## Societe Generale

## Answer to the Consultation Paper on the Guidelines on transaction reporting

**Q1: Are there any other scenarios which you think should be covered?**

No.

**Q2: Are there any areas in Part I covered above that require further clarity? Please elaborate.**

Yes. *§ 1.1.5. page 21 Identifiers for parties*

ESMA states that *"Given identifiers of natural persons are among the details of the report pertaining to a given transaction, the requirement to report correct and accurate details equally applies to natural person identifiers. In order to ensure fulfillment of this, investment firms could, among others:*

- *ask the natural person to prove the correctness and validity of the identifier by providing official documents*
- *monitor the expiry date of a non-persistent identifier and ask the natural person to provide the new identifier after the expiry date was reached."*

ESMA should clarify whether the 2 latter items are an obligation or merely a suggestion. (In other words, if an investment firm fails to perform these 2 tasks, will it be considered as a failure of its transaction reporting procedure?)

**Q3: Are there any other situations on reportable transactions or exclusions from transactions where you require further clarity?**

Yes.

a) *§ 1.1.7.1. Meaning of 'transaction': acquisitions and disposals - Securities financing transactions*

*Example 3 page 25*
*"A central bank (member of ESCB) enters into a repurchase agreement (repo) with an investment firm in relation to a sovereign bond. … The investment firm executing the transaction shall therefore report it under Article 26 of MiFIR."*

Security Financing Transactions with members of ESCB should be excluded from reporting obligations under Article 26 of MiFIR for the following reasons:

- These transactions should never lead to market abuses as public authorities (among which central banks) can never be accused of market abuse;
- We believe that EU lawyers have purposely excluded these transactions from the reporting obligation under Article 4 of the SFTR (because they are not incurring risks justifying their reporting). Including them back in the scope of the reportable transactions under MiFIR would contradict the spirit of the SFTR. ESMA should thus request EC's position on whether these transactions should be reported or not.

In any case, this eventual reporting obligation should not come into force before the date on which reporting obligations under the SFTR come into force.

b) *Exclusions under Article 2(5)(i) page 28*

*…"Where acquisitions or disposals take place in connection with mergers, takeovers, insolvency proceedings under Council Regulation 1346/2000, stock splits or reverse stock splits, these are not reportable."*

Investment firms need to get further detailed guidance on which kinds of conditional corporate events are reportable / not reportable. Ideally, ESMA should inventory all types of existing conditional corporate events, at least in the main European countries and indicate for each of them whether they are reportable or not.

We made an analysis on corporate actions based on the SWIFT codification and focused on the optional ones. This analysis has been endorsed by the French Group of experts for corporate actions. Most of the corporate actions shall not be reported. We strongly suggest ESMA to incorporate the following table in its guidelines.

| CAEV code | Swift definition | Eligible for transaction reporting |
|---|---|---|
| COOP | Company option | NO |
| DVOP | Dividend option | NO |
| DVSC | Scrip dividend/payment | NO |
| EXOF | Exchange | NO |
| EXOF CHOS | Exchange | NO |
| EXRI | Call on intermediate securities | NO |
| EXWA | Warrant exercise | NO |
| PRIO | Priority issue | NO |
| TEND | Tender/acquisition/ takeover/ purchase offer/ buyback | NO |
| BIDS | Repurchase offer/issuer bid/reverse rights | NO |
| BPUT | Put redemption | NO |
| CLSA | Class action/proposed settlement | NO |
| CONS | Consent | NO |
| DRIP | Dividend reinvestment | NO |
| DTCH | Dutch auction | YES |
| ODLT | Odd lot sale/purchase | YES |
| OTHR | Other event | YES |
| NOOF | Non-Official Offer | YES |

c) *Exclusions under Article 2(5)(i)*

*Example 10 page 28*
*"A new company launches an initial public offering (IPO), and therefore there are no allotment rights. Investment firm X applies for shares via the IPO and receives those shares. A request for admission to trading has been made although the shares have not yet started trading."*

We understand that reporting obligations incur only on the underwriters of the IPO and on the investment firms who have purchased stocks from underwriters, in other words that the issuer is not subject to a reporting obligation. Thus, only the transactions taking place on the primary market or on the grey market are reportable, but not the underwriting of the issuance.

We think that this is not expressed clearly enough in *Article 2* and thus suggest complementing the last sentence of *Article 2* page 429 as follows:

*"The exclusion provided for in point (i) of the first paragraph shall not apply to initial public offerings or secondary public offerings or placings, or debt issuance, where the sales of the underwriters to the offering, placing or issuance as the case maybe, the purchases from underwriters, and generally all transactions taking place on the primary and on the grey market are reportable. For the sake of clarity, underwriters' subscriptions of the issue from the issuer are not reportable."*

**Q4: Are there any specific areas covered by the mechanics section where you require further clarity? Please elaborate.**

Yes.

*a) § 1.1.8.2 page 32 Submission of transaction reports*

*… ESMA recognises that there are a number of questions concerning the scope of the obligation stated in MiFIR Article 26(7). This is an area that requires further consideration; additional clarifications will be provided in due course."*

We understand that ESMA constituted a task force to analyze the necessity or not for an investment firm preparing the reporting file of their subsidiaries or of third parties to qualify as an ARM, as long as these subsidiaries / third parties submit the reporting to their home regulator on their own or through their ARM.

We will welcome ESMA's conclusions and would welcome an exemption from ARM qualification for investment firms merely preparing the reportings.

*b) § 1.1.8.3 Where to send transaction reports*

*Exception 3 page 33: Article 14 (1) of RTS 22 gives the competent authority from the home member state and the competent authority from the host member state together the possibility to deviate from the general rule. Investment firms are advised to contact their home competent authority to ask for which member states such a deviation exists and under what conditions transactions need to be sent to the home competent authority and under which conditions they need to be sent to the host competent authority.*

Can ESMA provide insight to investment firms on intentions of competent authorities to deviate from the general rule? Bearing in mind that investment firms welcomed the decision by ESMA that all reportings are filed directly with the home regulator and that any exception to that rule would complicate and weaken firms reporting procedures.

