ESMA Consultation Paper on MiFID II/MiFIR review report on the transparency regime for non-equity instruments and the trading obligation for derivatives (DTO)

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1.- Target participants

This consultation is mainly addressed to all stakeholders involved in the securities markets. In particular, it is of interest to competent authorities and firms subject to MiFID II and MiFIR – mainly investment firms and credit institutions providing investment services and activities, and trading venues. It is also important for trade associations and industry bodies, institutional and retail investors, their advisers and consumer groups as well as any market participants as the requirements of MiFID II and MiFIR seek to implement enhanced provisions to ensure transparency and orderly running of financial markets with potential impacts for anyone engaged in the dealing with or processing of financial instruments.

The CNMV would appreciate it if all the above-mentioned potential stakeholders were to send a copy of their responses to the consultation to the following email address: documentosinternacional@cnmv.es

2. - Information Note

The consultation paper covers the mandates under Articles 52(1) to 52(3) of MiFIR which require ESMA to submit a report to the European Parliament and to the European Council on the impact on the implementation of the transparency obligations established pursuant to Articles 3 to 13 of MiFIR. The articles related to equity and equity-like instruments have been addressed in another consultation. This paper focuses on non-equity instruments under Articles 8 to 11 of MiFIR.

Likewise, Article 52(6) of MiFIR requires ESMA to submit a report to the European Parliament and to the Council on the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms pursuant to Articles 25 and 28 of MiFIR. Therefore, this mandate is also covered in the consultation.

Under Article 17 of RTS 2 (Commission Delegated Regulation 2017/583) ESMA is required to analyse whether it is appropriate to move to the following stage in terms of transparency with regard to: (i) the average daily number of trades threshold used for the quarterly liquidity assessment of bonds, and (ii) the trade percentile used for determining the pre-trade SSTI thresholds. If deemed appropriate, ESMA will submit to the Commission an amended version of the RTS 2, adjusting the thresholds for the relevant parameters. This review is also included in this paper.

In the context of the Level 2 review, ESMA is also taking this opportunity to review the transparency regime specifically for commodity derivatives embedded in RTS 2.

In this paper, ESMA has carried out a technical review of the MiFIR transparency regime for non-equity instruments with the aim of: (i) ensuring that the provisions have delivered on their objectives; and (ii) where possible, proposing legislative amendments to ensure more effective application of the rules while simplifying a regime that has proved to be rather complex to apply and supervise in practice. However, this review does not intend to redefine the general objectives and goals that have been set by co-legislators.

Section 2 contains a brief introduction.

Section 3 addresses the review of Level 1 provisions and starts with the analysis of the pre-trade transparency regime for non-equity instruments (Section 3.1). In particular, three dimensions are investigated: (i) the evolution of pre-trade transparency before and after MiFID II/ MiFIR; (ii) the evolution of trading executed on- and off- venue (including on systematic internalisers); and (iii) the evolution in the use of the different types of waivers. In particular, two main conclusions can be drawn from the analysis. Firstly, the level of pre-trade transparency in non-equity markets remains limited. Secondly, the market structures prevalent in many non-equity markets and the complex structure of the non-equity waivers and the multiple choices available to waive pre-trade transparency requirements turn real-time transparency into the choice of last resort.

Section 3.2 deals with the post-trade transparency regime. This section concludes that also the level of post-trade real-time transparency remains very limited after the implementation of MiFID II/ MiFIR which is exacerbated by the complex deferral regime which is subject to the national discretion, thus leading to different rules applying in the EU. In this regard, ESMA's proposals aim at simplifying the regime in order to increase post-trade transparency. Section 3.3 concludes with the trading obligation for derivatives.

Section 4 focuses on the Level 2 review. In particular, Section 4.1 deals with the review of the setting of: (i) one of the parameters to assess bond liquidity; and (ii) the percentile used to calculate the pre-trade SSTI thresholds for bonds and other non-equity instruments. The paper concludes with the review of the liquidity assessment and the methodology to determine the pre-trade LIS threshold for commodity derivatives.

ESMA will consider the feedback it receives to this consultation and expects to publish a final report and submit, if necessary, draft technical standards to the European Commission in July 2020.

<u>3.- Submission of comments</u>

Due to the extraordinary circumstances resulting from the Covid-19 outbreak, ESMA has decided to extend the deadline of this consultation until **17 May 2020.**

Respondents may send their comments through ESMA's website: **www.esma.europa.eu.** The paper of this consultation and the response form are available on the website ***Consultations*** (place the cursor on the word to obtain the link).

Likewise, please send a copy of your answers to the CNMV to the following email address: **documentosinternacional@cnmv.es**

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