Response Form to the Consultation Paper

MiFIR review report on the obligations to report transactions and reference data

28 September 2020 | ESMA74-362-887

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in the Annex. 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 **20 November 2020.**

All contributions should be submitted online at 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_CP_TRRF_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_TRRF_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_TRRF_ABCD_RESPONSEFORM.

5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open Consultations" → "Consultation paper on MiFIR review report on the obligations to report transactions and reference data").

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 publicly 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 under the heading Legal Notice.

Who should read this paper?

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

General information about respondent

Name of the company / organisation	Alternative Investment Management Association and Managed Funds Association
Activity	Investment Services
Are you representing an association?	☒
Country/Region	International

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_CP_TRRF_1>

The Alternative Investment Management Association[1] ("AIMA") and Managed Funds Association[2] ("MFA") welcome the opportunity to respond to the European Securities and Markets Authority ("ESMA") regarding its Consultation Paper "MiFIR review report on the obligations to report transactions and reference data"[3] ("the CP").

1 AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry.

2 MFA represents the global alternative investment industry and its investors by advocating for public policies that foster efficient, transparent, fair capital markets, and competitive tax and regulatory structures. MFA supports member business strategy and growth via proprietary access to subject matter experts, peer-to-peer networking, and best practices. MFA's more than 140 member firms collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia, supporting a global policy environment that fosters growth in the alternative investment industry.

3 ESMA74-362-773. Online at: https://www.esma.europa.eu/file/57227/download?token=NZvJm-4x

In our detailed responses to the questions raised in the CP, we make the following points:

- We strongly oppose the possible extension of the Article 26 transaction reporting requirement to AIFMs and UCITS Management Companies that are providing MiFID services under Article 6(4) of UCITS Directive and Article 6(6) of AIFMD and do not believe that the costs to industry associated with providing that information are warranted in light of its modest potential supervisory value.

- We encourage ESMA to examine issues of scope from a different perspective and consider whether the existing rules could be adapted to lessen the reporting burden on buy-side firms operating under a MiFID licence by elaborating a reporting framework that involves brokers, rather than clients, reporting transactions.

- We very much welcome the fact that ESMA has picked up on the proposals made by AIMA and MFA that the concept of TOTV should be replaced for derivatives with a structure that assumes that a transaction involving an investment firm that is a systematic internaliser in the relevant sub-asset class would be reported under MiFIR. We believe this would greatly improve the degree of post-trade transparency available in respect of OTC derivatives, helping support liquidity and price formation to the benefit of all users of the market.

- We would suggest that if ESMA has found that the majority of NCAs do not use the Algo ID field, then it evidently provides limited supervisory value and should be removed from the reporting framework to reduce the amount of information that must be reported.

- We strongly favour ESMA's suggestion that the short sale indicator field be removed from the transaction reporting framework, given that the short-selling regulation is the more appropriate regulatory framework for NCAs to obtain information on the net short positions of market participants.

- We strongly support the proposal that ESMA should be empowered to determine the start date for transaction reporting to ensure that appropriate technical measures are in place well in advance of reporting obligations going live.

- Given ESMA's discussion of the interaction between different pieces of legislation (MIFID, MAR, SSR), we take this opportunity to stress the importance of providing a single source of accurate and up-to-date reference data to enable market participants to assess which rules are relevant in the context of an individual security. We support harmonization of the scope of reference data by merging Article 4 of MAR into Article 27 of MiFIR. ESMA should continue to explore ways in which FIRDS could be expanded and improved to achieve this.

<ESMA_COMMENT_CP_TRRF_1>

Questions

Q1 : 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.

<ESMA_QUESTION_TRRF_1>

AIMA and MFA strongly oppose the possible extension of the Article 26 transaction reporting requirement to AIFMs and UCITS Management Companies that are providing MiFID services under Article 6(4) of UCITS Directive and Article 6(6) of AIFMD.

Buy-side firms that are subject to MiFID II routinely single out transaction reporting as being one of the most significant compliance burdens associated with the regime, noting that it created major one-off systems build costs, whilst also generating significant on-going costs associated with making reports and validating reporting processes. This reflects the fact that buy-side entities do not have the same operational and reporting capacity as large sell-side institutions, something that we believe should be considered when designing reporting obligations.

While we acknowledge the interest on the part of national competent authorities ("NCAs") in having a "complete set of information", it is, in our view, essential to consider whether the costs to industry associated with providing that information are warranted in light of its potential supervisory value.