For these very reasons, we strongly recommend that, should competent authorities decide to deviate from the general rule, investment firms should have the possibility to report the impacted transactions, either to the host regulator, or to the home regulator.

**Q5: Do you require further clarity on the content of Article 1 of RTS 22? Please elaborate.**

No.

**Q6: Do you require further clarity on the content of Article 2 of RTS 22? Please elaborate.**

Yes.

a) Firms that are submitted to the reporting requirement:

As written in Article 2, the RTS is for the purposes of Article 26 of Regulation 600/2014 (MiFIR), which applies (according to its article 1) to investment firms, credit institutions when providing investment services and/or performing investment activities, and to market operators. Moreover, Article 26 of MiFIR applies to investment firms which execute transactions.

Thus the reporting obligation should not apply when the investment firm offers only ancillary services to its clients, notably safekeeping and administration of financial instruments which are ancillary services, or when the investment firm acts under a contract of mandate given by an issuer since the issuer itself is not subject to MiFID2.

We believe that for the sake of clarity this should be stated in the RTS. At the moment only the (c) of article 2(5) introduces an exemption for custody but it does not cover all cases (see point b) below). Should such amendment be unfeasible then it would be highly appreciated to have these exemptions explicitly described in the ESMA guidelines.

b) Custodial activity:

Article 2(5)(d) of RTS 22 states that *"an acquisition or disposal that is solely a result of a custodial activity"* is excluded from the definition of what constitute a transaction that shall be reported. According to the final report (ESMA/2015/1464 pages 364 & 365), pure custodial activity is limited to cases where there is no change in beneficial ownership, meaning that each change of beneficial ownership in the books of a custodian shall be reported.

Such definition raises questions within the securities services industry. Indeed in most of the cases where a transaction is concluded between two parties, the agreement will lead to a change of beneficial ownership in the books of a custodian through a settlement either internal or external. Thus requiring a custodian to report each movement as soon as the beneficiary has changed will mean to ask the custodian to report almost its whole activity and especially what has been already reported by the parties of the transaction - which is contradictory with the principle to not declare twice.

To illustrate our concern, we have imagined what would happen in several cases based on OTC and on exchange transactions between two parties with the custodian (Z) required to report the movement of financial instruments from one account to another one within its books (internal) or within the books of a CSD (as an example of external movement). We have voluntarily focused our examples on the case where the settlement is done in the books of the custodian to highlight that even in such hypothesis there will be unintended consequences.

Examples:

- Where the transaction is in fact an on-exchange one (thus declared by the executing entity);
- Where none of the two parties in the trade are is required to report;
- Where one of the parties of the transaction is submitted to the requirement to report;
- With a settlement in USD done separately (directly between the US banks);
- Where the OTC transaction is in fact a repo transaction (not to be declared under MIFIR).

Actually, in none of the above cases the reporting done by the custodian will be correct (being either duplicated, not expected, not accurate or incomplete).

Custodians only manage settlement instructions (instructions to receive / deliver financial instruments, against cash or free of payment). Most of the time settlement instructions stem from transactions (see our answer to question 31) but at the custody level, the transaction has been replaced by the instruction and

some information like the price has disappeared, replaced by a net amount. Should the cash being paid outside, then the net amount will be equal zero and the movement of financial instruments will be viewed by the custodian as for free!

For the same reason, the custodian will just know the first entity in the custody chain going upstream from it to the party to the transaction. We are definitively not in the case where all the reporting entities are involved in the execution process (actually the broker, the transmitting firm, …) knowing the buyer / seller.

Therefore we ask ESMA to amend the article 2(5)(d).

This could be done via this wording:

*5. A transaction for the purposes of Article 26 of Regulation (EU) No 600/2014 shall not include:*
*…/…*
*(d) any instruction given to a custodian to receive or deliver financial instruments;*

or by clearly stating that the RTS shall not apply to custodians.

More generally we suggest that there should be a clear and unambiguous definition of a transaction in order to have a clear and unambiguous way of determining when transaction reporting obligations arise and for which entities. ESMA correctly excluded from transaction reporting some post-trade or corporate actions/administrative events but not others. We would welcome more consistency in this respect.

<u>Examples</u>:

On exchange transaction in € - external settlement

Investor A
Order to sell 10 000
Confirmation for 10 000 at an average price + fees
Broker B
Order to sell 10 000
8 000
1 025
975
TV
Instruction to deliver 10 000 against cash to Y
Custodian C
Client: Invesor A
Reported on TD+1:
Sell of 8000 – Investor ID
Sell of 1025 – Investor ID
Sell of 975 – Investor ID
8 000
1 025
975
Instruction to deliver 10 000 against cash to Y
Global custodian X
Client : Custodian C
GCM
CCP
Instruction to deliver 10 000 against cash to Y
Received on TD+1
Local custodian Z
Client : Gl Custodian X
GCM's Settlement Agent Y
Reported on TD+2 by Z:
Transfer of 10000
Price : net amount divided by quantity
Seller : X
Buyer : Settlement Agent?
Instruction to deliver 10 000 against cash to Y
CSD's SSS
Local CSD
Local custodian
Settlement Agent
CCP
10000
settlement of the instructions
10000

- Broker B has received an order from investor A and has executed the order on a Trading Venue
- **B report the 3 market executions with A's ID**
- A and B have exchanged their SSIs
- A will instruct its custodian C to deliver the shares to Y
- A's instruction will then be transmitted to X and then to Z
- B will instruct Y to receive shares from X
- Z and Y will send their instruction to the CSD'SSS for matching and then settlement
- **Z will declare the transfer of 10 000 shares from X to Y**
- **there will be a double reporting**

