European Fund and Asset Management Association

EFAMA's position on the ESMA Consultation Paper on the Review of the technical standards on reporting under Article 9 of EMIR (ESMA/2014/1352)

EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 61 corporate members almost EUR 17 trillion in assets under management of which EUR 11 trillion managed by 55,000 investment funds at end September 2014. Just under 36,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit www.efama.org

Preliminary remarks

Prior to responding to the questions raised by ESMA, we would like to highlight important issues that are not covered in this consultation but that ESMA should consider in its proposed Implementing Technical Standards.

1. The UTI ("Unique Trade Identifier").

In practice, there are delays in the production of UTI. Some counterparties fail to provide identifiers on time.

We believe that ESMA should determine which party is responsible by default for providing an UTI, although this should be amendable if both parties agree.

In addition, we believe that ESMA should also consider a provision by which the party who is obliged to communicate to its counterparty a UTI is also due to:

- Communicate it as soon as possible and at least within the confirmation process. If the provider is unable to communicate the UTI within the reporting deadlines, the receiver should be allowed to generate its own UTI in order to report. The TR should allow this provisional UTI to subsequently be amended once it is agreed with the counterparty;
- Provide the UTI in a standardized way (e.g. within the confirmation of the transaction) especially instead of (i) requesting its counterparty to obtain the UTI from a website or (ii) communicating it via separate e-mail) (both, (i) and (ii) cannot be considered by the party receiving the UTI in an automated way).

Lastly on this UTI topic, due to diverging interpretations in the market, we believe that ESMA should clarify whether a UTI is to be reported regarding ETDs.

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2. Definition of application to funds.

We are asking ESMA to clarify in these RTS the level of application of EMIR to collective investment undertaking.

In the last version of its Q&A issued on 24 October 2014 (ESMA/2014/1300), ESMA stated that "If the derivative contract is concluded at the level of the sub-fund, the counterparty should be the sub-fund and not the umbrella fund. In that case, the sub-fund needs to have an LEI for reporting purposes and be identified as the counterparty[1]". This ESMA Q&A seems to be contradicted by the recent ESMA opinion on draft RTS on clearing obligation on Interest Rate Swaps[2] where the calculation of thresholds is set at fund level.

The European Commission, through its letter to ESMA dated 18 December 2014 and related to the draft RTS on the clearing obligation of IRS stated in its second point that the European Commission considers that "for collective investment undertaking, the threshold should be calculated per single fund instead than at group level…"

We welcome those clarifications but we also believe that they could still cause some issues of interpretation and legal certainty:

In terms of interpretation, because the ESMA's Q&A recognises the reporting at the sub-fund level and the European Commission requires a calculation at collective investment undertaking's level, we believe that this may cause conflicts of interpretation. Consequently, we would urge both ESMA and the European Commission to recognise that every reporting is provided and every calculation of thresholds is calculated at the level of the fund (or the sub-fund for umbrella funds);

In terms of legal certainty, we fear that, in the absence of a definition in a level 1 or level 2 text on reporting levels for collective investment undertaking, some market participants (especially non-EU regulated counterparties) might challenge the legal opposability of ESMA's Q&As.

To avoid this situation and to improve legal certainty, we urge ESMA to consider the insertion of the following text in every proposed Technical Advices to the Commissions or draft Regulatory, Technical Standards, starting with the draft RTS subject to this consultation:

"For exposure and threshold calculation as well as for reporting purpose, transactions made with collective investment schemes (i.e. subject to UCITS, AIFMD or unincorporated funds) are made at the level of the fund (or at the level of the sub-fund in case of umbrella collective investment scheme. In that case, the sub-fund needs to have an LEI for reporting purposes and the sub-fund is identified as the counterparty.)".

[1] See ESMA Q&A in its General Question and General Answer 1 (c)
[2] See ESMA's opinion on clearing obligation for IRS

3. Regulation's implementation timing approach

We believe that ESMA's proposed entry into force of the implementing measures is too close to the publication in the Official Journal.

Based on previous experience, we noticed that Trade Repositories need more time (well understandingly considering some of the imposed timelines) to adapt their systems

Additionally, the IT systems of all the impacted market participants need to be adapted (including fund accounting, transfer agents, etc.). Furthermore, the IT service providers supporting the asset management companies, for example provides the IT fund accounting systems, can only implement the new reporting fields on the basis of the final technical standards based on the final specifications made by the trade repositories

Consequently and for obvious reasons, the implementation of the proposed new data fields and reporting duty by market participants (and especially by the asset management companies) needs more time.

Considering, all these elements, we are of the opinion that the earliest possible time to start the reporting is six months (and preferably one year) after the publication of the Regulation in the Official Journal.

4. Timing for review

We regret the fact that such modifications arise so soon (or so late…) in the implementation of the reporting obligation.

