

**Via Electronic Submission**

European Securities and Markets Authority

CS 60747

103 rue de Grenelle

75345 Paris Cedex 07

France

March 17, 2020

**Re: Consultation Papers on MiFID II/MiFIR**

Dear Sir or Madam:

Managed Funds Association[[1]](#footnote-1) (“**MFA**”) welcomes the opportunity to provide comments to the European Securities and Markets Authority (“**ESMA**”) in response to its consultation paper “*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*” (the “**Equity CP**”) dated February 4, 2020[[2]](#footnote-2) and its consultation paper *“MiFIR report on Systematic Internalisers in non-equity instruments”* (the “**SI Non-Equity CP**”, and together with the Equity CP the “**Consultation Papers**”) dated February 3, 2020. [[3]](#footnote-3)

MFA supports a regulatory framework that promotes market transparency and efficiency. MFA therefore appreciates ESMA’s efforts to implement a Level 2 regime that is intended to improve market transparency and ensure depth and liquidity of markets.

Given the scope of the Consultation Papers and for ease of review, we have consolidated in this letter the points raised in our electronic response submitted for each Consultation Paper.

**I. Pre-Trade Transparency Requirements for Equities**

* Whilst MFA supports ESMA’s aims of increasing pre-trade transparency and simplifying the currently complex regime of pre-trade transparency waivers in the Markets in Financial Instruments Regulation (“**MiFIR**”),[[4]](#footnote-4) MFA does not consider there to be a need to reduce the available pre-trade transparency waivers (or otherwise amend the application of the waivers) at this stage. Conversely, MFA considers there to be merit with retaining the reference price (“**RP**”) waiver and negotiated transaction (“**NT**”) waiver, both of which ESMA has proposed to remove.
* With respect to the RP waiver, the waiver is available only where the trade price is determined by reference to either the mid-point of the current bid and offer prices where the instrument was first traded or the most relevant market in terms of liquidity, or, when this price is not available, the opening or closing price of the relevant trading session. Accordingly, as the prices of such transactions are not subject to the usual price formation process, publication of those prices could risk undermining general price formation in the market in the particular financial instrument.
* For example, the removal of the RP waiver in its entirety could potentially be a detriment to market stability and / or contribute to market distortion. The publication of prices that would have otherwise benefited from the RP waiver could, in times of market duress / high volatility, exacerbate distressed prices.
* With respect to the NT waiver, the NT waiver is only available where price formation is subject to conditions other than the current market price of the financial instrument. Accordingly, as a similar concern to that with removing the RP waiver, publication of prices that would otherwise be subject to the NT waiver could risk undermining general price formation in the market in the particular financial instrument.
* Furthermore, these waivers are legitimately used by end-investors (amongst the other waivers currently permitted by MiFIR) to avoid market conditions moving against them and, accordingly, removal of these waivers would further expose end-investors to such a risk.

**II. Double Volume Cap**

* MFA supports the retention of the double volume cap mechanism (“**DVC**”) which limits the usage of the RP and NT waivers to prevent their misuse.
* We note ESMA’s observation in the Equity CP that “… *the percentage of suspensions from TV level to EU level is much larger than the re-suspensions at TV level. This means that due to the dark trading suspension on a venue (4% breach), dark trading was re-distributed on the other dark-pools, thus leading to a breach of the 8% cap.*”[[5]](#footnote-5)
* Given that the efficacy of the 4% trading venue level threshold in reducing unlit trading in general appears to be limited, of the options to amend the DVC as suggested by ESMA (and on the assumption that the availability of the RP and NT waivers are retained), we support the proposal to eliminate the 4% trading venue level threshold and keep the EU level threshold at 8%. This appears to MFA to be the simplest, but still effective, approach to preventing the misuse of the RP and NT waivers, without the need to eliminate these waivers.