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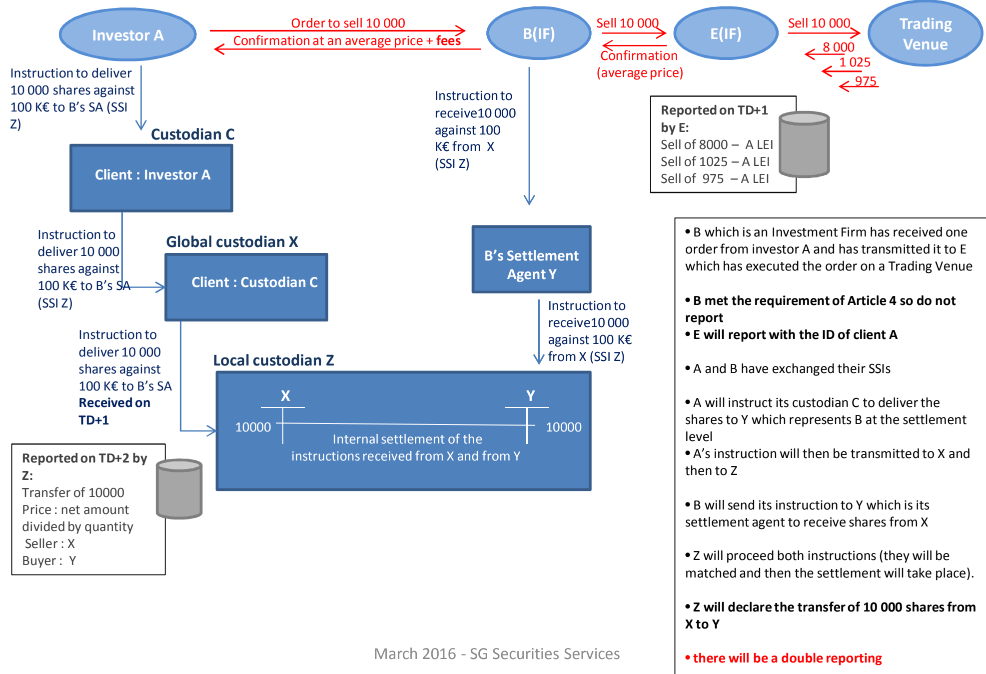
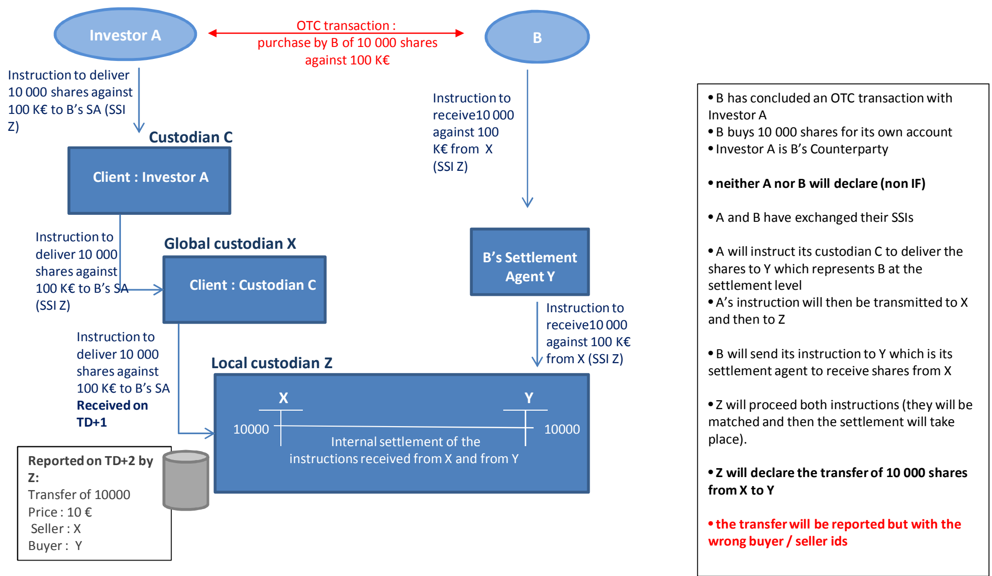
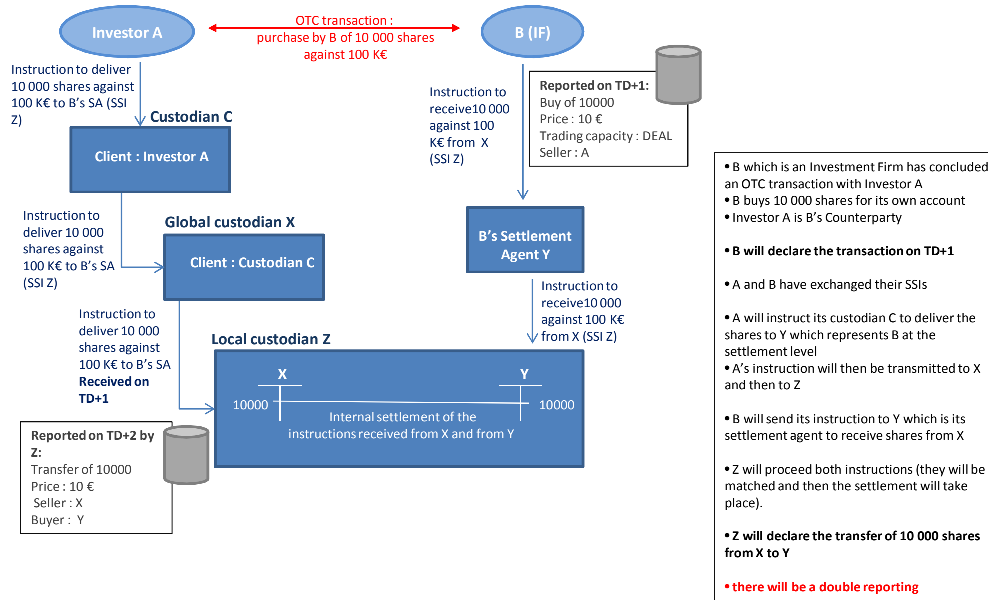
## On exchange transaction in € - internal settlement




