German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

On ESMA's Consultation Paper on the Review of the technical standards on reporting under Article 9 of EMIR

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,200 banks.

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Comments on ESMA's Consultation Paper on the Review of the technical standards on reporting under Article 9 of EMIR

A. Introduction and summary of key observations and concerns

The German Banking Industry Committee (GBIC, die Deutsche Kreditwirtschaft) is grateful to be given the opportunity to comment on ESMA's Consultation Paper on the Review of the technical standards on reporting under Article 9 of EMIR.

ESMA proposes a variety of amendments regarding the content of fields or the introduction of new fields. As an aspect of paramount importance, we would therefore like to emphasise that ESMA has to provide for a sufficient lead time in order for market participants to adapt their reporting mechanisms. A satisfactory quality level of the data that counterparties submit will only be obtained when there is adequate time for the technical implementation of the proposed amendments as well as the possibility to test the exchange of data with respect to the new or amended fields with the trade repositories.

According to the current drafting, the new rules and fields would have to be observed on from the 20th day after the Technical Standards' publication in the official journal. This period is too short and ESMA should provide for an ample implementation period. We estimate at least 12 months of implementation and testing time. It should be borne in mind that based on the guidance provided by the consultation paper, it is not possible to commence the technical implementation of the proposed amendments, since ESMA may change its approach here and there due to comments received in the course of the consultation.

Trade reporting under EMIR has proven to be technically challenging as well as to be absorbing significant amounts of market participants' resources. In case that the relevant Technical Standards will be revised on a regular basis in the future and in order to provide for the diligent implementation of any new rules we would like to request ESMA to introduce fixed annual release cycles as they are common in the information technology. The procedures deployed by SWIFT may serve as a specimen in this context. At the same time it should be ensured that the set-up of these release cycles does not interfere with market participants' work on their annual balance of accounts. From an operational point of view we would very much appreciate it if the review of the Technical Standards were dovetailed with ESMA's pending Level II Data Validation Rules for trade repositories.

As regards field definition reporting counterparties would be dependent on technically even more detailed provisions than hitherto set forth. We would therefore recommend ESMA to fortify the Annex of the draft ITS with additional specificities based upon well-established IT standards. Our comments found under section II. below may illustrate this approach which receives further justification by the necessary competition among trade repositories.

Otherwise trade repositories are given too much leeway regarding the technical and conceptual implementation of the ITS. As a consequence, trade repositories may in fact assume a "gatekeeper" position, rejecting a report because of technical issues which are not part of the regulatory requirements. Such a role for trade repositories is nowhere envisaged in the rules texts. Reporting counterparties might end up in a lock-up scenario where it is virtually impossible to switch from one trade repository to another.

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B. Responses to the consultative questions

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.

Yes, we do not consider it appropriate to remove the "other" category from the derivative class and type descriptions in Articles 4(3)(a) and 4(3)(b) of ITS 1247/2012. We understand Article 4(3)(c) as covering hybrid/mixed types of derivatives whereas the "other" category in Article 4(3)(a) covers structured derivatives such as weather derivatives, derivatives on emission allowances or derivatives on freight rates. While in principle it would be possible to categorize all of these types using the existing classifiers, the proper choice of category can at times be far from obvious. Likely, such a re-categorization will strain counterparties with additional bilateral reconciliation efforts in the future in order to ensure that they report the same category. It does not seem feasible to require counterparties to agree on the derivative class upfront. Thus, removing the category "other" could entail difficulties in case not all derivative classes are specified by ESMA. Therefore, even in the event of deleting the category "other", ESMA and/or the national competent authorities should remain responsible for providing sufficient information on how each derivative class should be reported.

At the same time, it seems unclear whether there is significant benefit in adding certain derivatives products to a category which they only loosely resemble. If the "other" category was deleted, the affected derivatives would probably have to be qualified as commodity derivatives, notwithstanding the fact that they fail to meet the specific characteristics of such contracts.

Currently, consistency between the reported category and the ISDA-taxonomy is provided by reporting products as ESMA category "other" and applying ISDA-taxonomy "ForeignExchange:ComplexExotic". If the category "other" was removed, some products of e.g. ESMA category "swap" would map with the ISDA-taxonomy "ForeignExchange:ComplexExotic".

