

Suspending the use of pre-trade transparency waivers for a trading venue for the purposes of the Double Volume Cap under Article 5(3B) UK MiFIR¹

Background

1. UK MiFIR includes a provision known as the “Double Volume Cap” or “DVC” as a mechanism for protecting the price formation process in equity financial instruments by limiting the level of “dark” trading on trading venues. Dark trading is where trading takes place without pre-trade transparency i.e. without the details of the terms on which market participants are prepared to trade being publicly advertised. UK MiFIR permits trading venues to use waivers that, in specified circumstances, allow trading to take place without this pre-trade transparency.

2. Under the DVC, if the proportion of trading taking place under two of the waivers from pre-trade transparency for an individual equity instrument exceeds certain thresholds, then the use of those waivers is suspended for a period of 6 months. The suspension for that equity instrument may either apply across the market as a whole (if trading under the waivers across all trading venues exceeds 8 per cent of total trading across the relevant area in that equity instrument) or on a specific trading venue (if trading under the waivers on that venue exceeds 4 per cent of total trading across the relevant area in that equity instrument). DVC suspensions take place on a monthly basis.

3. UK MiFIR gives us a power² to make and renew suspensions of waivers under the DVC without undertaking and publishing the calculations of whether trading has exceeded the 4 and 8 per cent thresholds. Under this power, we may suspend the use of a waiver for period of up to six months and may renew a suspension where we feel that the circumstances which led us to impose the suspension of a waiver continue to exist.

The legal framework for our power

4. We may exercise the power to suspend pre-trade transparency waivers to ensure that its use does not unduly harm price formation if we consider it necessary to advance our integrity objective under section 1D of the Financial Services and Markets Act 2000 (FSMA). In deciding whether that test has been met we –

a. must take into account –

- i. our consumer protection objective and competition objective under sections 1C and 1E of FSMA;
- ii. the thresholds applying under Article 5 of MiFIR as it has effect in the EU; and
- iii. the most recent information published by ESMA under Article 5(4), 5(5) and 5(6) of MiFIR before the end of the Brexit transition period.

b. we may also take into account –

- i. any relevant information produced under Article 3 of UK MiFIR, or under equivalent pre-trading transparency requirements in other jurisdictions, about the use of the waiver in the

¹ UK MiFIR is the UK version of 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, which is part of UK law by virtue of the European Union (Withdrawal) Act, 2018.

² The power is available for a period of four years from the end of the Brexit transition period or shorter if directed by the Treasury.

United Kingdom, or under equivalent waiver arrangements in any other country, in relation to the financial instrument; and

ii. any relevant information available in relation to trading volumes in the financial instrument concerned, whether in the United Kingdom or in any other country.

Policy

5. We shall consider information that may indicate that suspending the use of a waiver would be necessary to advance our integrity objective. Such information may come from UK trading venues or from market participants and users, from our own analysis or from the analysis of other authorities with whom we co-operate. We will also consider the extent to which such trading is being used to minimise execution costs for end investors. We may seek to assess how dark trading is impacting on measures of market quality such as those we considered in Occasional Paper No.29: Aggregate Market Quality Implications of Dark Trading³.

6. In relation to instruments with significant trading on trading venues in another jurisdiction as well as in the UK, we will, if that jurisdiction makes an equivalence decision in respect of the UK, be willing to replicate in the UK suspensions of relevant pre-trade transparency waivers announced in that jurisdiction.

7. We will publish our decision to use this power on our website

³ <https://www.fca.org.uk/publications/occasional-papers/no-29-aggregate-market-qualityimplications-dark-trading>