## OTC transaction in € - internal settlement – A & B are not IF

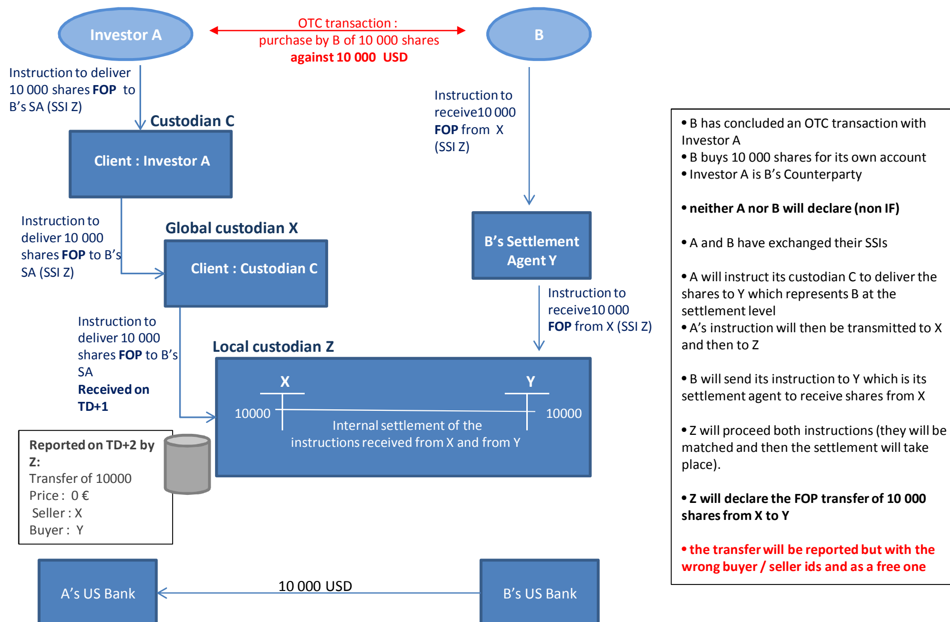


## OTC transaction in € - internal settlement – B is an IF

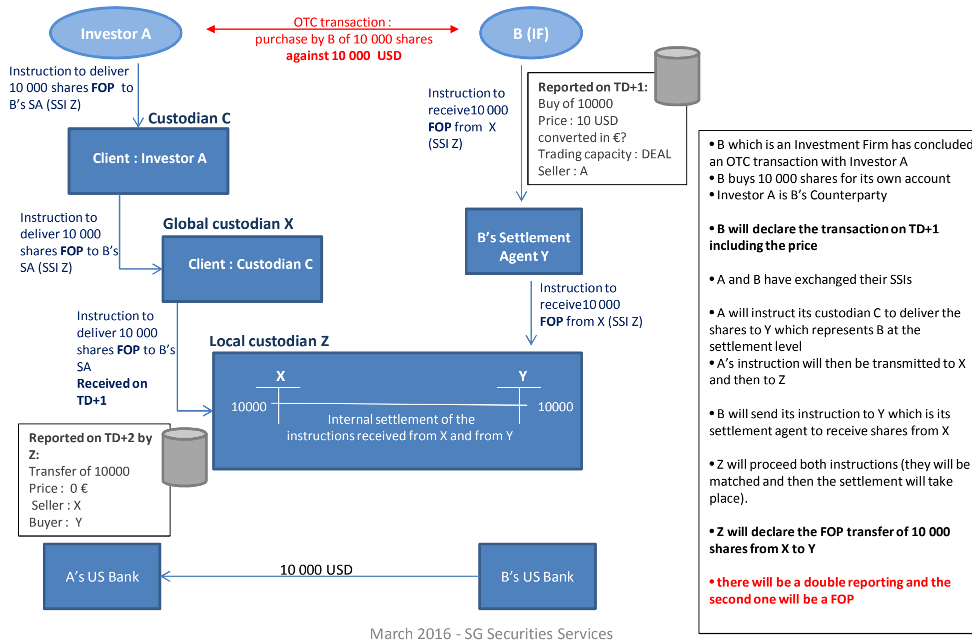




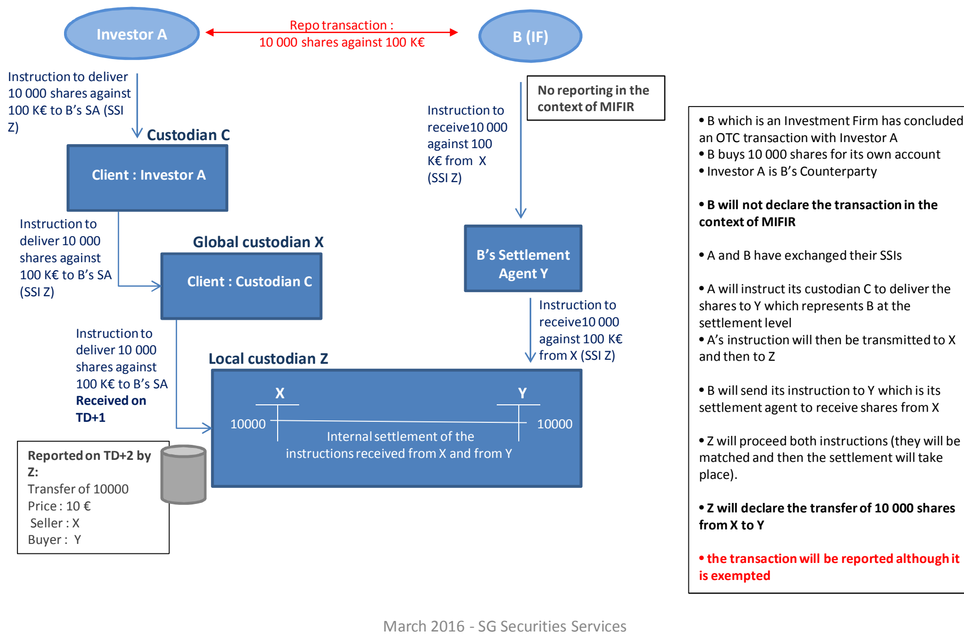

## OTC transaction in USD – internal settlement - A & B are not IF



## OTC transaction in USD – internal settement – B is an IF




## REPO Transaction – internal settlement - B is an IF

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**Q7: Do you require further clarity on the content of Article 3 of RTS 22? Please elaborate.**

Yes.
Article 26(9) of MIFIR requires ESMA to define what constitutes a transaction and an execution of a transaction for the purpose of the reporting.