On the other hand, it would not be advisable to delete Article 4(3)(c), since there are a number of derivatives, such as swaptions, consisting of two different types of derivatives. In some cases, the swaption may resemble more closely either an option or a swap and, thus Article 4(3)(c) could apply. In other cases, no such allocation according to resemblance may be possible and, thus, the "other" category in Article 4(3)(b) would apply.

Given that the portion of "other" derivatives presumably captures not more than a small one digit percentage, neither regulators nor the industry should invest inappropriate amounts of time and effort into ironing out each and every detail regarding this product category. Trade reporting's original target was to achieve transparency over the exposure per product and not building up a (confirmation) matching platform.

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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.

The requirement that the counterparties should agree on parameters such as the derivative type is not compatible with the day-to-day work on an operational level and might impede timely and thoroughly reporting.

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.

Mapping data might become problematic, if the values regarding ETD can only be reported as a positive number.

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.

As a general remark, changing the names and contents of data fields requires to adjust the reporting structure in its entirety and leads to high efforts. It is questionable whether such an approach will provide any advantages. The introduction of new fields and definitions creates new challenges and questions let alone IT costs. It would definitely be beneficial to reduce the number of data fields (as has happened with the EEA indicator).

Paragraph 29: To delete the possibility to use BIC or client code is very farfetching. The problem remains, that many counterparties in particular in the non-financial sector, refrain from obtaining a LEI and there is no indication, that this problem will be solved in the near future.

Paragraph 34: It is not clear how the values mentioned would be calculated for e.g. a commodity swap, where a constant quantity of the underlying commodity is used to determine contractual payments based on the market price and the predetermined swap rate. We wonder, if the "original notional" is the sum of all notional for all cashflows of the swap or the notional used for determining a single payment. In the former case it remains unclear whether the "actual notional" will be amended after each payment or not. Furthermore, it should be possible to calculate current notionals from the initial report plus subsequent amendment reports.

Paragraph 36: The logic behind aligning reporting data of MiFIR and EMIR was to waive the reporting requirement under MiFIR if all necessary data is already reported via EMIR reporting. Unfortunately, the name change and conflicts with MiFIR demonstrates that this goal is getting out of reach. We would ask ESMA to align the reporting requirements to prevent unnecessary duplicative reporting requirements.

Furthermore, the "report tracking number" will lead to significant operational challenges on top of generating the UTI. Therefore adding the exchange of a RTN code will only defer the point in time when the EMIR reporting is working as intended.

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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.

Paragraph 45: In case of ETD being ordered by the customer of a Clearing Member, it is necessary that ESMA further clarifies whether the legal relationship between the customer and the Clearing Member has to be reported as a derivative (ETD or OTC?); and if this were the case, which country should be determined by the customer (CCP's country of domicile or Clearing Members country of domicile).

Paragraphs 52-54: The restructuring of the collateral reporting requires some time to be implemented as the reporting mechanisms have to be set up anew.

Paragraph 55: We agree with the proposed changes regarding the UTI generation in principle but would like to address again that the implementation period should be set by reasonable terms. On a more general note, we think it is very farfetched to derive the requirement to agree on all of the report's contents from the sentence "counterparties and CCPs shall ensure that the details of their derivative contracts are reported without duplication". As an example, reporting two different timestamps or to different UTIs is not a duplication of the reported data. In our opinion, requiring the agreement on all "common data" in such a short time puts too much burden on reporting entities, especially smaller ones.

Furthermore, we welcome the amendment to the Commission Implementing Regulation (EU) No 1247/2012 by inserting an Article 4a. However, Article 4a(2)(b) seems to be devoid of the sentence: "Subsequently, the unique trade identifier should be generated by the clearing member for its counterparty."

In practice, at least some sell side counterparties fail to provide a UTI in time. Therefore, besides determining a party that is responsible for delivering a UTI, ESMA should also consider a provision, by which the party who is obliged to communicate to its counterparty a UTI:

- should do so as soon as possible but at least within the confirmation process;
- should 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).

