Brussels, 20 November 2020

EACB Answer to ESMA's public consultation on its MiFIR review report on the obligations to report transactions and reference data

November 2020

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Introduction

The EACB welcomes the opportunity to submit its answer to the ESMA's consultation on its MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-73) dated 24 September 2020.

Whilst we note the intention of the suggested changes is positive in that it can help organise the existing transparency regime practices under MiFIR, we would have preferred that these were consulted and reviewed within the broader context of the MIFID review so that firms can assess the potential cost and impact in a holistic manner, rather than solely in the context of transaction and reference data reporting.

That said, our members can already anticipate that several proposals for reporting of new data shall require significant upfront and ongoing implementation costs for firms, particularly due to system update challenges. We would have appreciated if ESMA presented a cost benefit analysis that justifies adding to the reporting burden on firms.

In summary, our feedback *inter alia* covers concerns and proposals with respect to:

- cross-legislative issues between EMIR and MiFIR;
- the clarification of the ToTV and TVTIC concepts;
- the extension of reporting to UCITS management companies and AIFMs;
- the forced obligation for investment firms to report the transmission of orders; and
- the replacement of the term "index" with "benchmark" in Article 26(2)(c) MiFIR.

Please find further details below.

Section 3. Entities subject to transaction reporting and arrangements for sharing reports (Article 26(1), Article 26(5) and Article 26(8) MiFIR)

1 ***[Section 3.1. AIFMD and UCITS Firms]***

Do you foresee any challenges for UCITS management companies and AIF managers in providing transaction reports to NCAs? If yes, please explain and provide alternative proposals.

Banks are already obliged to report transactions by investment companies to the NCAs in accordance with Article 26 MiFIR. For the implementation of the intended reporting obligation, if the investment companies were to carry out transactions on trading venues themselves, the reporting channel would have to be completely rebuilt and associated with high IT costs.

A delegation option or obligation to accept the report by the banks with which the

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investment companies conclude transactions would change the reporting logic for the banks as the implementing institution, since both the fund and the customer who uses a portfolio service of the investment company, are customers of the bank. In addition, the intended reporting data is not available, such as the CONCAT of persons acting in the (external) investment company as decision makers.

This leads to considerable IT expenditure and organisational challenges in the banks, as the personal data of the "external managers" are not available, especially in the case of external funds, or when the team makes an investment decision, the team has neither a CONCAT nor a LEI.

The high implementation costs that arise here, both for investment companies and banks, are not justified by the argument of "the purpose of market abuse surveillance" (pg.12 of consultation paper). The data of the transactions carried out including the information on the decision maker are now available from the NCAs.

2 ***[Section 3.2. Reference to "members/participants/users" of Trading venues]***

Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

There should be no obligation for trading venue members to report data on their customers to the trading venues (order record keeping), since this data is already contained in their own reports.

In addition, this customer data has no added value for the trading venues for checking price manipulation, since the trading venue will very often receive data from intermediaries behind which there can be from a wide variety of customers. The end-client is very often not a direct customer of the trading venue member, but of an intermediary.

The NCAs have all end customer data in the reports of the trading venue members. Whether a transfer of customer data to a trading venue is even possible under data protection law would have to be checked during implementation.

However, if the proposed approach were to be adopted, we suggest that the term "firm" be legally defined. In this way, the legibility and thus the clarity of the legal text could be significantly increased.

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Section 4. Scope of instruments subject to reporting obligations (Articles 26(2) and 27(1))

8 ***[Section 4.2. Transaction reporting indices under Article 26(2)(c)]***

Do you foresee any challenges with the proposal to replace the reference to the term "index" in Article 26(2)(c) with the term "benchmark" as defined under the BMR? If yes, please explain and provide alternative proposals.