As explained in recital (4) of the RTS "*an investment firm should be considered to be executing a transaction where it performs a service or activity referred to in points 1 to 3 of Section A of Annex I of [Directive 2014/65/EU], makes the investment decision in accordance with a discretionary mandate given by a client, or transfers financial instruments to or from accounts, provided in each case that such services or activities have resulted in a transaction*".

Firstly we would have been interested by the rationale to not refer to the investment service of portfolio management and rather give a dedicated definition. Does ESMA make a difference between them?

But our main issue is on transfers. We assume ESMA's idea when adding transfers to a list of what is or looks like investment services was to cover pure OTC transactions (the few ones that will remain in a MIFID2 context).

Article 3 states that *"Where an investment firm performs any of the following services or activities that result in a transaction within the meaning of Article 2, it shall be deemed to have executed that transaction:*
*… (v) Transfer of financial instruments to or from accounts."*

While we acknowledge (i) the incurred reporting obligation and (ii) that custodial activity does not incur any reporting obligation, we cannot see how practically investment firms would have the ability to report such transfers, especially if the financial instruments are transferred to another bank and would be very interested in having an answer to the following question:

- What is a transfer?

A definition of a "transfer" for the purposes of the reporting would be most welcome. Indeed transfers are listed as a service or activity (although transfers are not in the Annex I – Section A of MIFID2) that "results in a transaction". This is amazing since, should we try to give a definition to the concept of transfer, we would rather say that a transfer results from the conclusion of a transaction. As described in examples 1.3.1.1 and 1.3.1.2, the starting point is Client A that wants to transfer financial instruments to Client B. We can assume that both A and B agree on such transfer. In other words they conclude a transaction between them. Then comes the time for the post-trade process (the realization of the agreement i.e. the movements of financial instruments and cash). Therefore A as well as B will send an instruction to its custodian, and they will always do that. Post-trade and thus settlement always start with an instruction sent to a custodian and this is irrespective of the type of the underlying transactions (pure OTC, on-exchange, repo, ...).

Trying to catch pure OTC transactions by requiring custodians to report any transfer (internal or external) as soon as there is a change of beneficial owner is not the right way.

As a matter of principle, we consider that executions incurring a transaction reporting obligation under MiFIR should be strictly bound to transactions (i.e. in relation to investment services) and not to settlement instructions or transfer instructions, as well as any other post-trade or administrative event. The purpose of MiFIR transaction reporting is the prevention of market abuse. Events that result in the change of property of securities do not necessarily stem from transactions and hence are not susceptible to be part of abusive market practices.

- Who is responsible for the reporting?

OTC transactions involve very few actors. As stated in (c) of article 2(5), settlement of mutual obligations between parties shall not be reported. Moreover (see our answer to question 6), custodians are not in the scope of the reporting requirement.

In our view when answering the question, the same principle should apply irrespective of the type of transaction. Entities involved in the execution/conclusion of the transaction should be the ones required to report. Since there is no intermediation in the case of an OTC transaction, the reporting has to be done by the trading parties themselves. This will somehow be similar to what should be required in terms of post-trade transparency for “pure OTC” transactions.

**Q8: Do you require further clarity on the content of Article 4 of RTS 22? Please elaborate.**

Yes.

MiFIR requests that buyer/seller details, buyer/seller decision maker details, trader details are reported notwithstanding eventual legal/regulatory provisions existing in some countries prohibiting the reporting of these data to a regulator other than the home regulator of the concerned person.

In many other countries, these data can be reported only after having obtained the express consent from the concerned persons and/or having made the appropriate declarations to the concerned personal data protection authorities as the case may be.

Any violation of the applicable banking secrecy and/or personal data protection laws/regulations is a criminal offence in many countries.

In the absence of cross-border/international agreements to lift banking secrecy / personal data protection obligations for regulatory reportings, investment firms are likely to face many situations where they will be prevented from reporting these data, be it because the applicable regulation in a given country prevents them to do so or because they have not yet managed to obtain client’s consent.

Indeed, clients in some countries are reluctant to provide their consent because they do not feel compelled by European regulations, as is experienced by the European financing industry with EMIR for instance.

EEA regulators should be aware that until an agreement is reached at international level to lift banking secrecy / personal data protection obligations for regulatory reportings, it will be very difficult if not impossible in some instance for investment firms to systematically report these data.

On another hand, compelling investment firms to report these data in all situations would simply prevent them from pursuing their brokerage activity on EEA financial instruments in some countries/areas.

**Q9: Do you require further clarity on the content of Article 5 of RTS 22? Please elaborate.**

No.

**Q10: Do you require further clarity on the content of Article 6 of RTS 22? Please elaborate.**

Yes. Please refer to our answer to question 8 for personal data protection issues.

**Q11: Do you require further clarity on the content of Article 7 of RTS 22? Please elaborate.**

Yes. Please refer to our answer to question 8.

**Q12: Do you require further clarity on the content of Article 8 of RTS 22? Please elaborate.**

Yes. Please refer to our answer to question 8 for personal data protection issues.

**Q13: Do you require further clarity on the content of Article 9 of RTS 22? Please elaborate.**

Yes. Please refer to our answer to question 8 for personal data protection issues.

**Q14: Do you require further clarity on the content of Article 10 of RTS 22? Please elaborate.**

No.

**Q15: Do you require further clarity on the content of Article 11 of RTS 22? Please elaborate.**

Yes.

§ 2 states that *"an investment firm shall determine on a best effort basis the short sales transactions in which its client is the seller"*.

While we understand the logic underlying this requirement, we think that it is not relevant when an investment firm purchases financial instruments not from a client but from a counterparty.

Illustration:
Let us consider that investment firm A purchases illiquid bonds from investment firm B. Both A and B are market-makers on the bonds. B sells the bonds short to A.

- B will never disclose to A, a direct competitor, that it makes a short sale. So, in these situations, A will systematically report 'NTAV'.
- But on another hand, B being an investment firm will report the short sale on its side.

Indeed, while investment firms can collect from their clients on a best efforts basis whether it sells short or not, this requirement is likely to prove inapplicable when investment firms deal with counterparties, as the latter ones will never be willing to provide this information.

