthermore, answers showed a shared view that trading OTC should not correspond to minimal post-trade transparency and that OTC transactions should reach the same level of quality in post-trade reporting.

390. Few respondents pointed out that market participant's struggle to comply with post-trade transparency requirements for OTC trading, a circumstance which calls for ESMA intervention to ensure that reporting obligations, including accurate flagging or transactions, are applied consistently.

391. It was also emphasized that the availability, quality and consistency of OTC post-trade data is not satisfactory and that such circumstances hamper consolidation of such data.

392. Very few respondents do not agree on the deferred reporting thresholds for OTC and on-venue transactions to be aligned. The service provider belonging to this group who elaborated more on his answer advocated for longer post-trade deferral periods for OTC activity to encourage liquidity providers to provide more capital to clients.

393. A respondent indicated its preference for trades which do not entail risk taking to be reported without deferral.

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

394. The slight majority of respondents were in favour of ESMA's proposal. However, they asked for flags which are granular enough to allow market participants to distinguish addressable versus non-addressable liquidity. Furthermore, they believe that non-price forming activity (e.g. give-up/give-in trades) should not be included in

transparency calculations (e.g. liquid market, SMS). It is noted that market stakeholders have been addressing these issues in industry working groups such as FIX Protocol.

395. Some of the remaining respondents who did not agree with ESMA's proposal claimed that this information is already available and that transactions are already reported under the post-trade transparency regime and under the transaction reporting regime under Article 26 MiFIR and flagged with "TNCP", i.e. transactions not contributing to the price discovery process for the purposes of Article 23 of Regulation EU No 600/2014. Furthermore, some of them agreed that easier identification of trades not subject to the share trading obligation or otherwise not price-forming would help in having more accurate information. However, they believed that changes should be made as a priority to the post-trade reporting regime and not to FITRS to benefit investors.

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

396. The vast majority of respondents agreed that allowing for a maximum of one minute from the time of execution to the time of publication is appropriate.

397. Most of these respondents, in particular trading venues, believed that in technological markets the reporting of transactions should be (and in most cases is) just a few milliseconds for most of the trades. However, given that there is also an obligation to report technical trades and trades subject to the NT waiver, the one minute maximum is appropriate.

398. There is also an agreement amongst market participants that the regulation should not allow for any deliberate or artificial delay once the trade is captured. In that sense, many trading venues reiterated their support to ESMA's Q&A which should be appropriately enforced by NCAs. In addition, these firms stressed that the requirements for OTC/SI reporting should be the same as those for trading venues. On this specific point, one proprietary trading firm argued that OTC/SI trades take longer to report which can withhold important price sensitive information thus being detrimental to market integrity.

399. There were a number of market participants that are of the view that allowing for a maximum of one minute is too stringent. The main argument is that for negotiated trades, it is technically impossible to comply with this requirement.

400. Respondents also made a few more observations on this topic:

- The discussion of the time to report should go hand in hand with the discussion on an EU CTP, in particular on timestamps and the differences between SI and TV (milliseconds vs. seconds);

- More important than the timing is to have a clear distinction between addressable and non-addressable liquidity;
- The one minute requirement encourages off-book trading hence it should be more stringent;
- The compliance with the rules requires firms to check for data quality which can be quite burdensome to do in one minute.

401. One respondent suggested that a robust enforcement of the current rules is more important than changing them.

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

402. Most respondents agreed with ESMA's approach to third-country trading venues for the purpose of transparency requirements under MiFID II, although a couple of them supported the publication of a negative list of third-country trading venues not meeting the conditions set out by ESMA rather than a positive list.

403. A large majority of the respondents supporting ESMA's approach were also of the view that there was no need for a Level 1 change. A handful of respondents however considered that ESMA's approach should be reflected in a Level 1 change for more consistency and legal certainty. Whilst supporting ESMA's approach, one respondent noted that a further step should be made by excluding from the scope of transparency requirements under MiFID II all transactions concluded on a third-country trading venue, without any further conditions.

404. Some respondents did not explicitly support or oppose ESMA's approach but suggested that the list of eligible venues is published and that a more formalised approach for recognition is set up.

405. One stakeholder disagreed with ESMA's approach and considered that no reporting requirement should apply to instruments that are not European. Another stakeholder suggested to amend Level 1 to address scoping issues across numerous MiFID II topics such as the share trading obligation and PTT with reference to instruments traded on an official list or admitted to trading on a trading venue with the consent of the issuer. One trade association was of the view that transparency requirements under MiFID II should only apply when the EU is the primary marketplace for the instrument.

