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| Response Form to the Consultation Paper |
| MiFIR review report on the obligations to report transactions and reference data |

**Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in the Annex. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **20 November 2020.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_CP\_TRRF\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_TRRF\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TRRF\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open Consultations” 🡪 “Consultation paper on MiFIR review report on the obligations to report transactions and reference data”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper?**

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

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | German Banking Industry Committee / Die Deutsche Kreditwirtschaft |
| Activity | Choose an item. |
| Are you representing an association? |  |
| Country/Region | Germany |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_CP\_TRRF\_1>

## 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 approximately 1,700 banks.

The German Banking Industry Committee welcomes the opportunity to reply to the Consultation Paper and would like to comment on the obligations to report transactions and on reference data as follows.

<ESMA\_COMMENT\_CP\_TRRF\_1>

**Questions**

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

<ESMA\_QUESTION\_TRRF\_1>

To ensure a level playing field, the principle of “same business, same rules” should be applied.

<ESMA\_QUESTION\_TRRF\_1>

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

<ESMA\_QUESTION\_TRRF\_2>

In order to avoid repeated enumerations in the legal text, we suggest that the term "firm" should be legally defined. In this way, the legibility and thus the clarity of the legal text could be significantly increased.

<ESMA\_QUESTION\_TRRF\_2>

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

<ESMA\_QUESTION\_TRRF\_3>

It should be clearly stated in the level 1 text who is responsible to transmit a copy of the reports to the competent authority of the host Member State. We understand this would be the responsibility of the home Member State’s NCA and will be executed via ESMA’s Transaction Reporting Mechanism (TREM).

<ESMA\_QUESTION\_TRRF\_3>

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

<ESMA\_QUESTION\_TRRF\_4>

No.

<ESMA\_QUESTION\_TRRF\_4>

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

<ESMA\_QUESTION\_TRRF\_5>

We strongly object ESMA’s proposal to replace the tried and test TOTV concept by introducing an approach leading to all derivative instruments that are exclusively traded through SI systems would be subject to extensive transparency requirements and reporting obligations at the least. We do not see any authorisation basis for this proposal and the options derived from it. Not surprisingly, ESMA has refrained from proposing a specifc Level 1 text which would show the far-reaching consequences. However, this would be necessary in order to be able to thoroughly assess all consequences.

Instead, we strongly advocate a transformation of the existing Opinion ESMA70-156-117 into a corresponding Level 1 text.

The broadening of the reporting obligation will lead to a creation of ISINs for instruments whose terms are bilaterally negotiated due to the investment needs of counterparties. Hence, these ISINs will not add any meaningful transparency to the market but introduce reporting noise, as ESMA also notices in Paragraph 38 of the consultation paper. Instruments would be found in the FIRDS database that are not ToTV – hence needing an extra flag in order for market participants for the purposes of the relevant sections in the MiFIR, where the ToTV concept applies, to filter the ToTV instruments.

Furthermore, it should be kept in mind that with regard to non-ToTV instruments solely traded on SIs, SIs are not in competition with exchange traded products. Hence there is no need for an alignment of transparency requirements. In addition, the fact that opt-in SIs will face additional reporting obligations might result in fewer market participants opting in the SI regime.

Therefore, with respect to ESMA’s outlined ‘traded on an SI’ concept, we would like to point out, that SIs do generally not compete with trading venues and have a role as liquidity providers. Hence, an expansion of transaction reporting requirements to products which are either naturally OTC products or illiquid might further prevent SIs’ role as vital liquidity providers in derivative markets. These impacts on liquidity seem not justified.

ESMA’s proposals in the CP also raise serious practical problems, not least because they consciously or unconsciously ignore the complexity of the subject. The question of what is to be considered TOTV not only plays a role in transaction reporting, but also with regard to pre- and post-trade transparency, the trading obligation and the reporting of reference data. While we strongly advocate retaining the same TOTV concept for all applications, we would like to point out that the transaction reporting obligation only plays a subordinate role in this respect. We consider the procedure chosen by ESMA to deal conclusively with this question in the consultation paper on transaction reporting, to be inappropriate.