We suggest ESMA to amend *Article 11 § 2* as follows:

*"When providing execution services, an Investment firm shall determine on a best effort basis the short sales transactions in which its client is the seller."*

The advantage of this wording is that it enables to encapsulate all client sales stemming from the performance of execution services, whether on an agency or on a principal capacity.

Besides, we take the opportunity to illustrate the very significant operational challenges incurred by the obligation for the investment firm to identify in real time any short position resulting from sales:

- The required calculation is complicated by the fact that it necessitates to consolidate information stored in different IT systems that are sometimes segregated to prevent conflicts of interests;

- If an investment firm detects afterwards that it omitted to take into account and report a given sale, it would have to report it as soon as the anomaly is detected, but also to re-compute and re-report as the case may be all sales made by the firm on the same underlying between the trading date of the missed sale and the day on which the missing transaction is eventually reported. Thus the reporting firm will have to "replay" the calculation of the Short selling indicators potentially on a number of transactions elapsing over several days.

**Q16: Do you require further clarity on the content of Article 12 of RTS 22? Please elaborate.**

No.

**Q17: Do you require further clarity on the content of Article 13 of RTS 22? Please elaborate.**

No.

**Q18: Do you require further clarity on the content of Article 14 of RTS 22? Please elaborate.**

No.

**Q19: Do you require further clarity on the content of Article 15 of RTS 22? Please elaborate.**

No.

**Q20: Do you require further clarity on the content of Article 16 of RTS 22? Please elaborate.**

No.

**Q21: Do you require further clarity or examples for population of the fields covered in Block 1? Please elaborate.**

No.

**Q22: Do you require further clarity or examples for population of the fields covered in Block 2? Please elaborate.**

Yes. It would be very helpful to have examples involving:

- Funds and fund managers. Please refer to the example we propose in answer to question 38;
- Adults under guardianship or curatorship or children to illustrate the fact that in these instances, decision maker details have to be completed.

**Q23: Do you require further clarity or examples for population of the fields covered in Block 3? Please elaborate.**

No.

**Q24: Do you require further clarity or examples for population of the fields covered in Block 4? Please elaborate.**

No.

**Q25: Do you require further clarity or examples for population of the fields covered in Block 5? Please elaborate.**

No.

**Q26: Do you require further clarity or examples for population of the fields covered in Block 7? Please elaborate.**

No.

**Q27: Do you require further clarity or examples for population of the fields covered in Block 8? Please elaborate.**

Yes.

a) We think there is a slight mistake in § 1.2.8. page 56 third sentence: *“Where the short selling information is not made available to the investment firm by the client, the field 62 shall be populated with ‘UNDI’.”*

   The field 62 shall instead be populated with ‘NTAV’.

b) Please refer to answer to question 15 above. It would be useful that ESMA provides examples where:

   - The investment firm purchases financial instruments from an another investment firm;
   - The investment firm executes a short sale order from one its clients, (i) in an agency capacity, (ii) in a principal capacity.

**Q28: Do you require further clarity or examples for population of the fields covered in Block 10? Please elaborate.**

Yes.

*§ 1.2.9.2 page 62 Commodity derivative indicator*

We think that there is a mistake in *Example 1: “…client A has indicated that it is reducing its risk in an objectively measurable way in accordance with Article 57 of Directive 2014/65/EU… client A is an investment firm”.*

Indeed, Article 57 of Directive 2014/65/EU refers to *“non-financial entities [which positions] are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity”.* Investment firms are financial entities. Their activity consists of a financial activity, not a commercial one.

Besides, one should stress that investment firms are unlikely to collect this information from competitors (for instance utility companies exercising the activity of market-making on given commodity derivatives products on one hand, hedging their commercial activity on another hand).

Thus, as proposed for the identification of short sales made by investment firm’s clients or counterparties (please refer to our answer to question 15), we recommend that ESMA specifies that the obligation for investment firms to report the value of the Commodity derivative indicator is restricted to the provision of execution services.

**Q29: Do you require further clarity or examples for population of the fields covered in Block 11? Please elaborate.**

No.

**Q30: Do you require further clarity or examples for population of the fields covered in Block 12? Please elaborate.**

Yes.

The examples taken in *§ 1.2.12 page 72* refer to a situation where at inception *"the seller of the credit default swap is receiving the [up-front payment (field 42)]"*. Conversely, when there is a decrease in notional *(§ 1.2.12.2 page 76*), we understand that the seller of the credit default swap, firm Y, makes an up-front payment of € 75,000 to X.

While the examples provided address most capital market situations, one cannot rule out extreme situations where, for instance, in case of decrease in notional, the buyer X and not the seller Y makes an upfront payment.

We suggest that ESMA illustrates this kind of situations, where we understand that the field 42 *"Up-front payment"* will be reported with a – (minus) sign.

**Q31: Do you require further clarity or examples for the scenarios in section 1.3.1? Please elaborate.**

Yes.

According to the two examples given in 1.3.1 pages 78 and 79, the reporting should be done by the investment firm X where X seems to be the client's custodian. We strongly believe that the reporting obligation of transfers (internal as well as external) should not rely on custodian banks and actually could not.

First, this requirement is done on the ground that the custodial activity (and its associated exemption) is limited to movements with no change of beneficiary and thus any other movement has to be declared. As explained in our answer to question 6, this will lead to most of the activity be declared twice. Moreover the custody is not an investment service and therefore, when a firm provides only custody services to a client, the former could not be considered as "providing an investment service" and could not be liable for any reporting.

Second, these two examples seem to assume that the custodian can detect transfers from other underlying transactions when being instructed. Such approach does not reflect the reality. Even if the "transfer" for the purpose of Article 26 had been just defined (see our answer to question 7), when a custodian is instructed by its client to deliver shares it simply doesn't know if:

- the delivery is linked to an order executed by a broker on a trading venue;
- the quantity of the instruction is the same as the one at the trading level;
- the instruction corresponds to an aggregation of multiple transactions all related to the client;
- the instruction corresponds to a net of multiple transactions all related to the client;
- the client is the end client or represents several different clients and therefore maybe several different types of underlying transactions (some already reported, other not yet);
- there is a real change of beneficiary;
- the underlying transaction is a security financial collateral arrangement (thus the transfer is without any change of ownership);

- the underlying transaction is a lending of securities (thus not to be declared as an SFT);
- the related underlying transaction, in case the delivery is free of payment, is a free one or if the cash is paid outside the system (for example, because the CSD's SSS des not admit the currency agreed at the trading level: a US client that sold French shares on Euronext and wanted to be paid in USD); at the trading level such question could not exist, at the trading it is clear if the transaction is against cash or not;
- ….

