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| 10 March 2020 |

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| Reply form for the Consultation Paper on MiFID II/ MiFIR review report on the transparency regime for non-equity and the trading obligations for derivatives |
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| Date: 10 March 2020 |

Responding to this paper

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

*Instructions*

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

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

Responses are most helpful:

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

**Naming protocol**

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

ESMA\_CP\_MIFID\_NQT\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

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

ESMA\_CP\_MIFID\_NQT\_ANNEX1

***Deadline***

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

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

***Publication of responses***

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

***Data protection***

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

# General information about respondent

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| --- | --- |
| Name of the company / organisation | ING Bank N.V. |
| Activity | Banking sector |
| Are you representing an association? |  |
| Country/Region | Netherlands |

# Introduction

Please make your introductory comments below, if any:

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

ING welcomes the opportunity to respond to the consultation on non-equity transparency and the derivatives trading obligation. ING will limit its response to the questions on pre-trade transparency (Q1-Q9), the proposals of ESMA regarding ToTV (Q16-18) and the Derivatives Trading Obligation (Q20-24), where ING would like to clearly express its own view. For the other parts of the consultation ING would refer to the responses of AFME, ICMA and ISDA.

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

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

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

ING fully supports the aim of MiFID II and MiFIR to contribute to increased transparency in the non-equity markets. Only adequately calibrated regimes can achieve such transparency and ING is of the view that the way in which MiFID II and MiFIR intend to achieve greater transparency did not succeed. ING does, therefore, not support increased pre-trade transparency.

Non-equity markets do not function in a similar way to equity markets. There can even be differences depending on the non-equity underlying. It is important to stress that there is already pre-trade transparency in the non-equity markets in the form of constantly updated market streams, axes and inventories, but that this is not as a result of the MiFID II and MiFIR transparency requirements, which appear to be calibrated for liquid equity instruments. In addition, we find that within the professional non-equity markets there seems to be no demand for MiFIR-mandated pre-trade transparency. The main purpose of transparency is to provide potential investors with necessary information on price formation and to enable them to make informed decisions on investments. However, such transparency actually already existed pre-MiFIR in the form of constantly updated market streams, axes and inventory which are used in the non-equity markets. This suits the needs of institutional investors. With MiFIR we have seen no change in this market practice and – as we already indicated – little additional benefit from regulated pre-trade transparency.

The bespoke nature of quote and information request to SIs, makes it impossible for the non-quote requesting clients and counterparties to rely on pre-trade quotes. It is highly unlikely that the quote submitted to client A will be interesting for client B, C, or D, unless they would want to trade on exactly the same quantity and the change to inventory of the SI does not influence the price. ING therefore sees no added value in any increase in (the scope of) SI pre-trade transparency.

Retail investors and institutional investors would benefit more from increased post-trade transparency, which would have the following benefits: a level playing field regarding access to information which could remove existing information asymmetries and enable them to assess the market dynamics, promoting market resilience by ensuring that changes in supply and demand are more efficiently reflected in the current price levels, promoting competition by enabling investors to better compare the prices, and supporting the Capital Markets Union.

We would request ESMA come up with workable post-trade practices that benefit the whole market. This includes a centralised, high quality, affordable, trustworthy data source, offering a comprehensive market view, such as an EU bond consolidated tape.

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

1. What proposals do you have for improving the level of pre-trade transparency available? Do you believe that the simplification of the regime for pre-trade transparency waivers would contribute to the improvement of the level of pre-trade transparency available?

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

As we already indicated, ING is of the view that if pre-trade transparency does not meet its aims, the obligation should be removed all together. Alternatively we would advocate a change in set-up in that individual SI quotes should be made public on an anonymous basis and that therefore Articles 18 (5)-(7) MiFIR would be deleted.

A simplification of the waiver regime could lead to damaging liquidity provision as the waiver regime is also intended to protect liquidity providers from undue risks, and ING is therefore not in favour of a simplification. The current waivers meet their purpose.