**III. Pre-Trade Transparency of Systematic Internalisers (Equities)**

* MFA supports ESMA’s proposal to increase the minimum quoting size of Systematic Internalisers (“**SI**”) for equity and equity-like instruments in the interest of promoting greater market liquidity in these instruments.
* Additionally, in the interest of promoting greater market liquidity in illiquid equity and equity-like instruments under the SI regime, MFA supports extending the obligation for SIs to publish firm quotes (as currently applicable to quotes in liquid equity and equity-like instruments) to those in illiquid equity and equity-like instruments also.

**IV. Share Trading Obligation**

***Identification of Third Country Shares***

* MFA agrees with ESMA’s assessment of the practical difficulties faced with applying the share trading obligation to third country shares (i.e. shares with the main pool of liquidity located outside of the EU), being:
	+ the lack of liquidity in third country shares on EU trading venues;
	+ difficulties as pertaining to the equivalence regime used for the purposes of the share trading obligation (in particular, we note ESMA’s statement that “*it appears unrealistic to think that the Commission could undertake this analysis for all third-countries in the near future*”);[[6]](#footnote-6) and
	+ overlap with equivalent trading obligations applicable in other third countries with respect to third country shares.
* As an example of where these practical difficulties came to the fore, MFA recalls the complications during 2019 as pertaining to ESMA’s approach to the EU share trading obligation in the eventuality of the UK leaving the EU without a withdrawal agreement (a “**no-deal Brexit**”).
* In particular, on March 19, 2019, ESMA had published a statement (the “**ESMA Statement**”) which would have required in a no-deal Brexit situation for the MiFIR share trading obligation to apply to shares with ISINs containing an EU member state prefix and also to a list of shares with ISINs containing the “GB” prefix.
* As a result of the ESMA Statement, had a no-deal Brexit occurred (and in the absence of equivalence for UK trading venues), EU27 MiFID firms would have been prohibited from trading those in-scope shares on UK trading venues.
* Conversely, had a no-deal Brexit occurred and had the FCA adopted the same approach as ESMA for the purposes of the separate share trading obligation in the UK’s onshored version of MiFIR (which would have come into effect upon a no-deal Brexit), UK MiFID firms would have been prohibited from trading shares with a “GB” ISIN prefix and certain shares with an “EU” ISIN prefix that had sufficient UK liquidity on EU trading venues.
* The overlap of shares being subject to both the share trading obligation in MiFIR and the equivalent share trading obligation in the UK’s onshored version of MiFIR was concerning for MFA members given the high expectation that this would have resulted in a liquidity split occurring for such shares as between EU and UK trading venues and, as a corollary, would have impacted the ability for EU and UK firms to achieve best execution.
* The concerns about the STO remain particularly valid in the eventuality that EU and UK trading venues do not receive mutual equivalence for the purposes of the EU’s and UK’s respective share trading obligation before the end of the Brexit implementation period (occurring on December 31, 2020).
* Given the practical difficulties identified, MFA supports the exclusion of third country shares from the scope of the share trading obligation.
* Of the alternative approaches to identifying third country shares as proposed by ESMA, MFA considers the ISIN approach to have the benefit of simplicity and is likely to be the most effective.
* However, we note that even the ISIN approach has its limitations given that having an EU ISIN prefix is merely a proxy for indicating that there is sufficient EU liquidity in those shares and such prefix is not, in itself, evidence of sufficient EU liquidity. As acknowledged by ESMA “*… it fails to take into account that some non-EU ISINs are primarily or only traded in the EU (and therefore should be subject to the share trading obligation) while some EU ISINs barely trade on EU trading venues (even though those instruments are available for trading on EU trading venues)”.[[7]](#footnote-7)*
* Though ESMA states that the limitation described above *“… only concerns a limited number of ISINs”*, it would be helpful to understand how ESMA had come to this conclusion (in particular, on what data has ESMA relied) given that the need for ESMA to determine an alternative approach to identifying third country shares is, in part, due to ESMA’s limited access to third country liquidity data. By ESMA’s own acknowledgement, “*ESMA only has access to EU data and, in the past months, had to rely on other criteria and proxies to identify third country shares*.”[[8]](#footnote-8)
* In the event that ESMA decides to adopt the ISIN approach, MFA does not agree with ESMA’s proposals to supplement this approach with the inclusion of non-EU ISIN prefixed shares for which its issuer had actively sought for those shares to be admitted on an EU trading venue.
* MFA considers that the adoption of this supplemental approach would lead to the materialisation of the main concern previously raised in the eventuality of a no-deal Brexit (in particular, as pertaining to the overlapping of equivalent share trading obligations as applicable in the EU and in third countries and its effect on the market).
* For example, adoption of this supplemental approach would likely lead to the UK Financial Conduct Authority (“**FCA**”) following suit for the purposes of the share trading obligation in the UK’s onshored version of MiFIR, which will come into effect at the end of the Brexit implementation period.
* Should this occur and assuming EU and UK trading venues do not receive mutual equivalence by this date, it is likely that a high number of shares would be subject to both the EU and UK share trading obligation. In turn, this would likely result in a liquidity split in such shares as between EU and UK trading venues and, as a corollary, would impact the ability for EU and UK firms to achieve best execution.
* The adoption of the ISIN approach, without supplementing the approach as described by ESMA, would significantly mitigate the risk of EU / third country overlap as regards to equivalent share trading obligations and, as a corollary, would avoid market fragmentation in in-scope shares.
* Additionally, in the absence of a mechanism to comprehensively and accurately identify third country shares, ESMA may wish to consider weighing the utility of retaining the share trading obligation against the potential risk of damage to markets in shares that are caught as in-scope of the MiFIR share trading obligation but for which there is insufficient EU liquidity.
* Given the practical difficulties with constructing a share trading obligation that achieves the objectives of greater transparency and best execution for investors, MFA agrees with the recent German Finance Ministry position paper which says that “*the intended benefits and the shortcomings of the [share trading obligation] should be thoroughly analysed*”. We further agree with the German Finance Ministry that the MiFIR share trading obligation could be repealed if necessary. In our view, if the share trading obligation is not clearly facilitating best execution for investors, policymakers should reconsider whether a robustly enforced best execution principle would be more effective than retaining the share trading obligation.