Asset managers have spent a lot of human resources and time during 2014 to comply with the reporting obligation. Now that it is finally in place and that we can focus on the fine tuning of the quality of the information that asset managers are sending to the trade repositories, we believe that adding new data at this stage is causing unnecessary burdens and costs. We would have preferred to focus on other priorities for the reporting, such as the simplification of the data flows sent to the Trade Repositories.

Of course, we will use all of our efforts to comply with the new reporting rules in time, but we fear that the compliance priority may be achieved again at the disadvantage of the quality of data that are sent.

Detailed reply

Q1: Do you envisage any difficulties with removing the 'other' category from derivative class and type descriptions in Articles 4(3)(a) and 4(3)(b) of ITS 1247/2012? If so, what additional derivative class(es) and type(s) would need to be included? Please elaborate.

We do not anticipate any problem following this proposed removal.

However, we believe that this would not be appropriate.

Indeed, the category "others" in the derivative class and type can be useful to classify the reportable contracts that would not be part of a specific derivative class or type (e.g. due to a hybrid nature such as Total Return Swaps or derivative contracts with mixed underlying assets like baskets) are extremely difficult to set in a specific derivative type or class.

Consequently, even if this would not create major disturbance to remove this field, we suggest ESMA to maintain the field "other" until a global UPI concept is implemented or endorsed by ESMA.

Q2: Do you think the clarifications introduced in this section adequately reflect the derivatives market and will help improve the data quality of reports? Will the proposed changes cause significant new difficulties? Please elaborate.

We agree and we do not expect any new difficulties.

Q3: What difficulties do you anticipate with the approaches for the population of the mark to market valuation described in paragraphs 21 or 19 respectively? Please elaborate and specify for each type of contract what would be the most practical and industry consistent way to populate this field in line with either of the approaches set out in paragraphs 21 and 23.

We do not anticipate any particular difficulties with the approaches for the population of the mark to market valuation described in paragraphs 21 or 19 respectively.

It might only cause problems should the mapping of data contain fields where the values to report ETDs can only be a positive number. Negative numbers should be allowed in reporting fields.

We also question the need to further define "valuation" in these technical standards as it is already agreed by counterparties and is part of the process of portfolio reconciliation.

Q4: Do you think the adaptations illustrated in this section adequately reflect the derivatives market and will help improve the data quality of reports? Will the proposed changes cause significant new difficulties? Please elaborate.

We believe that the approach aiming at increasing standardization will help improving data quality and relevance of the reports.

We are, however, concerned about several points:

1. **Entity Identifier: Paragraph 29**

We agree with ESMA's assessment in paragraph 29 to use only the LEI as the entity identifier. We believe that this will support legal certainty across EU countries and will provide better transparency of data and improve supervisory controls.
We would however maintain the visibility of existing identifiers (like BIC codes) to facilitate reporting of older transactions or of closed transactions subject to back-loading.

2. **Notional Amount: Paragraph 34**

We agree in general with ESMA`s proposal to amend and rename the current Table 2 Field 14 "Notional Amount" and to introduce two new fields on the notional. However, we suggest to replace the field "Original notional" through "Traded notional" as it could be difficult to retrieve the original "notional amount" in certain circumstances, e.g. for Total Return Swaps with resetting Notional.

3. **Unique Product Identifier: Paragraph 37**

As already expressed in several consultations and as restated above, it is crucial to develop global identifiers.
This applies also to UPI which must be developed without any intellectual property rights and free of charge.

Q5: Do you think the introduction of new values and fields adequately reflect the derivatives market and will help improve the data quality of reports? Will the proposed changes cause significant new difficulties? Please elaborate.

We are globally satisfied with the introduction of new values and fields that adequately reflect the derivatives market and will help improve the data quality reports. ESMA should consider phasing in the new value and fields with a focus on matching a limited number of economic fields initially, with additional fields made mandatory as reporting quality improves.

However, we would welcome some changes to the following elements:

1. **Country of domicile of the other Counterparty: Paragraph 45**

We do not see the benefit to add this new field as the description "Country" is an attribute of the LEI which can be derived from the LEI static data.

2. Reporting of collateral: Paragraph 52

We encourage ESMA to clarify the description of these fields.

We support the proposed changes and the addition of the two new fields ("initial margin posted" and the "variation margin posted"). However, we believe that this is not sufficiently precise and we would like that ESMA imposes to the counterparty posting collateral to also report this information to the Trade Repository.

3. ETDs

In case of an ETD ordered by the customer of a Clearing Member, we would like ESMA to clarify the following:

(i) if the legal relationship between the customer and the Clearing Member is to be reported as a derivative (ETD/OTC) ?; and

(ii) if yes, which country should be determined by the customer (CCP's country of domicile / Clearing Members country of domicile)?

4. Baskets

We believe that there will be practical difficulties as the reporting of all the constituents of the basket is not always possible at the time of negotiation of the transaction.