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

406. Q31 has triggered many replies showing the importance of this issue for market participants.

407. Respondents to the consultation expressed unanimous support for revising the scope of the STO but with noticeable differences regarding the magnitude of the necessary changes. While some respondents agree with ESMA to focus on excluding third-country shares, others (dealers and buy side in particular) are in favour of a more radical approach and propose to simply remove the STO from MiFIR.

408. Respondents often support their recommendations highlighting the issues that emerged in relation to Brexit and the non-renewal of the equivalence for Switzerland. Those events have acted as catalyst shedding a light on the shortcomings of the STO: i.e. the difficulty for EU investors to access liquidity pools, the risk of overlapping obligations for branches in particular, etc…

409. Respondents expressed a general concern about the lack of clarity regarding the scope of application of the STO. They invited ESMA to therefore avoid an overly complex solution and to rather focus its efforts on improving certainty and predictability regarding the application of the STO. Some consider that ESMA should be used as a central source of information and publish the list of ISINs subject to this obligation.

410. Many respondents also questioned the interplay between the STO and the best execution obligation. For those respondents, best execution should take precedence over the STO and they therefore invite ESMA to clarify that best execution should always prevail over the STO (in particular for shares also listed outside the EU).

411. Regarding the identification of third-country shares, respondents generally support using the ISIN 2 first letters as a starting point. The vast majority of respondents acknowledges however the limitations this unique approach has and agrees to complement it with other criteria.

412. The most commonly supported criterion is about whether the issuer has actively sought listing. Respondents do not think that this criterion would be used to circumvent MiFIR since a listing on a third country venue implies stringent reporting obligations for issuers which are not easy to comply with.

413. This criterion is envisaged differently by the various respondents: (i) either in combination with the ISIN approach to define shares what fall within the scope of STO or (ii) as another criterion to exempt some EU ISINs from the scope of the STO. Regarding the latter approach, respondents also proposed variations: (i) to exclude dual-listed EU ISINs from the STO, (ii) to continue applying the STO to dual listed shares but allowing trading on the third-country venues where the issuers has actively sought listing (transactions executed on those third country venue remaining subject to post-trade transparency), (iii) to analyse dual-listed EU ISINs on a case-by-case basis also taking volumes executed in the EU into account, (iv) to only exempt dual-listing EU ISINs where issuers has sought listing on the third country venue before 31 December 2019 to avoid circumvention and regulatory arbitrage, etc… Another

recommendation is to consider bringing non-EU ISIN back into the scope of the STO where the issuer has only sought listing in the EU.

414. Respondents are generally not in favour of taking the currency into consideration stressing that this would for instance not solve the problem for some Irish shares listed on the LSE (e.g. Ryanair, Kingspan, Bank of Ireland and AIB).

415. Other recommendations were made in the received responses. Some respondents stressed existing shortcomings of the MiFIR equivalence regime with respect to the STO. Respondents consider that delays in adopting equivalence decisions, the limited number of them and the non-renewal of the Swiss equivalence have indeed amplified the issues inherent to the application of the STO. Some propose to amend the equivalence decision process making it more transparent (timeline, etc…) and giving more power to ESMA to grant ad hoc equivalence for identified trading venues where necessary. Others suggest to simply remove this equivalence regime and focus on adjusting the scope of the STO.

416. A few respondents suggest, in light of the increasing trading volume in ETFs, to include those instruments within the scope of the STO.

417. One respondent invites ESMA to reconsider its guidance regarding overseas branches of EU investment firms to facilitate the activity of those entities and avoid them being subject to conflicting laws (i.e. EU and third country laws).

418. Lastly, some respondents recommend to make a link between the STO and the tick size regime, suggesting to also exempt third country instrument from the scope of Article 49 of MiFID II.

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

419. The majority of respondents are not in favour of removing SIs as eligible execution places for the purposes of the STO.

420. In addition, a few respondents recommend retaining SIs as eligible execution places for the purposes of the share trading obligation but with the condition of limiting the activity to trades above LIS. They consider that SI activity should remain eligible for LIS transactions only below LIS as this type of execution venue should operate as a trading venue, under non-discretionary and non-discriminatory rules, and comply with the tick size and transparency regimes.