***Ability to Trade In-Scope Shares with SIs***

* Whilst MFA supports ESMA’s aim to reduce market fragmentation, MFA does not support ESMA’s proposal to remove the ability for firms to trade shares that are in-scope of the share trading obligation on SIs.
* The ability to directly purchase shares from an SI, rather than on a trading venue, adds optionality to the manner in which a firm may execute its trades. In particular, the ability to execute a share trade on the basis of a quote obtained from an SI produces an advantage for the SI’s client with respect to price certainty and execution certainty that is not always present when placing an order on a trading venue.
* MFA considers maintaining the current breadth of execution optionality is an important tool to enable firms to achieve best execution.

 **V. OTC Transactions Not Subject to the Share Trading Obligation**

* MFA requests clarification on ESMA’s proposal for transactions not subject to the trading obligation for shares but subject to post-trade transparency requirements to be reported to FITRS.
* In particular, MFA requests clarification on how, practically, ESMA envisages firms should report this data to FITRS.

**VI. Pre-Trade Transparency of Systematic Internalisers (Non-Equities)**

* MFA supports ESMA’s aim to simplify the requirements for SI quotes in non-equity instruments.
* We note ESMA’s observation that, in its current form, the pre-trade transparency regime for SIs in illiquid non-equity instruments has limited practical utility. In particular, we refer to ESMA’s statement that “*In practice, as evidenced by the ad-hoc SI data and the magnitude of quoted volumes provided under a pre-trade transparency waiver, it would appear that the obligation to “disclose quotes to clients on request” is hardly ever applied.”[[9]](#footnote-9)*
* MFA agrees with ESMA that (as one of the alternative options noted by ESMA as available) to impose the quote publication requirement as currently applicable to liquid non-equity instruments also to illiquid non-equity instruments, but then to provide a waiver for illiquid instruments to ensure a level playing field between SIs and EU trading venue, would indeed be “*circular, complex and suboptimal*”.[[10]](#footnote-10)
* Given the limited options remaining, MFA supports ESMA’s alternative proposal to remove the obligation to “*disclose quotes to clients on request*” for illiquid non-equity instruments (i.e. to delete Article 18(2) of MiFIR) and, instead, for ESMA to develop ad-hoc supervisory convergence tools for SIs to better determine which quotes are in instruments that are sufficiently liquid and, hence, should be subject to the pre-trade transparency requirement.