The main challenge that we foresee is if the consideration of the ESMA benchmark register (paragraph 50) as the "golden source" could be challenged, and how to proceed in the case that a benchmark is falsely not included in the register. Moreover, it is not clear how ESMA's approach to decouple the transaction reporting obligations arising from the list of financial instruments defined in Annex II Section C of MiFID II could be legally justified. Moreover, the term "benchmark" is defined too broadly under the BMR and may result in a significantly expanded universe of financial instruments outside the present scope of Article 26(2)(c).

In the meantime, we would also suggest as an alternative that the term index is more strictly defined under the Benchmarks Regulation.

9 ***[Section 4.2. Transaction reporting indices under Article 26(2)(c)]***

Which of the three options described do you consider the most appropriate? Please explain for which reasons and specify the advantages and disadvantages of the outlined options. If you disagree with all of the outlined please suggest alternatives.

The EACB considers that all three options have their disadvantages.

First, from the perspective of a cost-benefit ratio and since there are no necessary purposes here, such as market abuse control, any change or expansion of the reporting system that causes high costs (especially in the IT area) should be avoided.

Even option 3 which we could consider as the safer option does not really maintain the status quo as suggested in the consultation paper. This is because Option 3 refers to benchmarks (which include a reportable financial instrument), while Article 26(3)(c) MiFIR refers to an index. An index and a benchmark are not necessarily identical.

We suggest that ESMA instead checks that indices pursuant to Article 26(3)(c) MiFIR are to be treated in the same way as baskets pursuant to Article 26(3)(c) MiFIR, so that the index components would have to be disclosed. This solution would be proportionate.

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13 ***[Section 4.3.4.: Instruments exclusively traded on SIs]***

Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals

The EACB foresees the following challenges in amending Article 27 MiFIR to equate the systematic internaliser to a trading venue:

- First, this would effectively manifest the problem of polluting FIRDS with reference data with regards to non-ToTV instruments in Level 1. The concept of issuers does not make much sense in a derivatives context. Similarly, the terminology of admitting to trading also does not lead to any logical conclusion in the context of SIs for derivatives. Furthermore, this would likely amplify the issue as ESMA's suggested wording may even bring non-TOTV in scope of reference data requirements;
- Second, this would also mean that reference data from financial instruments would have to be supplied to the NCAs that are not subject to the reporting obligation according to Article 26 para 2 MiFIR. But it is precisely with this reporting obligation that this supplement is argued; and
- Third: Considering the cost-benefit ratio, the usefulness of such an addition is questionable. Apart from data collection, we do not foresee any benefits in comparison to the high IT implementation costs for reference data reporting.

15 ***[Section 4.3.5: Frequency of updates to instrument reference data (defined list)]***

Do you foresee any challenges with the approach as outlined in the above proposal? If yes, please explain and provide alternative proposals.

The EACB would like to draw your attention to the quality deficiencies of the FIRDS database in general. It might be advisable to upgrade the system so that the database contents meet the usual quality requirements and allow for automated processing. We doubt whether FIRDS would be able to process further amounts of data, especially on a daily basis.

Section 5. Details to be reported (Article 26(3)): Trading Venue Transaction Identification; chain of transactions

18 Do you foresee any challenges with the approach outlined in paragraphs 75 and 76? If yes, please explain and provide alternative proposals.

Regarding paragraph 75, we have the following comments:-

- The expansion of the provisions of Article 26 MiFIR to include the systematic internaliser means that a credit institution is on par with a trading venue that is subject to more comprehensive reporting requirements. If the legislature had wanted this to be the case, it would not have added a distinction between trading center and SIs in Article 26 MiFIR. This expansion requires considerable IT implementation and organisational effort for every SI, especially the generation of a TVTIC or a new code (similar to the complex code ID) for messages with INTERNAL code (INTC). These codes must be able to be forwarded within the bank and also to business partners (via interface or alternative channels (telephone, etc.). In this case, cross-bank interfaces are to be set up that represent a technical challenge. It is already now possible for the NCAs to use the available message fields to find related messages. The cost-benefit of such an expansion is therefore questionable; and
- Clarification of the generation of the TVTIC is a positive step and we hope that the market operators would be unambiguously obliged to deliver the TVTIC to market participants in its final form, so that the code is ready to be used in transaction reporting. Currently some trading venues deliver TVTIC values which need to be further handled (concatenated, filled, trimmed etc) by reporting entities. This type of process is prone to errors and misunderstandings, thus leading to matching breaks when NCAs analyse the data. That said, a possible obligation to specify a TVTIC for transactions in third countries will lead to practical problems, since the relevant trading venues are not subject to MiFIR and therefore cannot be obliged to generate a TVTIC. As a result, those subject to the reporting obligation would not be able not fully comply with the reporting obligations.