In particular, we draw attention to the competition aspects affected by the ESMA proposal. For example the same day FIRDS systematic internaliser (SI) reporting requirement inadvertently makes public the type of instrument/trade being traded by that SI, by displaying the Market Identifier Code (MIC) of the SI associated with an instrument as well as the country where the SI is located, in the publically available FIRDS database the next day. Having to publish ISINs to FIRDS with the SI’s MIC attached significantly expands transparency for illiquid ToTV instruments (e.g. complex Interest Rate Derivatives). By making public information which is not reported in the post trade reporting requirement, due to its careful calibration based on instrument liquidity status, it risks undermining the transparency regime.

Publication of this instrument activity data enables market participants to identify and observe the trading activity of other firms, and theoretically extends the obligations not just for traded deals but into the pre trade space as well. The possible identification of an SI as a counterparty allows market participants to extrapolate certain information and anticipate the hedging position of an SI, thereby inhibiting an SI to trade on normal market terms. This in turn impacts the ability of the SI to maintain liquidity provision capability to its clients. The possibility to mask the SI MIC and the country when reporting instruments on a same day basis to FIRDs, in order to anonymise the data and provide for consistency with the transparency regime, should be introduced for SIs when reporting to FIRDs.

<ESMA\_QUESTION\_TRRF\_5>

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

<ESMA\_QUESTION\_TRRF\_6>

No. We strongly advocate a transformation of the existing ESMA Public Statement into a corresponding Level 1 text. Please refer to A5 for details.

<ESMA\_QUESTION\_TRRF\_6>

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

<ESMA\_QUESTION\_TRRF\_7>

We oppose any extension of the current transaction reporting regime and therefore strongly disagree with all of the outlined options. The objective of applying a level playing field between SIs and trading venues only applies to ToTV products and these are already reportable by SIs under the current regime. OTC derivatives are covered by EMIR reporting obligations – including any life-cycle events. Hence, supervisors already have all the required data at hand – the extension of the transaction reporting regime to OTC instruments or instruments traded on SIs (which are also generally tailored to the needs of the customers) is superfluous. Please also refer to A5 for details.

<ESMA\_QUESTION\_TRRF\_7>

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

<ESMA\_QUESTION\_TRRF\_8>

Yes, we expect that implementation of the proposals would lead to significant practical problems. We fear that there might be discussions, whether the ESMA benchmark register (paragraph 50) is to be considered as golden source and how to proceed, if a benchmark is falsely not included in the register. Most importantly, however, we cannot see how ESMA’s approach to decouple the transaction reporting obligations arising from the list of financial instruments defined in Annex II Section C of MiFID II could be legally justified.

<ESMA\_QUESTION\_TRRF\_8>

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

<ESMA\_QUESTION\_TRRF\_9>

We strongly reject all three options. It is also not true that option 3 would not change the status quo. Option 3 refers to benchmarks (which include a reportable financial instrument), while Art. 26(3)(c) MiFIR refers to an index. Index and benchmark are not necessarily identical.

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

<ESMA\_QUESTION\_TRRF\_9>

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

<ESMA\_QUESTION\_TRRF\_10>

We would like to draw your attention to the quality deficiencies of the FIRDS database in general. It might be advisable to upgrade the system so that the database contents meet usual quality requirements and allow for automated processing.

<ESMA\_QUESTION\_TRRF\_10>

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

<ESMA\_QUESTION\_TRRF\_11>

Furthermore, we would like to draw your attention to the quality deficiencies of the FIRDS database in general. It might be advisable to upgrade the system so that the database contents meet the usual quality requirements and allow for automated processing.

<ESMA\_QUESTION\_TRRF\_11>

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

<ESMA\_QUESTION\_TRRF\_12>

The proposed text for an amended Article 27 of MiFIR does not reflect all currant practical issues. While we acknowledge that ESMA aims at reflecting Article 17 of MAR by introducing the concept of financial instruments “where the issuer has approved trading of the issued instrument”, we miss a reconciliation with Article 26(2)(a) of MiFIR according to which financial instruments “for which a request for admission to trading has been made” are subject to the transaction reporting obligation. For the sake of clarity, any misalignment must be avoided.