Finally, ESMA's proposal alludes to having a rule for UTI in circumstances where the parties fail to agree on the UTI. We would request ESMA to clarify that its proposed rule can already be applied from the moment of execution so that there is no need for an agreement anymore.

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

We think that Q6 intends to refer to paragraph 44 instead of paragraph 40. All fields considering a value that can be negative from the perspective of one of the counterparties should permit for negative values. However, it must be ensured that the field population is consistent with the buy/sell indicator applicable for the reporting counterparty.

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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.

Presumably, Q7 refers to paragraph 46 and not 42. Furthermore we wonder, if the values proposed could not better linked to the parties' LEI so that it is not necessary to report such data on each trade.

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.

The question presumably refers to paragraph 49. In principle, we welcome the suggestion to allow ISO 3166. However, the suggested expansion of range of values for such field may increase the quota of mismatches.

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 cannot see any advantages in providing more detailed information in this section.

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?

We recommend ESMA to rethink its approach since it remains unclear how complex structures shall be reported given that the usage of the UTI is limited to one contract. The problem Q10 refers to is typically not caused by the execution of a trade, but due to the fact that counterparties use different Treasury Management Systems (TMS) which trigger the reporting of trades. Some systems can reflect trading strategies in a single transaction, while others have to split the strategy into different trades. For the reporting of strategies consisting of multiple trades a solution could involve adding new fields in the option sections, for example "Part of a strategy trade" yes/no and/or "Type of strategy", to be filled with a description (e.g. straddle, strangle, etc.). In order to connect the different trades of a strategy, an additional field could be implemented, e.g. "Grouping yes/no".

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:

Yes, we agree.

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C. Comments on individual provisions of the draft RTS and ITS

I. Comments on the draft RTS

Recitals 1 and 3:
Reference should be made to Regulation (EU) No 148/2013 instead of 148/2012.

Article 1(1):
In order to duly reflect the qualification of central counterparties as counterparties to a derivatives contract as laid out in Recital 1 the limitation to contracts "concluded on a trading venue" should be omitted. Even contracts entered into OTC should be reported in their cleared form if clearing takes place on the day of execution.

Annex Table 1

Table 1 Field 20:
The exact valuation time (with the exception of ETD) is usually not available to the market participants. We therefore would like to request ESMA to rethink its approach.

Table 1 Field 21:
We would like ESMA to explain the difference between a CCP's valuation and a mark-to-market.

Table 1 Field 25:
We would like to understand whether ESMA asks the reporting counterparties to sum up the value of the initial margin posted, including cash settled. If so, we are asking for a clarification and a reasoning.

Table 1 Field 26:
It is necessary that the specification of the currency of the initial margin posted is not limited to one currency. Rather "n" currencies shall be specifiable. Moreover, it might be an approach to permit several collateral portfolios for one trade in order to reflect multiple currencies.

Table 1 Field 27:
We would like to understand whether ESMA asks the reporting counterparties to sum up the value of the variation margin posted, including cash settled. If so, we are asking for clarification and a rationale.

Table 1 Field 28:
It is necessary that the specification of the currency of the variation margin posted is not limited to one currency. Rather "n" currencies shall be specifiable.

Table 1 Field 29:
We would like to understand whether ESMA asks the reporting counterparties to sum up the value of the initial margin received, including cash settled. If so, we are asking for clarification and a rationale.

Table 1 Field 30:
It is necessary that the specification of the currency of the initial margin received is not limited to one currency. Rather "n" currencies shall be specifiable.

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Table 1 Field 31:
We would like to understand whether ESMA asks the reporting counterparties to sum up the value of the variation margin received, including cash settled. If so, we are asking for clarification and a rationale.

Table 1 Field 32:
It is necessary that the specification of the currency of the variation margin received is not limited to one currency. Rather "n" currencies shall be specifiable.

Annex Table 2

Table 2 Field 9:
It is of paramount importance that the field "notional currency 1" is not limited to two legs. Rather "n" legs shall be specifiable.

Table 2 Field 10:
Likewise, it is necessary that the field "notional currency 2" is not limited to two legs. Rather "n" legs shall be specifiable.

Table 2 Field 12:
There needs to be an interim arrangement for already used UTI that can no longer be used under the new specifications. Especially modifications on existing contracts with no longer valid UTIs are in scope here.