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

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

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

No, ING is not supportive of the proposal to delete the pre-trade SSTI waiver. This waiver protects liquidity providers from undue risks. The SSTI thresholds is an important element to allow SIs to offer services to clients and to support liquidity in the market. As also rightly mentioned by AFME, the SSTI thresholds serve an important purpose throughout MiFIR and this should be taken into account to prevent undue risks to the markets.

However, should any changes be made, then ING stresses the importance that these are uniform to on and off venue.

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

1. What are your views on the use of the SSTI for the SI-quoting obligations. Should it remain (Option 1) or be replaced by linking the quoting obligation to another threshold (e.g. a certain percentage of the LIS-threshold) (Option 2)? Please explain.

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

ING does not support the deletion of the pre-trade SSTI waiver. ING is supportive of the MiFIR approach that liquidity provision is supported and that a liquidity provider should not face undue risks. The different pre-trade thresholds and waivers are not uniformly applied to on- and off-venue trades and the same quote is therefore subject to different conditions depending on whether it is provided on- or off-venue. Both presented options would not remedy this and would create a more complex regime instead of a more simplified regime.

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

1. Would you support turning the hedging exemption into a limited negotiated trade waiver? If so, would you support Option 1 or Option 2? If not, please explain why.

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

ING is not in favour of replacing the hedging exemption by a limited negotiated trade waiver. The scope of both waivers would not differ and this proposal would only increase the administrative burden for market participants. Instead, we support the proposal of ISDA to extend the hedging exemption to financial counterparties which would, as ISDA argues, address the specifics of the commodity markets.

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

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

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

Although it might be that not all trading systems are fully captured by Annex 1 of RTS 2, ING does not support the issuance of an opinion by ESMA for each new trading system. This might lead to a very burdensome process and delays in innovation and longer trading in less regulated environments, and thus have detrimental impacts on the markets. ESMA would then also have to consult the market that actually uses the trading systems to come to opinions that support innovation. All in all it might become very complex compared to the current regime where trading venues register themselves with their NCA.

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

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

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

In ING’s view, hybrid trading systems should comply with the transparency requirements. Their rulebooks should set out how they comply with RTS2. Hybrid trading systems should not be a vehicle to avoid transparency, but neither should the regulatory regime be one that invokes barriers to entry into the market and to innovation. If ESMA were to issue further guidance ING would welcome a well calibrated regime that would facilitate innovative trading systems.

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

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

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

ING understands ESMA’s aim is to come to a level playing field between trading venues and APA’s on the one hand, and SI’s on the other. In order to achieve such a level playing field, the scope of the SI regime needs to be made clear first. To come to such a level playing field the same scope of the transparency regime would have to apply, which means that the regime should not be applicable to instruments that are traded on a SI but not on a trading venue (the so-called non-TOTV products). The extension of the SI regime to non-TOTV products has led to quite some problems and will continue to lead to problems, such as a inappropriate generation of ISINs and data flaws in FIRDS. Should ESMA’s proposal be followed then it should be strictly limited to TOTV products.

As ING also indicated in this consultation and in other consultations, the pre-trade transparency regime does not function as MiFID II and MiFIR intend, as professional clients and counterparties are not interested in the MiFID II and MiFIR pre-trade transparency. As ING also explained the usefulness of the pre-trade information is limited.

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

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

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

No, ING does not see benefit in further standardisation. The most important reason is that there is no demand for such information in the market, and that is also why ING advocates to delete the pre-trade transparency for non-equity instruments as the rules should be there to support the market and not to create a demand that is not there at all.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. What would be the optimal transparency regime to help with the potential creation of a CTP?

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

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

1. Do you agree with ESMA’s above assessment? If not, please explain.

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

The scope of regulatory reporting and of transparency differs because the purpose of these rules is different. Where regulatory reporting aims at enabling NCAs to monitor what is happening on the markets and detect market abuse and misconduct, transparency rules aim at enabling investors to make their investment decisions.