MFA would be pleased to discuss the issues addressed in this letter with ESMA. Please do not hesitate to contact Michael Pedroni (mpedroni@managedfunds.org) or Matthew Newell (mnewell@managedfunds.org) in relation to the issues raised in this letter.

Respectfully submitted,

/s/ Michael N. Pedroni

Michael N. Pedroni

Executive Vice President and Managing Director, International Affairs

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| --- |
| 4 February 2020 |

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| Reply form for the Consultation Paper on MiFID II/ MiFIR review report on the transparency regime for equity and equity-like instruments, the DVC and the trading obligations for shares |
|   |

|  |
| --- |
| Date: 4 February 2020 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the transparency regime for equity and equity-like instruments, the double volume cap mechanism and the trading obligations for shares MiFID II/ MiFIR review report published on the ESMA website.

*Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_QUESTION\_CP\_MIFID\_EQT\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

* if they respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

**Naming protocol**

In order to facilitate the handling of stakeholders’ responses please save your document using the following format:

ESMA\_CP\_MiFID\_EQT\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_CP\_MiFID\_EQT\_ESMA\_REPLYFORM or

ESMA\_CP\_MiFID\_EQT\_ANNEX1

***Deadline***

Responses must reach us by **17 March 2020.**

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

***Publication of responses***

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

***Data protection***

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

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Managed Funds Association (MFA) |
| Activity | Investment Services |
| Are you representing an association? |[x]
| Country/Region | International |

# Introduction

Please make your introductory comments below, if any:

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

MFA supports a regulatory framework that promotes market transparency and efficiency. MFA therefore appreciates ESMA’s efforts to implement a Level 2 regime that is intended to improve market transparency and ensure depth and liquidity of markets.

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

1. 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.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_1>

Whilst MFA supports ESMA’s aims of increasing pre-trade transparency and simplifying the currently complex regime of pre-trade transparency waivers in the Markets in Financial Instruments Regulation (“MiFIR”), MFA does not consider there to be a need to reduce the available pre-trade transparency waivers (or otherwise amend the application of the waivers) at this stage. Conversely, MFA considers there to be merit with retaining the reference price (“RP”) waiver and negotiated transaction (“NT”) waiver, both of which ESMA has proposed to remove.

With respect to the RP waiver, the waiver is available only where the trade price is determined by reference to either the mid-point of the current bid and offer prices where the instrument was first traded or the most relevant market in terms of liquidity, or, when this price is not available, the opening or closing price of the relevant trading session. Accordingly, as the prices of such transactions are not subject to the usual price formation process, publication of those prices could risk undermining general price formation in the market in the particular financial instrument.

For example, the removal of the RP waiver in its entirety could potentially be a detriment to market stability and / or contribute to market distortion. The publication of prices that would have otherwise benefited from the RP waiver could, in times of market duress / high volatility, exacerbate distressed prices.

With respect to the NT waiver, the NT waiver is only available where price formation is subject to conditions other than the current market price of the financial instrument. Accordingly, as a similar concern to that with removing the RP waiver, publication of prices that would otherwise be subject to the NT waiver could risk undermining general price formation in the market in the particular financial instrument.

Furthermore, these waivers are legitimately used by end-investors (amongst the other waivers currently permitted by MiFIR) to avoid market conditions moving against them and, accordingly, removal of these waivers would further expose end-investors to such a risk.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_1>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_2>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_3>

1. 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.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_4>

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<ESMA\_QUESTION\_CP\_MIFID\_EQT\_4>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_5>

1. 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.

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

TYPE YOUR TEXT HERE

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

1. 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.