Regarding paragraph 76:

- While we understand the benefits of the proposed new code, we feel that implementation would be very complex. Current systems are not designed to create such codes. Besides the necessary identification and processing, the proposed dissemination of the additional code along the transaction chain would require to set up a completely new process. As explained above, reporting entities involved would have to ensure correct and timely interaction with respective intermediaries along the transaction reporting chain, i.e. potential iterations for confirmations or adjustments respectively.
- Against this backdrop, we see an increased risk for potential failures and additional time consuming processes with regard to the transmission of the new

code to reporting entities. In other words, a mapping of a connecting element in all reports will in reality encounter such difficulties in implementation that, in our opinion, the goal – to enable NCAs to link all transactions – cannot be achieved.

19 Do you foresee any difficulties with the implementation of an additional code generated by the trading venue to be disseminated down the transaction chain in order to link all transactions pertaining to the same execution? If yes, please explain and provide alternative proposals.

We understand the benefits of the proposed code, however we do see serious difficulties implementation of an additional code that is generated by the trading center or SI and is to be distributed down the transaction chain. In addition to our answer to question 18, we note that:

First, transmitting such a code through the entire chain obviously requires system and interface changes with all investment firms concerned. It should be noted that if there is a break in transmitting this code, this will affect the entire chain from that point forward, and back-delivering the code later on would require all affected firms to correct their reporting afterwards.

Second, a transmission chain may include the use of the INTC technical account. When several market executions are allocated, through INTC, to several investment firms next in the transmission chain, situations will occur where several of these new codes need to be transmitted with one transaction all the way through the chain. For these situations, the technical field for this code should be either very long (hundreds of characters) or repeatable. In either case this will most likely lead to complex and unclear situations, both with implementation and when NCAs try to make use of this data. Overall these difficulties lead to an extremely high IT implementation cost and organisational effort, not just due to generating the additional code but also with respect to: the adaption of all existing interfaces between all parties involved in a business, and all international interface standards (SWIFT, Fix, etc.). It is already currently possible for the NCAs to use the available message fields to combine related messages in the chain. The cost-benefit of such an expansion is also questionable in this regard.

Third, it also should be noted that OTC derivatives are predominantly used for the purpose of risk management between dealer banks hence a regulators' need 'to link all transactions pertaining to the 'same transaction chain' might be less relevant in this context and not justify the creation of a separate code.

Fourth, we strongly oppose the idea of including organised trading platforms outside the Union. It will be close to impossible to get these entities to comply with such obligation, since the relevant trading venues are not subject to MiFIR and therefore cannot be obliged to generate a TVTIC. In the end, it will – again – be the European entities subject to the transaction reporting requirements which face enormous difficulties in setting up correct files for their report.

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Section 6. Details to be reported: the identifiers to be used for parties (Articles 26(3) and 26(6))

20 Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

The EACB sees various challenges with this proposal.

First, it is to be noted that the information on the decision maker can only be provided to customers by the bank, because the counterparty does not have this knowledge. The credit institutions in turn do not have the data of the counterparty, the latter of whom are required to report anyway. The customer category can already be filtered out of the data, since private investors can be identified by the LEI based on the national ID (e.g. CONCAT) and the professional customers and GGPs. The data is therefore available to the NCAs, and this expansion of the reporting fields would entail IT costs for the credit institutions, of which the benefit is questioned.