As ISDA also indicates, the lower level of pre-trade transparency for OTC derivatives cannot be explained from the definition of TOTV compared to on-venue securities, but from the particularities of OTC derivatives.

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

1. Are you of the view that the interpretation of TOTV should remained aligned for both transparency and transaction reporting? If not, please explain why.

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

No. For transparency purposes, SIs are not trading venues but can be used by clients to trade financial instruments that are also traded on a trading venue (TOTV instruments). In such cases where the instrument is traded on a trading venue ING is of the view that it is appropriate to apply similar transparency requirements to SIs and trading venues. Transparency requirements should not be applied to instruments that are traded on a SI, but that are not traded on trading venues (non-TOTV instruments).

For regulatory reporting this is different. The reporting requirement applies both to TOTV and uTOTV instruments. This is supported by ING as this serves a different purpose (cf. the answer to the previous question).

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

1. Which of the three options proposed, would you recommend (Option 1, Option 2 or Option 3)? In case you recommend an alternative way forward, please explain.

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

ING can only support option 1, as product that are only traded OTC or in SI capacity without them being traded on trading venues should not be considered TOTV products and in scope of transparency requirements. The application of the transparency regime should focus on creating a level playing field between trading venues and SIs where the latter facilitate off venue trades in TOTV instruments. This regime should not be extended to non-TOTV instruments as the need to create a level playing field is not present there.

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

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

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

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

1. Do you have any remarks on the assessment of Article 28 of MiFIR? Please explain.

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

ING concurs with ESMA’s assessment of Article 28 MiFIR. Derivatives subject to the derivatives trading obligation (DTO) should be traded or admitted to trading on a trading venue on a non-exclusive and non-discriminatory basis. ING does however like to express the importance of equivalence decisions according to Article 28(4) MiFIR, in particular as the main pool of liquidity for certain asset classes might be on a third-country venue. Mutual equivalence decisions might remedy conflicting DTO’s. This would for example also prevent the clash of circumvention provisions.

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

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

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

ING did not identify asset classes which should be subject to the DTO in the absence of CCPs offering to clear these products. ING notices that central trading of non-cleared products is not common in the EU, and that the demand for on venue trading of non-cleared products is not there, so ING would not support ESMA making use of the option of Article 32(4) MiFIR. For non-cleared products, market participants should be able to decide on a case-by-case basis whether they want to conduct a trade OTC or on-venue (should a venue be prepared to executed a non-cleared trade).

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

1. Do you agree that a procedure for the swift suspension of the trading obligation for derivatives is needed? Do you agree with the proposed procedure? Please explain.

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

ING acknowledges that the current suspension powers of ESMA and the EC are not capable of responding quickly to the need of a suspension as it requires amending the RTS. ING does therefore support the idea of a standalone power for ESMA to be able to swiftly suspend the DTO if needed, but stresses that it is important that this power is subject to pre-defined conditions to offer market participants as much guidance as possible. The power to suspend the DTO should not be confined to situations in which the Clearing Obligation is suspended, as ISDA also rightly mentions, as the criteria for the application of the DTO are not similar to those for applying the Clearing Obligation.

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

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

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

ING is of the view that the introduction of fallback clauses in legacy contracts pursuant to Article 28(2) Benchmark Regulation should not in itself trigger the DTO. The same would apply for the replacement of interest rate benchmarks pursuant to the IBOR transition. ING would welcome a clarification along these lines in Article 33 MiFIR.

As mentioned before, ING is in favour of adopting mutual equivalence decisions with third countries with an equivalent legal and supervisory framework, which would prevent conflicts between the EU DTO and the third-country DTO. An alternative would be to re-scope the EU DTO to prevent such conflicts.

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

1. Do you have any views on the functioning of the register? Please explain.

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

ING supports an ESMA register that contains the classes of derivatives subject to the DTO and the relevant EU and third-country venues. ING thinks it is useful to have all information in one place and would support to maintain the current register.

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

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

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

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

1. Do you agree with ESMA proposal to move to stage 2 for the determination of the liquidity assessment of bonds? Please explain.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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