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

TYPE YOUR TEXT HERE

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

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

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

TYPE YOUR TEXT HERE

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

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

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

TYPE YOUR TEXT HERE

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

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

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

TYPE YOUR TEXT HERE

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

1. 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.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_11>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_12>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_13>

MFA supports ESMA’s proposal to increase the minimum quoting size of Systematic Internalisers (“SI”) for equity and equity-like instruments in the interest of promoting greater market liquidity in these instruments. .

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_13>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_14>

In the interest of promoting greater market liquidity in illiquid equity and equity-like instruments under the SI regime, MFA supports extending the obligation for SIs to publish firm quotes (as currently applicable to quotes in liquid equity and equity-like instruments) to those in illiquid equity and equity-like instruments also.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_14>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_15>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_15>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_16>

MFA supports the retention of the double volume cap mechanism (“DVC”) which limits the usage of the RP and NT waivers to prevent their misuse.

We note ESMA’s observation in the Equity CP that “… the percentage of suspensions from TV level to EU level is much larger than the re-suspensions at TV level. This means that due to the dark trading suspension on a venue (4% breach), dark trading was re-distributed on the other dark-pools, thus leading to a breach of the 8% cap.”

Given that the efficacy of the 4% trading venue level threshold in reducing unlit trading in general appears to be limited, of the options to amend the DVC as suggested by ESMA (and on the assumption that the availability of the RP and NT waivers are retained), we support the proposal to eliminate the 4% trading venue level threshold and keep the EU level threshold at 8%. This appears to MFA to be the simplest, but still effective, approach to preventing the misuse of the RP and NT waivers, without the need to eliminate these waivers..

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_16>

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_17>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_17>

1. 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.

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

TYPE YOUR TEXT HERE

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

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_19>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_19>

1. Please provide your answer to the following [survey](https://forms.office.com/Pages/ResponsePage.aspx?id=aPIG5OdKgEyJlAJJPaAMA8MbwIo5IbFHiXG6oH-BVkdUNjJUNktLOU1BSVZYUUFEQVUwSVZHSzdZTC4u) (<= click here to open the survey) on the impact of DVC on the cost of trading for eligible counterparties and professional clients.

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

[CLICK ON THE WORD “SURVEY” IN THE QUESTION IN ORDER TO PROVIDE YOUR ANSWER]

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

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_21>

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<ESMA\_QUESTION\_CP\_MIFID\_EQT\_21>

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

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

TYPE YOUR TEXT HERE

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

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

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_23>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_23>

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

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

TYPE YOUR TEXT HERE

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

1. 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.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_25>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_25>

1. 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.

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

TYPE YOUR TEXT HERE

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

1. Do you agree with ESMA assessment of the level of post trade transparency for OTC transactions?

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_27>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_27>

1. 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.

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

MFA requests clarification on ESMA’s proposal for transactions not subject to the trading obligation for shares but subject to post-trade transparency requirements to be reported to FITRS.

In particular, MFA requests clarification on how, practically, ESMA envisages firms should report this data to FITRS.

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

1. 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.

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

TYPE YOUR TEXT HERE

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

1. 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.

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

TYPE YOUR TEXT HERE

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

1. 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?

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

MFA agrees with ESMA’s assessment of the practical difficulties faced with applying the share trading obligation to third country shares (i.e. shares with the main pool of liquidity located outside of the EU), being:

* the lack of liquidity in third country shares on EU trading venues;
* difficulties as pertaining to the equivalence regime used for the purposes of the share trading obligation (in particular, we note ESMA’s statement that “it appears unrealistic to think that the Commission could undertake this analysis for all third-countries in the near future”); and
* overlap with equivalent trading obligations applicable in other third countries with respect to third country shares.

As an example of where these practical difficulties came to the fore, MFA recalls the complications during 2019 as pertaining to ESMA’s approach to the EU share trading obligation in the eventuality of the UK leaving the EU without a withdrawal agreement (a “no-deal Brexit”).