In this situation, we do not believe that the costs to firms would be proportionate given that NCAs do already have extensive information from the reports made by trading venues and investment firm counterparties in respect of the activities of AIFMs and UCITS Management Companies. It is not clear that NCAs would derive additional meaningful data about the decision-maker involved in the transaction, as many firms will have a centralized trading desk, likely with the Chief Investment Officer as the decision-maker for all reported transactions.

We also note the operational challenges associated with delineating trading activities by regulatory permission, such that it will be difficult for AIFMs and UCITS Management Companies to limit reporting to trading related to individual portfolio management, creating risks of over-reporting. A similar challenge arises in the context of RTS 28 reports for AIFMs with MiFID top-up permissions, forcing some firms to compile information that covers both MiFID and non-MiFID services.

We would further argue that ESMA should examine issues of scope from a different perspective and consider whether the existing rules could be adapted to lessen the reporting burden on buy-side firms operating under a MiFID licence by elaborating a reporting framework that involves brokers, rather than clients, reporting.

This would bring the consistency favoured by ESMA, while ensuring that rules are designed in a way that reflects the differing operational capacity of counterparties to a trade. This would also ensure that reporting requirements are not a barrier to entry for smaller investment managers seeking to establish in the EU, something that is likely to be the case if MiFID is amended to require that AIFMs submit transaction reports for MIFID top-up activities.
<ESMA_QUESTION_TRRF_1>

Q2 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_2>

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<ESMA_QUESTION_TRRF_2>

Q3 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_3>

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<ESMA_QUESTION_TRRF_3>

Q4 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_4>

While we can appreciate the need for information sharing between NCAs, we believe it is important that any move to make it easier for NCAs to share data is also accompanied by a clear statement regarding the need to share data in a manner that is subject to robust data security controls.

Data reported by firms to individual NCAs is of a highly sensitive nature and provides significant information about an individual firm's commercial activities. It is important that data be subject to robust controls when it comes to the way in which it is handled by NCAs.
<ESMA_QUESTION_TRRF_4>

Q5 : Do you envisage any challenges in increasing the scope including derivative instruments traded through an SI as an alternative to the expanded ToTV concept? Please justify your position and if you disagree please suggest alternatives.

<ESMA_QUESTION_TRRF_5>

We very much welcome ESMA's recognition of the proposals made by AIMA and MFA in response to ESMA's "Consultation Paper: MiFID II/ MiFIR review report on the transparency regime for non-equity instruments and the trading obligation for derivatives"[4] that the concept of ToTV should be replaced for derivatives with a structure that requires that a transaction involving an investment firm that is a systematic internaliser in the relevant sub-asset class would be reported under MiFIR.

We believe this would align with the goal of improving the degree of post-trade transparency available in respect of OTC derivatives, helping support liquidity and price formation to the benefit of all users of the market.
<ESMA_QUESTION_TRRF_5>

Q6 : Do you agree that the extension should include all Systematic Internalisers regardless of whether they are SI on a mandatory or voluntary basis? Please justify your position.

<ESMA_QUESTION_TRRF_6>

[4] ESMA70-156-2189. Online at: https://www.esma.europa.eu/sites/default/files/library/esma70-156-2189_cp_review_report_transparency_non-equity_tod.pdf.

We believe this approach should apply regardless of whether a firm is an SI on a voluntary or mandatory basis, as we believe that the extension in reportability of trades would not fundamentally undermine the franchise benefits to brokers of opting into the SI regime. Opting-into the SI regime means that a firm is agreeing to comply with the requirements associated with being a registered SI, including any transaction reporting and transparency requirements.
<ESMA_QUESTION_TRRF_6>

Q7 : Do you envisage any challenges with the approach described in paragraphs 45-46 on the scope of transactions to be covered by the extension? Please justify your position and indicate your preferred option for SIs under the mandatory regime explaining for which reasons. If you disagree with all of the outlined options, please suggest alternatives.

<ESMA_QUESTION_TRRF_7>

In terms of the specific options outlined by ESMA, we favour Option 1 (whereby an SI would have to report quotes and transactions undertaken in any derivatives belonging to the same sub-asset class of the derivative contracts for which that investment firm qualifies as an SI). This would maximise the degree of post-trade reporting, whilst being operationally the most straightforward to implement. Furthermore, Options 2 and 3 would leave the current status quo largely unchanged, as only ToTV instruments would be covered by transaction reporting and transparency requirements since many investment firms are only designated as SIs for derivatives in ToTV instruments.