Table 2 Field 16:
We would welcome a clarification whether the initial margin is part of the upfront payment or not.

Table 2 Field 19:
The label of the field "original amount" is misleading, under the consideration of amortising contracts we suggest renaming field 19 into "reference amount" and wonder whether the initial margin is part of the upfront payment.

Table 2 Field 20:
Amortising contracts comprise the characteristic that the underlying reference amount constantly changes without any contractual modifications or amendments to the original terms and conditions. Against this background the question arises how haircuts, index factors, or alike should be corrected (cf. field 72).

Table 2 Field 23:
We wonder, whether the initial margin is part of the upfront payment. Furthermore, the question arises if it matters when exactly in the life cycle of the trade an upfront payment occurs (e.g. not at the inception date, but several days after the trade day). ESMA should provide a clear definition, what an upfront payment is and until when a payment is classifiable as upfront payment.

Table 2 Field 26:
The time zone of C/P1 or C/P2 needs to be specified if the counterparties' offices are domiciled in different time zones. Alternatively a currencies time zone could be used.

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Table 2 Field 33:
The events that constitute the confirmation timestamp in an OTC derivatives confirmation still remain unclear. Therefore, timestamps of the reporting counterparties differ from each other on a regular basis due to the fact that some counterparties refer to the confirmation and some to the re-confirmation. To avoid further uncertainty a mere plausibility check should be required by the trade repositories instead of an equality check.

Table 2 Field 40:
It is necessary that the fixed rate is not limited to two legs. Rather "n" legs shall be specifiable.

Table 2 Field 41:
It is necessary that the fixed rate is not limited to two legs. Rather "n" legs shall be specifiable.

Modification to the contract:
The nomenclature of this section should read "Section 2j" instead of "Section 2i".

II. Comments on the draft ITS

Recital 5: The wording should be "The inability" instead of "Ability" as drafted by ESMA.

Article 1(1):
The replacement of Article 3(2) should be specified in a way that the national competent authorities are empowered to provide market participants with a specific code allowing the unique identification of the broking entity at a national level.

Article 1(2):
The amendment of Article 3a (a–c) is incomplete; float/float swaps exist, as well as fix/fix swaps that have to be considered as well.

Article 1(3):
The deletion of the word "other" in Article 4(1a) should be rescinded. In any case, there is a strong need for a fall-back identification in cases where the counterparties to a trade cannot agree on a specific derivatives class. As regards Article 4(1)(c)(No 3) ESMA obviously refers to ISO 10962 (Classification of Financial Instruments; CFI code) – ISO 10692 refers to "gas cylinder valve connections for use in the micro-electronics industry". The amendment in Article 4(4) asks for a unique, neutral, etc. product classification if identification through ISIN or AII is not possible. However, lessons should be drawn from the fact that missing standards, or the freedom to apply industry's or market participants' autonomous interpretation of the requirements often lead to misunderstandings. We therefore would like to ask ESMA to provide binding standards.

Article 1(4):
As regards the insertion of an Article 4a we generally agree with the UTI generation "waterfall" derived from the ESMA EMIR Q&A; nevertheless we would like to see CCPs obligated to generate UTIs.

Article 2:
Besides the information about the entry into force of the amendment regulation there is need for an applicable date that allows market participants to implement the changes proposed.

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Annex Table 1

Table 1 Field 7:
The taxonomy for financial and non-financial counterparties should be mapped by a competent authority on the particular "customer classification" of the respective ESCB member. For Germany we suggest a mapping on the customer classification that is made available by the Deutsche Bundesbank to institutions subject to reporting requirements, which have to classify economic agents by sector for required statistics. This sectorial breakdown with explanations is published in the Special Statistical Publication 2 which corresponds to the classification used in the "European System of Accounts (ESA 95)". Special Statistical Publication 2 also contains a classification of the economy by sector and economic activity, the structure of which follows the Federal Statistical Office's "Classification of Economic Activities (WZ 2008)" which, in turn, is based on the "Statistical Classification of Economic Activities in the European Community (NACE Rev. 2)". By means of national standard setting or a binding mapping table misunderstandings can be avoided. We therefore ask ESMA to mandate such a mapping exercise.