Thus requiring the custodian to report "transfers" will lead to undesirable cases (see our diagrams in our answer to question 6):

- A double reporting: Since the detection of "real transfers" will be unfeasible, there is a risk that the custodian reports a settlement instruction as a transfer where the underlying transaction was between the final client and a broker and thus has already been declared by the broker. Unlike the investment firm that receives and transmits to another investment firm for execution (meaning having a role at the trading level), the custodian intervenes after and will not have any relation with the investment firm that executed the order and which is primarily responsible for the reporting;

- This leads to the second negative impact: The custodian will report the transfer at the earliest one day after its execution (thus the day after the settlement of the transfer) since the settlement instruction was the consequence of an order executed on the market to be reported the day after the execution; the NCA will have two declarations that it will not be able to match (unlikely when both the investment firm providing a RTO service and the broker report for the same initial order);

- Another undesirable effect could be for the NCA to have transactions reported that should not be reported at all (meaning SFTs) in the MIFID2's context.

Third, according to the examples given in the Consultation Paper, X which is the custodian, either executes the transfer (page 78) or receives an instruction that will be executed (page 79). Actually, in both cases, X receives an instruction. The fact that the term "executed" was preferred to "settled" when applying to an instruction raises some concern. Indeed, at the custodian level, we are definitively in the "post-trade" part, after the conclusion of the transaction, even a pure OTC one, a place where it is not about "execution" anymore. Requesting the custodian to report the execution of the transfer means that the details included in the report will correspond to the instruction itself rather than the underlying transaction. In other words, the custodian will report any external and internal settlement. This being said, we will be very interested in knowing how to populate some items like the trading date and the trading time. If one can imagine the answer when the instruction settles for the whole quantity on the intended settlement date, we need some explanations for the case where the settlement fails. Even more how to fulfill these items if at the end a buy-in process is triggered?

**Q32: Do you require further clarity or examples for the scenarios in section 1.3.2? Please elaborate.**

No.

**Q33: Do you require further clarity or examples for the scenarios in section 1.3.3? Please elaborate.**

No.

**Q34: Do you require further clarity or examples for the scenarios in section 1.3.4? Please elaborate.**

Yes.

*§ 1.3.4.3 page 87* *"Firm X deals on an 'any other' basis"*

The last § states that *"If the client is a firm with transaction reporting obligations, then it shall also transaction report the market executions rather than an average price transaction."*

This contradicts the statement made in *§ 1.1.3. "Chains"* in the 2nd §: *"The fact that a firm is part of a chain makes no difference to its reporting obligations except that its transaction reports shall reflect the execution that has been confirmed to it by the firm that has fulfilled its order."*

Indeed, in the example given in § 1.3.4.3., firm X can choose to confirm the execution to its client at an average price. In this instance, in line with the above, the client shall report the transaction at an average price.

To avoid any ambiguity, we suggest ESMA to replace the first sentence above by the following sentence:
*"If the client is a firm with transaction reporting obligations, then its transaction reports shall reflect the execution that has been confirmed to it by the firm that has fulfilled its order. In particular, if the latter one confirmed the execution at an average price, then the client shall transaction report an average price transaction."*

**Q35: Do you require further clarity or examples for the scenarios in section 1.3.5? Please elaborate.**

Yes.

a) *§ 1.3.5.1 page 88* *"One market fill for several clients" - Firm X deals on own account*

It is mentioned that *"If the allocations to the clients take place at a later time to the market execution and assuming that a sale of this amount would result in firm X having a short position, firm X would need to populate Report 1 to indicate this, regardless of the fact that firm X would be flat after the purchases from the clients."*

It should be noted that this contradicts the very principle of the "riskless principal" brokerage activity, as is carried out in the UK. Indeed, the "riskless principal" model is a pure brokerage model which should merely be seen as an alternative way to book the transactions compared to the agency model:

- The market execution done by the broker always results from a client order;
- The transaction made with the client systematically mirrors the market execution (except for the mark-up representing broker's margin);
- So that in essence, the broker is never going to bear any market risk on this activity. For this reason, it is referred as riskless principal;
- A short position represents a market position entailing a market risk for the entity which holds this position. This does not apply here as the riskless principal activity never creates a market position with the broker;
- The fact that there is a "technical" delay between the time on which the "market leg" and the "client leg" are executed should not be seen as an argument to consider the ephemeral positions resulting from this time difference as market positions. Considering them this way would introduce a flaw in the market risk assessment of investment firms. It would certainly contradict the spirit of the regulation as well as the intentions of the EU bodies and of the NCAs.

Besides, the implementation of this rule would incur a level complexity that would materially increase the cost of implementation of reporting systems for investment firms, while entailing a significant additional operational risk. Indeed, given that eventual short positions must be assessed globally at investment firm level:

- The calculation would entail the consolidation of data from different activities and IT systems (brokerage, market making, …), sometimes segregated for the purpose of management of conflicts of interests;
- This would incur significant and complex IT developments as the requested calculations would differ completely from those implemented to comply with the obligations resulting from the Short Selling Regulation;
- Thus putting at risk the ability of investment firms to populate accurately the Short selling indicator.

For all these reasons, we think that the ephemeral positions created in the firm by the riskless principal brokerage activity should be excluded from the calculation implemented to identify and report in-house short positions.

b) *§ 1.3.5.2 "Several market fills for several clients"*

*d) page 102 "Several clients and several transactions (firm X deals on an 'any other' basis)"*

In the example given in *scenario 1 (clients receive an average price)* and *scenario 2 (orders filled on a first come first served basis)*, ESMA states that *"there has to be an allocation to the clients at the end of each day since 'INTC' account cannot display changes in position more than the day."*

But some executing brokers can instead choose to confirm the transactions to the clients only when they are fully executed (instead of confirming the executed lots at the end of every day). To that end, the brokers use a dedicated internal account where the book the executions until clients orders are fully executed.