421. On the other hand, a minority of respondents are in favour of removing the SIs as eligible execution places for the purposes of the STO as a whole. The respondents argue that the growth and proliferation of SIs since the introduction of MiFID II has served to fragment liquidity, impair the price-formation process and create significant

challenges for IFs attempting to deliver best execution to their clients, with no corresponding benefits to the wider market to counterbalance these downsides.

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

422. Respondents are split regarding whether the exemption should be deleted with a slight majority for maintaining it.

423. Those that advocate for retaining the exemption note that it has provided crucial flexibility regarding the application of the STO. It has not only allowed ESMA to address issues that have appeared in relation to the STO through guidance, but it has also provided flexibility to market participants regarding the application of the STO allowing them to execute, for instance, OTC transactions in exceptional circumstances. Many of those respondents note that further clarification might however be beneficial.

424. Others recommend ESMA to delete the exemption to ensure a more harmonised application of the EU provisions and, in particular, in the light of the considered reduction of scope for the STO which could make this exemption redundant.

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

425. Respondents expressed mixed views on ESMA's proposal. However, a majority of them are in favour of simplifying the second exemption of Article 23 MiFIR in order to include all market participants. Among these respondents, one market participant asks ESMA to provide examples (whether with an ad-hoc Q&A or an opinion/guidelines) regarding the application of the requirements set out under article 2 of EU Delegated Regulation 2017/587 with respect to "transactions not contributing to the price discovery process".

426. On the contrary, other respondents support maintaining this exemption and strictly limiting its use to transactions not contributing to the price formation process.

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

427. Nearly all respondents agreed with the observation of increased volumes executed through closing auctions. Some respondents though stated that the market share of 40% presented in the CP was overstated and that the market share would be

rather between 12-30%. A few respondents acknowledged the increase but considered it unlikely that the trading volume on closing auctions would increase further.

428. Overall, respondents agreed with the factors identified in the CP explaining the increase of volumes traded in closing auction. In particular, the broader market trend towards more passive investment strategies was highlighted by most respondents. There was also support by various respondents that trading on closing auction is an easy way to meet the best execution requirements (with several respondents criticising that closing auctions are not always the most appropriate way to meet this requirement), that closing auctions may prevent exposure to high frequency traders, and that the increased use of algorithms reinforces the trend to trade on closing auctions.

429. In addition, respondents brought forward other factors driving this trend, such as the use of the closing price as a reference for a number of financial instruments, for corporate actions and other purposes (tax matters, settlement prices). Some respondents considered that the low volatility environment over the last years helped to increase trading on closing auctions and observed that the market share of closing auctions has decreased since mid-March due to high volatility.

430. Primary markets considered that MiFID II and increased fragmentation, the increase in SI- and OTC-trading as well as the high share of trading under pre-trade transparency waivers were a key driver for increased trading volume on closing auctions. However, other respondents did not agree with that view. Finally, a few respondents noted that in the EU closing auctions take place following the end of the continuous session, whereas in the US CLOB trading and closing auction run in parallel, which might explain the higher market share of closing auction in Europe.

431. Respondents expressed mixed views on the impact of the high trading volume on closing auctions. Primary markets stressed the positive effects, such as closing auctions concentrating liquidity, reducing costs and safeguarding price formation process. In their view, closing auctions are not detrimental to continuous trading. Furthermore, this group of respondents stressed that competitive alternatives to closing auctions already exist.

432. Another group of respondents (MTFs, buy- and sell-side, prop traders) had a more negative assessment of the high trading volume on closing auctions, and highlighted that it could undermine transparency and price discovery during the day, resulting in wider spreads and more volatility as well as worsening price formation in SME and Mid Cap stocks. One respondent highlighted that closing auctions are subject to supply and demand characteristics that have little to do with the underlying value of the instrument. This group of respondents also highlighted concerns over the high market power of primary trading venues operating closing auctions, and that the high trading volume on closing auctions could create stability risks. This assessment was not shared by primary markets, which stressed that the systems are subject to strict requirements ensuring their stability.

433. Concerning the way forward, about half of the respondents considered that ESMA should either monitor and assess the situation over the next 12-18 months before considering any action or did not recommend taking any action necessary. Overall, many stakeholders considered that the options for ESMA's action are rather limited in this area. Proposals for possible action included:

- Allow funds to use a VWAP reference unwind price across multiple venues rather than the official closing price;
- Reconsider the European process of creation/redemption based on end of day NAV;
- Promote competition in closing auctions. For instance, consider the development of a methodology for an 'official closing price' which is regulated, such as determining the closing price as a weighted average of closing auctions across multiple venues rather than one primary market or a volume weighted price on the CTP at a certain period of time (close to the start of the closing auction);
- Further specify best ex obligations to minimise herd behaviour;
- Aim for more even distribution of trading volume during the day, e.g. via introducing a limit of the share of trading allowed in the closing auction;
- Shorten trading hours and/or open markets later;
- Let the market develop new order types that facilitate intraday trading

434. Furthermore, a number of respondents recommended to investigate why prices for closing auctions are higher than for trading in continuous auctions. One respondent suggested to further assess innovations linked to closing auctions, such as market-on-close crossing mechanisms offered outside of the primary exchange for potential unintended consequences.