That said, we would expect certain clarifications on the approach outlined in the consultation paper. The main clarification would be on how Category B clients would be reported: If a client is treated as professional on request, e.g. for a specific transaction, should the client be categorised as B for that transaction, and C (retail) for other transactions?

The way current reporting systems are set up, it is usually not possible to treat a client differently in reporting for different transactions. Depending on ESMA's approach on the question above, we see a challenge here if a client needs to be categorised differently for different transactions.

It is also not apparent that the supervisory authority needs this data for market surveillance purposes. "Suitability" and "market trends" are not relevant in the context of transaction reporting. This is also true in the very broad norm of Article 24 MiFIR which is aimed at monitoring suitability obligations. Thus, the last sentence in Article 26 (6) as proposed by ESMA should not be added.

Section 7. Details to be reported (Article 26(3)): a designation to identify the computer algorithms and a short sale

22 *[Section 7.2. Short sale indicator]*

Which of the two approaches do you consider the most appropriate? Please explain for which reasons.

The EACB considers Option A the most appropriate. In the current situation it is already challenging to acquire this information accurately from clients, so the feasibility of option B is debatable.

With respect to Option A, we welcome that ESMA shares our view that it is not possible to make meaningful use of the information on whether a transaction is a short sale. Such labelling of short sales does not seem sensible. Short sales must meet the requirements of Regulation (EU) No. 236/2012, and thus, the supervisory authority has the necessary data; an additional data source is dispensable. Therefore, we strongly agree with a deletion of such field.

Section 9. Obligations for Investment Firms transmitting orders (Article 26(4))

27 Do you agree with this approach? If not, please clarify your concerns and propose alternative solutions.

Currently, the reporting person would have the option of outsourcing the reporting obligation to an Approved Reporting Mechanism (ARM), which is also responsible for the quality of the reported data. If the obligation were also to be transferred to an investment firm to report for someone else, we note several challenges:

- This extension would have to be checked with the requirements in relation to the ARM and, if possible, also adapted. In practice, entering into such an obligation would only be possible if the receiving investment company has a direct connection to the trading venues for all markets that the transferring investment company wants to use, which is probably not so common in practice;
- Obligating receiving firms to report on behalf of transmitting firms also puts an additional burden on the receiving firms in that they might need to make further investments in their systems to accommodate receiving all the necessary information from the transmitting firm. It is possible that the receiving firm's reporting systems have not been designed to handle all of the decision-making scenarios, or different national identification formats for natural persons, that the transmitting firm needs to report. Hence the receiving firm would bear all the costs of further system development, while the transmitting firm would be the one to benefit. In the consultation paper, ESMA also mentions that some of these smaller entities have had data quality issues. This begs the question: how ESMA plans to ensure that, were the proposal to be accepted, the data quality issues would not affect the receiving firm, and who will be responsible for incomplete data in these cases; and
- The proposed obligation may thus be misused due to the proposal not specifying who can take advantage of the arrangement; even larger transmitting firms

completely capable of reporting themselves might choose to put the reporting burden on another firm; and

- Most critically, ESMA is effectively intervening in civil law to achieve supervisory objectives. Experience in the context of EMIR Refit and the introduction of manadatory reporting by financial counterparties for small non-financial counterparties proves that the market has experienced severe problems since the duties of cooperation of the non-financial counterparties were not specified on Level II.

Against the above backdrop, we advocate maintaining the status quo. The transmitting firms who have these issues should make the necessary investments themselves to be able to report.