It is important, however, to ensure the rules are written in such a way that it is always the firm that is the SI that would discharge the post-trade transparency requirement, regardless of whether it is an SI for the specific instruments within the sub-asset class in question, rather than following the current hierarchy.
<ESMA_QUESTION_TRRF_7>

Q8 : 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.

<ESMA_QUESTION_TRRF_8>

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<ESMA_QUESTION_TRRF_8>

Q9 : 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.

<ESMA_QUESTION_TRRF_9>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_TRRF_9>

Q10 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_10>

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<ESMA_QUESTION_TRRF_10>

Q11 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_11>

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<ESMA_QUESTION_TRRF_11>

Q12 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_12>

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<ESMA_QUESTION_TRRF_12>

Q13 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_13>

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<ESMA_QUESTION_TRRF_13>

Q14 : Did you experience any difficulties with the application of the defined list concept? If yes, please explain.

<ESMA_QUESTION_TRRF_14>

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<ESMA_QUESTION_TRRF_14>

Q15 : Do you foresee any challenges with the approach as outlined in the above proposal? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_15>

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<ESMA_QUESTION_TRRF_15>

Q16 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_16>

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Q17 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_17>

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<ESMA_QUESTION_TRRF_17>

Q18 : Do you foresee any challenges with the approach outlined in paragraphs 75 and 76? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_18>

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<ESMA_QUESTION_TRRF_18>

Q19 : 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.

<ESMA_QUESTION_TRRF_19>

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<ESMA_QUESTION_TRRF_19>

Q20 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_20>

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<ESMA_QUESTION_TRRF_20>

Q21 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_21>

We would suggest that if ESMA has found that the majority of NCAs do not use the Algo ID field, then it evidently provides limited supervisory value and should be removed from the reporting framework to reduce the amount of information that must be reported.

We strongly favour ESMA's suggestion that the short sale indicator field be removed from the transaction reporting framework, given the short-selling regulation is the more appropriate regulatory framework for NCAs to obtain information on the net short positions of market participants.
<ESMA_QUESTION_TRRF_21>

Q22 : Which of the two approaches do you consider the most appropriate? Please explain for which reasons.

<ESMA_QUESTION_TRRF_22>

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<ESMA_QUESTION_TRRF_22>

Q23 : Do you foresee any challenges with the outlined approaches? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_23>

We would strongly oppose a modified approach to the existing short sale indicator (Option b), as that would imply unhelpful divergence between transaction reporting requirements and the approach to calculating net short positions under the SSR. This would create additional operational complexity

without solving the existing problem for NCAs, that the information reported under the MiFID framework does not correspond to information reported under the SSR.
<ESMA_QUESTION_TRRF_23>

Q24 : Do you foresee any challenges with the outlined approach to pre-trade waivers? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_24>

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<ESMA_QUESTION_TRRF_24>

Q25 : Have you experienced any difficulties with providing the information relating to the indicators mentioned in this section? If yes, please explain and provide proposals on how to improve the quality of the information required.

<ESMA_QUESTION_TRRF_25>

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<ESMA_QUESTION_TRRF_25>

Q26 : Do you foresee any challenges with this proposal? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_26>

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<ESMA_QUESTION_TRRF_26>

Q27 : Do you agree with this approach? If not, please clarify your concerns and propose alternative solutions

<ESMA_QUESTION_TRRF_27>

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<ESMA_QUESTION_TRRF_27>

Q28 : Do you agree with this analysis? If not, please clarify your concerns and propose alternative solutions.

<ESMA_QUESTION_TRRF_28>

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<ESMA_QUESTION_TRRF_28>

Q29 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_29>

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<ESMA_QUESTION_TRRF_29>

Q30 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_30>

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<ESMA_QUESTION_TRRF_30>

Q31 : Are there any specific aspects relating to the ISIN granularity reported in reference data which need to be addressed? Is the current precision and

granularity of ISIN appropriate or is (for certain asset classes) a different granularity more appropriate?

<ESMA_QUESTION_TRRF_31>

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<ESMA_QUESTION_TRRF_31>

Q32 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_32>

We strongly support the proposal that ESMA should be empowered to determine the start date for transaction reporting to ensure that appropriate technical measures are in place well in advance of reporting obligations going live.

<ESMA_QUESTION_TRRF_32>

Q33 : Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.

<ESMA_QUESTION_TRRF_33>

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<ESMA_QUESTION_TRRF_33>