<ESMA\_QUESTION\_TRRF\_12>

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

<ESMA\_QUESTION\_TRRF\_13>

We do not support ESMA’s suggested approach. The suggested amendment would effectively manifest the problem of polluting FIRDS with reference data with regard to non-ToTV instruments in Level 1. The concept of issuers does not make much sense in a derivatives context. Similarly, the terminology of admitting to trading also does not lead to any logical conclusion in the context of SIs for derivatives. Furthermore, this would likely amplify the issue as ESMA’s suggested wording may even bring non-TOTV in scope of reference data requirements.

<ESMA\_QUESTION\_TRRF\_13>

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

<ESMA\_QUESTION\_TRRF\_14>

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<ESMA\_QUESTION\_TRRF\_14>

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

<ESMA\_QUESTION\_TRRF\_15>

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

<ESMA\_QUESTION\_TRRF\_15>

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

<ESMA\_QUESTION\_TRRF\_16>

Yes, we see a host of open questions and challenges with the outlined approach. We miss a detailed analysis of all consequences that would result from ESMA’s proposal. The consultation paper on transaction reporting is not the appropriate place to propose such very far-reaching amendment to Article 27 of MiFIR. For this overriding reason alone, we reject the proposal.

<ESMA\_QUESTION\_TRRF\_16>

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

<ESMA\_QUESTION\_TRRF\_17>

We approve the deletion of Art. 4 MAR. This would ensure that only the reporting requirements under Art. 26 and 27 MiFIR could be designed as to fully serve the detection of market abuse and no other reporting regime would be necessary. The proposal would reduce complexity and costs for both regulatory authorities and reporting firms.

<ESMA\_QUESTION\_TRRF\_17>

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

<ESMA\_QUESTION\_TRRF\_18>

Yes, we see considerable implementation problems, particularly with regard to the proposed approach to identify “chains of transactions”. This proposal contradicts the approach according to which the market side has to report the market side details of the transaction. We are convinced that besides the necessary identification and processing especially the proposed dissemination of the additional code along the transaction chain would require to set up a completely new process. Reporting entities involved would have to ensure correct and timely interaction with respective intermediaries along the transaction reporting chain, i.e. potential iterations for confirmations or adjustments respectively. Against this backdrop, we see an increased risk for potential failures and additional time consuming processes with regard to the transmission of the new code to reporting entities. In other words, a mapping of a connecting element in all reports will in reality encounter such difficulties in implementation that, in our opinion, the goal – to enable NCAs to link all transactions – cannot be achieved.

Also, a possible obligation to specify a TVTIC for transactions in third countries will lead to practical problems, since the relevant trading venues are not subject to MiFIR and therefore cannot be obliged to generate a TVTIC. As a result, those subject to the reporting obligation would not be able not fully comply with the reporting obligations.

<ESMA\_QUESTION\_TRRF\_18>

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

<ESMA\_QUESTION\_TRRF\_19>

Yes, we see considerable implementation problems, particularly with regard to the proposed approach to identify “chains of transactions”. This proposal contradicts the approach according to which the market side has to report the market side details of the transaction. A mapping of a connecting element in all reports will in reality encounter such difficulties in implementation that, in our opinion, the goal – to enable NCAs to link all transactions – cannot be achieved. It also should be noted that OTC derivatives are predominantly used for the purpose of risk management between dealer banks hence a regulators’ need ‘to link all transactions pertaining to the ‘same transaction chain’ might be less relevant in this context and not justify the creation of a separate code.

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

<ESMA\_QUESTION\_TRRF\_19>

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

<ESMA\_QUESTION\_TRRF\_20>

We strongly reject the proposal. Not only do we expect significant problems if the cllent category stored in the customer master data were to be fed into the transaction report. These are completely separate systems. It is also not apparent that the supervisory authority needs this data for market surveillance purposes. “Suitability“ and „market trends“ are not relevant in the context of transaction reporting. Not even the very broad norm of Article 24 MiFIR is aimed at monitoring suitability obligations. Thus, the last sentence in Art. 26 (6) as proposed by ESMA should not be added.

<ESMA\_QUESTION\_TRRF\_20>

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

<ESMA\_QUESTION\_TRRF\_21>

As this field has not been of any use in the past years, we would suggest its deletion.