8.3 Annex III

TABLE 3 – SHARES

SHRS												
ADT range		Percentage of instruments in the ADT range	AVT range									
			AVT = 0	0.00000001	20,000	40,000	60,000	80,000	100,000	120,000	>= 140,000
				20,000	40,000	60,000	80,000	100,000	120,000	140,000	
			CURRENTLY APPLICABLE SMS									
			NA	10,000	30,000	50,000	70,000	90,000	110,000	130,000	etc.
ADT = 0		0%									
0.00000001	50,000	0%									
50,000	100,000	0%									
100,000	500,000	0%									
500,000	1,000,000	0%									
1,000,000	5,000,000	26.01%	0%	100.00%	0%	0%	0%	0%	0%	0%	0%
5,000,000	25,000,000	30.81%	0%	98.46%	1.54%	0%	0%	0%	0%	0%	0%
25,000,000	50,000,000	14.05%	0%	91.83%	7.21%	0.96%	0%	0%	0%	0%	0%
50,000,000	100,000,000	10.47%	0%	93.55%	2.58%	1.29%	0.65%	1.29%	0%	0%	0.65%
>= 100,000,000		18.65%	0%	0.36%	0%	0%	0%	0%	0%	0%	0%
Total number of instruments		1,480									

Source: ESMA

TABLE 4 - DRS

DPRS											
ADT range		Percentage of instruments in the ADT range	AVT range								
			AVT = 0	0.00000001 – 20,000	20,000 – 40,000	40,000 – 60,000	60,000 – 80,000	80,000 – 100,000	100,000 – 120,000	120,000 – 140,000	>= 140,000
			CURRENTLY APPLICABLE SMS								
			NA	10,000	30,000	50,000	70,000	90,000	110,000	130,000	etc.
ADT = 0		0%									
0.00000001	50,000	0%									
50,000	100,000	0%									
100,000	500,000	0%									
500,000	1,000,000	0%									
1,000,000	5,000,000	39.22%	0%	100.00%	0%	0%	0%	0%	0%	0%	0%
5,000,000	25,000,000	33.33%	0%	94.12%	5.88%	0%	0%	0%	0%	0%	0%
25,000,000	50,000,000	11.76%	0%	100.00%	0%	0%	0%	0%	0%	0%	0%
50,000,000	100,000,000	9.80%	0%	80.00%	20.00%	0%	0%	0%	0%	0%	0%
>= 100,000,000		5.88%	0%	100.00%	0%	0%	0%	0%	0%	0%	0%
Total number of instruments		51									

Source: ESMA

Table 5 - ETFS

ETFS											
ADT range		Percentage of instruments in the ADT range	AVT range								
			AVT = 0	0.00000001	20,000	40,000	60,000	80,000	100,000	120,000	>= 140,000
				20,000	40,000	60,000	80,000	100,000	120,000	140,000	
			OLD SMS								
			NA	10,000	30,000	50,000	70,000	90,000	110,000	130,000	etc.
ADT = 0		0%									
0.00000001	50,000	0%									
50,000	100,000	0%									
100,000	500,000	0%									
500,000	1,000,000	13.23%	0%	26.19%	54.76%	17.86%	1.19%	0%	0%	0%	0%
1,000,000	5,000,000	46.46%	0%	12.20%	30.51%	25.76%	17.29%	5.42%	4.07%	2.03%	2.71%
5,000,000	25,000,000	31.97%	0%	4.43%	14.29%	31.53%	15.76%	10.84%	4.43%	5.91%	12.81%
25,000,000	50,000,000	5.51%	0%	0%	8.57%	17.14%	28.57%	20.00%	14.29%	0%	11.43%
50,000,000	100,000,000	2.05%	0%	7.69%	0%	23.08%	23.08%	38.46%	7.69%	0%	0%
>= 100,000,000		0.79%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Total number of instruments		635									

Source: ESMA