Section 10. Entities entitled to provide transaction reports to NCAs (Article 26 (7))

28 Do you agree with this analysis? If not, please clarify your concerns and propose alternative solutions.

The EACB supports this analysis but in case a receiving firm includes in its report the information provided to it by the transmitting firm, the responsibilities regarding the completeness and accuracy need to be clarified in terms of:

(i) What action the receiving firm is required to take to make sure that data received from the transmitting firm is complete and accurate; and

(ii) In case there are errors in the receiving firm's reporting, but these errors stem from the transmitting firm, the transmitting firm should bear some of the responsibility for the errors.

Section 11. Interaction with the reporting obligations under EMIR

29 *[Section 11.1. Challenges of merging the two reporting regimes into one]*

Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

The EACB does not support ESMA's proposal, as it would put an end to the desirable consolidation of various reporting requirements. Rather, the constant increase in reporting requirements underscores the need for a conscientious examination of the options for consolidation. Double reporting should be avoided and ESMA's goal should be the convergence of the different reporting systems.

However if further alignment of MiFIR and EMIR is anticipated, we have considered the following alternatives:-

- We suggest to develop EMIR reporting requirements to simply include those data fields that are necessary to make EMIR reports sufficient for transaction reporting purposes. Reporting the additional fields could, for example, be dependent on whether a counterparty is an investment firm, so that non-investment firms would not face an unnecessary burden in their EMIR reporting. There is a similar alignment between EMIR and REMIT, and the EMIR fields for energy derivatives stem largely from REMIT requirements. A similar approach could be taken with EMIR and MiFIR; and/or
- A better alignment proposal would be if the the MiFIR review should also address remaining inconsistencies with SFTR reporting. In particular, we would encourage ESMA to reconsider the treatment of SFTs concluded with EU central banks (ESCB members) which are currently reportable under MiFIR. Article 2(5)(a) of the Delegated Regulation (EU) 2017/590 specifies that SFTs (as defined in SFTR) do not fall under the definition of a transaction and are therefore exempt from MiFIR reporting obligations. However, counterintuitively, this exemption does not apply to SFTs concluded with EU central banks, which are brought back into scope through the penultimate paragraph of article 2(5). In our view, this approach is inconsistent and should be reconsidered for the following reasons:
  - Reporting SFTs under MiFIR is inconsistent with SFTR: SFTR was designed as the only applicable reporting framework for SFTs. SFTR article 2(3) explicitly exempts SFTs with EU central banks from reporting. This has been a conscious political decision which pre-dated the drafting of the MiFIR technical standards, supposedly reflecting the fact that the details of these trades are known to central banks and can thus, if needed, be easily made available to all relevant national authorities. Whether or not these trades are reportable should have been a consideration under SFTR (and could potentially be reconsidered in the context of the SFTR review), but this is not a question that should have been addressed in MiFIR, an entirely different reporting regime with a different purpose (the logic explained by ESMA in paragraphs 106-107 equally applies to SFTR);
  - The MiFIR framework is not appropriate for reporting SFTs: SFTR was designed specifically to capture repos and other SFTs, taking into account their unique structure and features. MiFIR was not. The logic of MiFIR reporting therefore raises numerous practical issues. To name just one example, the reporting deadline under MiFIR requires reporting by T+1 in all cases, while SFTR allows in certain cases reporting by S+1, taking into account the fact that collateral is often only allocated upon settlement and can therefore only be reported at that time; and
  - As a result, MiFIR reporting does not accurately capture the fundamentals of SFTs and therefore does not provide meaningful information to regulators. Of course, it also only captures a small subset of the overall market. Building logic to allow firms to exclude a small number of SFTs and report these under

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an entirely different regime has been cumbersome and costly to implement and continues to be problematic, especially given the inappropriate design of the MiFIR rules. In short, this obligation has already caused disproportionate costs for no significant benefit in terms of increased transparency and should therefore be revoked.

- In conclusion to this alternative, we recommend redrafting article 2(5) to exclude all types of SFTs from MiFIR reporting. More specifically, we suggest deleting the penultimate paragraph of article 2(5) of Regulation (EU) 2017/590.

Contact:

The EACB trusts that its comments will be taken into account.

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