We have seen on several occasions that there are "potential baskets" which eventually are defined, within a predetermined universe, at the end of the period. We believe then that the reporting of all the constituents of the basket is not appropriate.

Q6: In your view, which of the reportable fields should permit for negative values as per paragraph 40? Please explain.

As expressed in our reply to Question Q3, negative numbers should be allowed in reporting fields. Indeed, many fields can have a value that can be negative from the perspective of one of the counterparties.

Q7: Do you anticipate any difficulties with populating the corporate sector of the reporting counterparty field for non-financials as described in paragraph 42? Please elaborate.

We agree and we do not expect any new difficulties.

Q8: Do you envisage any difficulties with the approach described in paragraph 45 for the identification of indices and baskets? Please elaborate and specify what would be the most practical and industry consistent way to identify indices and baskets.

We agree with the proposed text and expect no specific issue with the proposed regime.

However, we would also welcome some clarifications:

Paragraph 45 refers to the domicile of the Counterparty. We do not see a connection to indices and baskets.

If Paragraph 39 is the one meant to be commented on, ESMA should clarify, which would be the country code to be considered if an index or basket considers reference entities domiciled in different countries.

As expressed in the reply to Q5, we believe that there will be practical difficulties to implement this measure as the reporting of all the constituents of the basket is not always possible at the time of negotiation of the transaction.

We have seen on several occasions that there are "potential baskets" which eventually are defined, within a predetermined universe, at the end of the period. We believe then that the reporting of all the constituents of the basket is not appropriate.

We assume that it should be the paragraph 49 instead of 45 that refers to the identification of indices/baskets.

We do not support the proposal to provide more granular data in the case of baskets or indices, especially the identification of each individual financial instrument. ESMA suggests that the reporting counterparties should provide the full name and each financial instrument of the index assigned by the index provider. However, according to the proposal made by the EU Commission on the regulation of benchmarks[3], index providers are not required to make the index sufficiently transparent to the public as the EU Council and the ECON deleted Article 16 of the stated regulation.

Additionally, UCITS/AIF management companies are not in the scope of the MiFIR transaction reporting obligations. Furthermore, they do not have access to the composition of the baskets/indices.

Finally, we consider that the reporting of the identification of each financial instrument in the baskets/indices by the management companies is too burdensome/complex as the composition of the benchmarks/baskets changes over time and therefore complicates the operational process to have all relevant information available to be reported to the TR on T+1. We fear that the matching of the underlying data fields within the baskets/indices between the reporting counterparties is very complicated as the information is provided from different sources in multiple formats. Therefore, we propose to keep the current field "B"/"I" as the only reporting requirements.

3 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0641&from=DE.

Q9: Do you think the introduction of the dedicated section on Credit Derivatives will allow to adequately reflect details of the relevant contracts? Please elaborate.

We believe that this will improve transparency.

Q10: The current approach to reporting means that strategies such as straddles cannot usually be reported on a single report but instead have to be decomposed and reported as multiple derivative contracts. This is believed to cause difficulties reconciling the reports with firms' internal systems and also difficulties in reporting valuations where the market price may reflect the strategy rather than the individual components. Would it be valuable to allow for strategies to be reported directly as single reports? If so, how should this be achieved? For example, would additional values in the Option Type field (Current Table 2 Field 55) achieve this or would other changes also be needed? What sorts of strategies could and should be identified in this sort of way?

The majority of our members would agree with the fact that the reconciliation process is more complex to achieve and to process when it comes to this type of transaction.

A structured product is composed of several single components, but, for these type of more complex strategies, there may be other elements that drive the price such as embedded structuring fees of the seller.

We believe that compound products such as those strategies should be reported as a single position in order to facilitate the transparency towards ESMA and the NCAs.

We would suggest to use a general field with the name of the strategy and where the name of that field is provided in a list maintained by ESMA. The field could be named Option Type. Being in charge of the setting and maintenance of that list, ESMA should be able to revise the reporting tables on a frequent basis and based on the information submitted to them at a later stage

Q11: Do you think that clarifying notional in the following way would add clarity and would be sufficient to report the main types of derivatives:

60. In the case of swaps, futures and forwards traded in monetary units, original notional shall be defined as the reference amount from which contractual payments are determined in derivatives markets;
No response.

61. In the case of options, contracts for difference and commodity derivatives designated in units such as barrels or tons, original notional shall be defined as the resulting amount of the derivative's underlying assets at the applicable price at the date of conclusion of the contract;
No response.

62. In the case of contracts where the notional is calculated using the price of the underlying asset and the price will only be available at the time of settlement, the original notional shall be defined by using the end of day settlement price of the underlying asset at the date of conclusion of the contract;
No response.

63. In the case of contracts where the notional, due to the characteristics of the contract, varies over time, the original notional shall be the one valid on the date of conclusion of the contract.
We would agree.

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Brussels, 13 February 2015

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