In particular, on March 19, 2019, ESMA had published a statement (the “ESMA Statement”) which would have required in a no-deal Brexit situation for the MiFIR share trading obligation to apply to shares with ISINs containing an EU member state prefix and also to a list of shares with ISINs containing the “GB” prefix.

As a result of the ESMA Statement, had a no-deal Brexit occurred (and in the absence of equivalence for UK trading venues), EU27 MiFID firms would have been prohibited from trading those in-scope shares on UK trading venues.

Conversely, had a no-deal Brexit occurred and had the FCA adopted the same approach as ESMA for the purposes of the separate share trading obligation in the UK’s onshored version of MiFIR (which would have come into effect upon a no-deal Brexit), UK MiFID firms would have been prohibited from trading shares with a “GB” ISIN prefix and certain shares with an “EU” ISIN prefix that had sufficient UK liquidity on EU trading venues.

The overlap of shares being subject to both the share trading obligation in MiFIR and the equivalent share trading obligation in the UK’s onshored version of MiFIR was concerning for MFA members given the high expectation that this would have resulted in a liquidity split occurring for such shares as between EU and UK trading venues and, as a corollary, would have impacted the ability for EU and UK firms to achieve best execution.

The concerns about the STO remain particularly valid in the eventuality that EU and UK trading venues do not receive mutual equivalence for the purposes of the EU’s and UK’s respective share trading obligation before the end of the Brexit implementation period (occurring on December 31, 2020).

Given the practical difficulties identified, MFA supports the exclusion of third country shares from the scope of the share trading obligation.

Of the alternative approaches to identifying third country shares as proposed by ESMA, MFA considers the ISIN approach to have the benefit of simplicity and is likely to be the most effective.

However, we note that even the ISIN approach has its limitations given that having an EU ISIN prefix is merely a proxy for indicating that there is sufficient EU liquidity in those shares and such prefix is not, in itself, evidence of sufficient EU liquidity. As acknowledged by ESMA “… it fails to take into account that some non-EU ISINs are primarily or only traded in the EU (and therefore should be subject to the share trading obligation) while some EU ISINs barely trade on EU trading venues (even though those instruments are available for trading on EU trading venues)”.

Though ESMA states that the limitation described above “… only concerns a limited number of ISINs”, it would be helpful to understand how ESMA had come to this conclusion (in particular, on what data has ESMA relied) given that the need for ESMA to determine an alternative approach to identifying third country shares is, in part, due to ESMA’s limited access to third country liquidity data. By ESMA’s own acknowledgement, “ESMA only has access to EU data and, in the past months, had to rely on other criteria and proxies to identify third country shares.”

In the event that ESMA decides to adopt the ISIN approach, MFA does not agree with ESMA’s proposals to supplement this approach with the inclusion of non-EU ISIN prefixed shares for which its issuer had actively sought for those shares to be admitted on an EU trading venue.

MFA considers that the adoption of this supplemental approach would lead to the materialisation of the main concern previously raised in the eventuality of a no-deal Brexit (in particular, as pertaining to the overlapping of equivalent share trading obligations as applicable in the EU and in third countries and its effect on the market).

For example, adoption of this supplemental approach would likely lead to the UK Financial Conduct Authority (“FCA”) following suit for the purposes of the share trading obligation in the UK’s onshored version of MiFIR, which will come into effect at the end of the Brexit implementation period.

Should this occur and assuming EU and UK trading venues do not receive mutual equivalence by this date, it is likely that a high number of shares would be subject to both the EU and UK share trading obligation. In turn, this would likely result in a liquidity split in such shares as between EU and UK trading venues and, as a corollary, would impact the ability for EU and UK firms to achieve best execution.

The adoption of the ISIN approach, without supplementing the approach as described by ESMA, would significantly mitigate the risk of EU / third country overlap as regards to equivalent share trading obligations and, as a corollary, would avoid market fragmentation in in-scope shares.

Additionally, in the absence of a mechanism to comprehensively and accurately identify third country shares, ESMA may wish to consider weighing the utility of retaining the share trading obligation against the potential risk of damage to markets in shares that are caught as in-scope of the MiFIR share trading obligation but for which there is insufficient EU liquidity.