Table 1 Field 17:
Paragraph 21 of the consultation paper states that " […] the current market price (or model price, when appropriate) […] is generally expected to be a positive number […]" According to the present format amendment proposal field 17 could also be filled with "-0" as a valid value.

Table 1 Field 24:
We suggest introducing a "space character" as a fifth special character.

Annex Table 2

Table 2 Field 4:
ESMA obviously refers ISO 10962 here (Classification of Financial Instruments; CFI code). ISO 10692 refers to "gas cylinder valve connections for use in the micro-electronics industry".

Table 2 Field 6:
The sense is partially flawed due to false c/p: "The other…"

Table 2 Field 18:
The format requirements of field 17 and field 18 do not fit with each other.

Table 2 Field 19:
The label of the field "original amount" is misleading, under the consideration of amortising contracts we suggest renaming field 19 into "reference amount". We wonder, whether the initial margin is part of the upfront payment.

Table 2 Field 21:
For consistent data validation at trade repository level, identical reporting that slightly differs, such as "0,0", "00,0000" or "0,000" needs to be identified as equally fulfilling the reporting and format requirements of the trade repositories. Most likely, the usage of a standard (maybe ISO 80000 und IEC 80000 or alike) might be helpful.

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<u>Table 2 Field 22:</u>
For consistent data validation at trade repository level, identical reporting that slightly differs, such as "0,0", "00,0000" or "0,000" needs to be qualified as equally fulfilling the reporting and format requirements of the trade repositories. The application of a commonly used standard (e.g. ISO 80000 und IEC 80000 or alike) might be beneficial in this context.

<u>Table 2 Field 24:</u>
"O" should remain "O" over the life cycle of a trade. A change to "C" and "P" is neither advisable nor necessary. ESMA should clarify on that.

<u>Table 2 Field 30:</u>
The national competent authority or ESMA should provide a clear and syntactically unique abbreviation list.

<u>Table 2 Field 42:</u>
A more secure and unambiguous way to enumerate all Nominator/Denominator might lie in an explicitly described syntax (cf. Table 2 Fields 43 and 44).

<u>Table 2 Field 46:</u>
It is either advisable to more detail the respective EURIBOR (or other indices) by means of specification (e.g. EURIBOR-Telerate, EURIBOR-Reuters, EURIBOR-Act/365) or (even better) to refer to the ISDA 2006 definitions.

<u>Table 2 Field 47:</u>
It is either advisable to more detail the respective EURIBOR (or other indices) by specifying them (e.g. EURIBOR-Telerate, EURIBOR-Reuters, EURIBOR-Act/365) or (even better) to refer to the ISDA 2006 definitions.

<u>Table 2 Field 49:</u>
The quantitative figure of an exchange rate should also follow an ISO code to avoid inconsistencies.

<u>Table 2 Field 50:</u>
The quantitative figure of a forward exchange rate should also follow an ISO code to avoid inconsistencies. The conversion EUR/USD to USD/EUR should take place at the trade repository. EUR/USD and USD/EUR must match. Maybe ESMA should bindingly provide a character encoding standard or a sort sequence that alphabetically ascends (American Standard Code for Information Interchange – ASCII or ISO 646).

<u>Table 2 Field 59:</u>
The present field 59 should not be deleted in order to allow for the reporting of mergers or other hardly definable events.

<u>Table 2 Field 66:</u>
We ask ESMA to explain, why more than one value is allowed given the option exercise style "Bermudan - B" is explicitly allowed.

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Table 2 Field 68:
ESMA shall provide binding definitions and syntax on the seniority to avoid inconsistencies in content and format.

Table 2 Field 69:
The quantitative figure of the fixed coupon should follow an ISO code in order to avoid inconsistencies.

Table 2 Field 70:
ESMA shall provide for binding definitions and syntax on the possible lifecycle events or enumerate them in a concluding manner.

Table 2 Field 72:
The reverence appears to be wrong and maybe should read Field 20 instead.

Table 2 Field 72:
The quantitative figure of the index factor should follow an ISO code to avoid inconsistencies.

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