Can ESMA provide an example to illustrate this set-up?

**Q36: Do you require further clarity or examples for the scenarios in sections 1.3.6 and 1.3.7? Please elaborate.**

Yes.

*§ 1.3.7 page 108 "No transmission (firms dealing on matched principal or own account)"*

It is the first time an example illustrates how the field 3 *« Trading Venue transaction identification code »* should be populated. Is there any specific reason for this?

**Q37: Do you require further clarity or examples for the scenarios in section 1.3.8? Please elaborate.**

Yes.

*§ 1.3.8.1 page 122 "Conditions for transmission as per Article 4 not met"*

The example describes a case with a chain of intermediaries where conditions for transmission as per Article 4 are not met.

We understand that as far as there are at least two firms that shall report, both the transmitting firm and the receiving firm should report all fields except:

- The fields pertaining to transmission details, which should be reported, either by the transmitting firm (field 25), or the receiving firm (field 26 or 27);
- The fields which are specific to the transmitting firm i.e. fields 57 and 58, 62,64;
- Those specific to the receiving firm i.e. fields 61, 63.

For ease of understanding, we suggest that in the examples provided ESMA details how all the fields of the report should be populated.

**Q38: Do you require further clarity or examples for the scenario in section 1.3.9? Please elaborate.**

Yes.

We suggest that:

- In addition to the reports prepared by firm X, ESMA illustrates the reports prepared by firm Y;
- ESMA provides examples where X is not an investment firm. Please see the examples we suggest.

Example 1:

Entities concerned:
**X** is an asset manager - X is not an investment firm.
**Y** is a broker
Funds **Fd1** and **Fd2** are clients of X (fund management)
Investor **I** (natural person) is a client of X (portfolio management)

The transactions:
X transmits to Y an aggregated order to buy 120,000 shares
The allocation (that remains at X level) is:

- 50,000 shares for Fd1
- 65,000 shares for Fd2
- 5,000 shares for **I**

Y receives a single order and transmits it to the market (on an agency capacity).

The order is executed in three lots:

- 55,000 at € 11€
- 37,500 at € 11.50
- 5,000 at € 11.30 €.

Y confirms the complete transaction to X: 120,000 shares at an average price of € 11.225.

The reporting:

- X is not an investment firm, so X shall not report;
- The reporting is done only by Y.

⇨ How does Y report?
⇨ How should the fields buyer be populated? With the LEI of X (since X is the client of Y)?

Example 2:

Entities concerned:
**X** is an asset manager - X is not an investment firm.
**Y** is a broker.
**Z1** is a distributor – Z1 is a credit institution but not an investment firm.

**Z2** is a distributor – Z2 is an investment firm.
**Investor I1** is a retail client of X (portfolio management) and client of Z1 (custody).
**Investor J1** is a retail client of X (portfolio management) and client of Z1 (custody).
**Investor I2** is a retail client of Z2 (with a delegation of the portfolio management by Z2 to X).
**Investor J2** is a retail client of Z2 (with a delegation of the portfolio management by Z2 to X).

The transactions:
X transmits to Y an aggregated order to buy 100,000 shares.
The allocation (that remains at X level) is:

- 30,000 shares for I1
- 35,000 shares for I2
- 15,000 shares for J1
- 20,000 shares for J2.

Y receives a single order and transmits it to the market (under the AOTC trading capacity)

The order is executed in three lots:

- 40,000 at € 11
- 27,500 at € 11.50
- 32,500 at € 11.30.

Y confirms the complete transaction to X (100,000 shares at an average price of € 11.235).
X transmits a settlement instruction to Z1 for the aggregated transaction into a single CSD account with the re-allocation into clients' accounts (I1 & J1, I2 & J2) and a settlement instruction to Z2 with the re-allocation into I2 & J2 accounts.
Z1 instructs Z2 on the settlement of I2 & J2 transactions and instructs the CSD (SSS) on the global quantity of the aggregated transaction.

The reporting:

- X is not an investment firm so shall not report.
- Z1 is not an investment firm and so shall not report for its client (I1 & J1).
- Z2 is an investment firm, not providing a RTO service, but providing portfolio management services and so shall report for its clients (I2 & J2).
- A reporting is done by Y.

⇨ How does Y report?
⇨ How does Z2 report?
⇨ How are the following fields populated:
3. Trading venue transaction identification code
4. Executing entity identification code
6. Submitting entity identification code
7. Buyer identification code
9. Buyer - first name(s)
10. Buyer - surname(s)
11. Buyer - date of birth
12. Buyer decision maker code
25. Transmission of order indicator
26. Transmitting identification code (for the buyer)
27. Transmitting identification code (for the seller)
28. Trading date time
29. Trading capacity
36. Venue
57. Investment decision within firm
59. Execution within firm?

**Q39: Do you require further clarity or examples for the scenario in section 1.3.10? Please elaborate.**

No.

**Q40: Do you require further clarity or examples for the scenario in section 1.3.11? Please elaborate.**

No.

**Q41: Do you require further clarity or examples for the scenarios in sections 1.3.12 and 1.3.13? Please elaborate.**

Yes.

As regards the reporting of security financing transactions with central banks, please refer to our answer to question 3. Indeed, including the reporting of these transactions in MiFIR would contradict the spirit of the SFTR because they have been purposely excluded from reporting obligations.

**Q42: Are there any other equity or equity like instruments scenarios which require further clarification?**

No.

**Q43: Are there any other bonds or other form of securitised debt scenarios which require further clarification?**

No.

**Q44: Are there any other options scenarios which require further clarification?**

No.

**Q45: Are there any other contract for difference or spreadbet scenarios which require further clarification?**

No.

**Q46: Are there any other credit default swaps scenarios which require further clarification?**

No.

**Q47: Are there any other swap scenarios which require further clarification?**

No.

**Q48: Are there any other commodities based derivatives scenarios which require further clarification?**

No.

**Q49: Are there any other strategy trades scenarios which require further clarification?**

No.