Given the practical difficulties with constructing a share trading obligation that achieves the objectives of greater transparency and best execution for investors, MFA agrees with the recent German Finance Ministry position paper which says that “the intended benefits and the shortcomings of the [share trading obligation] should be thoroughly analysed”. We further agree with the German Finance Ministry that the MiFIR share trading obligation could be repealed if necessary. In our view, if the share trading obligation is not clearly facilitating best execution for investors, policymakers should reconsider whether a robustly enforced best execution principle would be more effective than retaining the share trading obligation. .

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

1. 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.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_32>

Whilst MFA supports ESMA’s aim to reduce market fragmentation, MFA does not support ESMA’s proposal to remove the ability for firms to trade shares that are in-scope of the share trading obligation on SIs.

The ability to directly purchase shares from an SI, rather than on a trading venue, adds optionality to the manner in which a firm may execute its trades. In particular, the ability to execute a share trade on the basis of a quote obtained from an SI produces an advantage for the SI’s client with respect to price certainty and execution certainty that is not always present when placing an order on a trading venue.

MFA considers maintaining the current breadth of execution optionality is an important tool to enable firms to achieve best execution.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_32>

1. 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.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_33>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_33>

1. 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.

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_34>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_34>

1. 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?

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_35>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_EQT\_35>

|  |
| --- |
| Response Form to the Consultation Paper  |
| MiFIR report on Systematic Internalisers in non-equity instruments |

**Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **18 March 2020.**

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

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_SINE\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_SINE\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_SINE\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open Consultations” 🡪 “Consultation on MiFIR report on Systematic Internalisers in non-equity instruments”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

This paper is of interest mainly to systematic internalisers active in non-equity instruments as well as clients of such systematic internalisers, and any associations representing their interest.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | Managed Funds Association (MFA) |
| Activity | Investment Services |
| Are you representing an association? |[x]
| Country/Region | International |

**Introduction**

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

<ESMA\_COMMENT\_CP\_SINE\_1>

MFA supports a regulatory framework that promotes market transparency and efficiency. MFA therefore appreciates ESMA’s efforts to implement a Level 2 regime that is intended to improve market transparency and ensure depth and liquidity of markets.

<ESMA\_COMMENT\_CP\_SINE\_1>

**Questions**

1. : Do you consider that there is a need to clarify what a “firm quote” is? If so, in your view, what are the characteristics to be met by such quote?

<ESMA\_QUESTION\_CP\_SINE\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_1>

1. : (For SI clients) As a SI client, do you have easy access to the quotes published, i.e. can you potentially trade against those quotes when you are not the requestor? Do you happen to trade against SIs quotes when you are not the initial requestor? How often? If it varies across asset classes, please explain.

<ESMA\_QUESTION\_CP\_SINE\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_2>

1. : What is your overall assessment of the pre-trade transparency provided by SIs in liquid non-equity instruments? Do you have any suggestion to amend the existing pre-trade transparency obligations? If so, please explain which ones and why.

<ESMA\_QUESTION\_CP\_SINE\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_3>

1. : (For SI clients) do you have access to quotes in illiquid instruments? If so, how often do you request access to those quotes? What is your assessment of the pre-trade transparency provided by SIs in illiquid instruments?

<ESMA\_QUESTION\_CP\_SINE\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_4>

1. : (For SIs) Do you disclose quotes in illiquid instruments to clients upon request or do you operate under a pre-trade transparency waiver? In the former case, how often are you requested to disclose quotes (rarely, often, very often)? Does it vary across instruments / asset classes?

<ESMA\_QUESTION\_CP\_SINE\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_5>

1. : Do you consider that there is an unlevel playing field between SIs and multilateral trading venues active in non-equity instruments, in particular with respect to pre-trade transparency? If so, please explain why and suggest potential remedies.

<ESMA\_QUESTION\_CP\_SINE\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_6>

1. : (for SIs who are also providing liquidity on trading venues): What are the key factors that determine whether quote requesters (your clients) want to receive the quote through the facilities of a trading venue or through your own bilateral trading facilities?