<ESMA\_QUESTION\_TRRF\_21>

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

<ESMA\_QUESTION\_TRRF\_22>

We welcome that ESMA shares our view that it is not possible to make meaningful use of the information on whether a transaction is a short sale. Such labeling of short sales does not make sense either. Short sales must meet the requirements of Regulation (EU) No. 236/2012. The supervisory authority therefore has the necessary data; an additional data source is dispensable. So we strongly agree with a deletion of such field.

<ESMA\_QUESTION\_TRRF\_22>

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

<ESMA\_QUESTION\_TRRF\_23>

We strongly support ESMA‘s proposal to remove the designation to identify short sales from the transaction report. Thus we strongly vote for Option 1 (omission of the Short Selling Indicator without substitution).

<ESMA\_QUESTION\_TRRF\_23>

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

<ESMA\_QUESTION\_TRRF\_24>

Yes. According to Paragraph 193 of the Final Report ESMA70-156-2756, Art. 18 (2) MiFIR is to be deleted without replacement. Since this also eliminates the possibility of using a waiver, the proposal in the CP would come to nothing.

<ESMA\_QUESTION\_TRRF\_24>

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

<ESMA\_QUESTION\_TRRF\_25>

Yes, there seems to be no requirements for ARMs/APAs to pass on this information free of charge to the market participants. However, supervisory authorities should receive this information in the context of MiFIR post-trade requirements anyway. Please refer to A24, too.

<ESMA\_QUESTION\_TRRF\_25>

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

<ESMA\_QUESTION\_TRRF\_26>

ESMA should clearly state that the filling of an additional reporting field (buy-back yes/no) would replace Article 5(3) MAR. We strongly support such an approach. In addition, the implementation of a new field into the transaction reporting system needs time. Hence, we would like to emphasize that sufficient lead time for necessary implementation should be considered.

<ESMA\_QUESTION\_TRRF\_26>

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

<ESMA\_QUESTION\_TRRF\_27>

No, we strongly oppose an obligation to contract for investment firms accepting transmissions. It is not comprehensible that transmitting investment firms are favored at the expense of "larger" investment firms. With this proposal, ESMA is effectively intervening in civil law to achieve supervisory objectives. Experience in the context of EMIR Refit and the introduction of mandatory reporting by financial counterparties for small non-financial counterparties proves that the market has experienced severe problems since the duties of cooperation of the non-financial counterparties were not specified on Level II. Against this backdrop and because it is not evident that there would be no milder means, we advocate maintaining the status quo.

<ESMA\_QUESTION\_TRRF\_27>

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

<ESMA\_QUESTION\_TRRF\_28>

Yes.

<ESMA\_QUESTION\_TRRF\_28>

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

<ESMA\_QUESTION\_TRRF\_29>

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

<ESMA\_QUESTION\_TRRF\_29>

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

<ESMA\_QUESTION\_TRRF\_30>

ANNA DSB at present generates ISINs for derivatives reported under Art. 26 MiFIR. The FIRDS Database is ISIN-based and represents reportable products/instruments under MiFIR. It is our understanding that the ISIN as a global and standardised instrument /product identifier has been well established in MiFIR reporting practice.

We feel that a potential use of the UPI as an alternative identifier for OTC derivatives will result in higher complexity and additional implementation efforts.

However, the planned use of the UPI instead of the ISIN under Art. 26 MiFIR requires clear and precise guidance by ESMA. Thus, we would assume that ESMA would conduct a separate discussion/consultation with market participants/reporting entities. We would like to emphasize that sufficient lead time for necessary implementation should be considered.

<ESMA\_QUESTION\_TRRF\_30>

1. : Are there any specific aspects relating to the ISIN granularity reported in reference data which need to be addressed? Is the current precision and granularity of ISIN appropriate or is (for certain asset classes) a different granularity more appropriate?

<ESMA\_QUESTION\_TRRF\_31>

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<ESMA\_QUESTION\_TRRF\_31>

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

<ESMA\_QUESTION\_TRRF\_32>

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<ESMA\_QUESTION\_TRRF\_32>

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

<ESMA\_QUESTION\_TRRF\_33>

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<ESMA\_QUESTION\_TRRF\_33>