<ESMA\_QUESTION\_CP\_SINE\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_7>

1. : What is your view on the proposal to simplify the requirements in relation to SI quotes in liquid non-equity instruments under Article 16(6) and 18(7)?

<ESMA\_QUESTION\_CP\_SINE\_8>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_8>

1. : Do you consider that the requirements in relation to SI quotes in illiquid non-equity instruments (Article 18(2)) are appropriate? What is your preference between the options presented in paragraph 52 (please justify)?

<ESMA\_QUESTION\_CP\_SINE\_9>

MFA supports ESMA’s aim to simplify the requirements for SI quotes in non-equity instruments.

We note ESMA’s observation that, in its current form, the pre-trade transparency regime for SIs in illiquid non-equity instruments has limited practical utility. In particular, we refer to ESMA’s statement that “In practice, as evidenced by the ad-hoc SI data and the magnitude of quoted volumes provided under a pre-trade transparency waiver, it would appear that the obligation to “disclose quotes to clients on request” is hardly ever applied.”

MFA agrees with ESMA that (as one of the alternative options noted by ESMA as available) to impose the quote publication requirement as currently applicable to liquid non-equity instruments also to illiquid non-equity instruments, but then to provide a waiver for illiquid instruments to ensure a level playing field between SIs and EU trading venue, would indeed be “circular, complex and suboptimal”.

Given the limited options remaining, MFA supports ESMA’s alternative proposal to remove the obligation to “disclose quotes to clients on request” for illiquid non-equity instruments (i.e. to delete Article 18(2) of MiFIR) and, instead, for ESMA to develop ad-hoc supervisory convergence tools for SIs to better determine which quotes are in instruments that are sufficiently liquid and, hence, should be subject to the pre-trade transparency requirement.

<ESMA\_QUESTION\_CP\_SINE\_9>

1. : What is your view on the recommendation to specify the arrangements for publishing quotes?

<ESMA\_QUESTION\_CP\_SINE\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_10>

1. : Do you have any comment on the analysis of Bond data and the relation with the SSTI thresholds as presented above?

<ESMA\_QUESTION\_CP\_SINE\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_11>

1. : Do you have any comment on the analysis of derivatives data and the relation with the SSTI threshold as presented above?

<ESMA\_QUESTION\_CP\_SINE\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_12>

1. : What is your view on the influence of the SSTI thresholds on the pre-trade transparency framework for SI active in non-equity instruments? Are there any changes to the legal framework that you would consider necessary in this respect?

<ESMA\_QUESTION\_CP\_SINE\_13>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_13>

1. : What is your view on the best way for ESMA to fulfil the mandate related to whether quoted and traded prices reflect prevailing market conditions and in particular: (1) the source of data for the SI quotes/trades (RTS 27, APA); (2) the source of market data prices; and (3) the methodology to compare the two and formulate an assessment?

<ESMA\_QUESTION\_CP\_SINE\_14>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_SINE\_14>

1. Managed Funds Association represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants. [↑](#footnote-ref-1)
2. <https://www.esma.europa.eu/sites/default/files/library/cp_review_report_transparency_equity_dvc_tos.pdf> [↑](#footnote-ref-2)
3. <https://www.esma.europa.eu/sites/default/files/library/esma70-156-1757_consultation_paper_-_mifir_report_on_si.pdf> [↑](#footnote-ref-3)
4. Regulation (EU) No 600/2014. [↑](#footnote-ref-4)
5. Paragraph 185 of the Equity CP. [↑](#footnote-ref-5)
6. Paragraph 261 of the Equity CP. [↑](#footnote-ref-6)
7. Paragraph 274 of the Equity CP. [↑](#footnote-ref-7)
8. Paragraph 272 of the Equity CP. [↑](#footnote-ref-8)
9. Paragraph 47 of the SI Non-Equity CP. [↑](#footnote-ref-9)
10. Paragraph 49 of the SI Non-Equity CP. [↑](#footnote-ref-10)