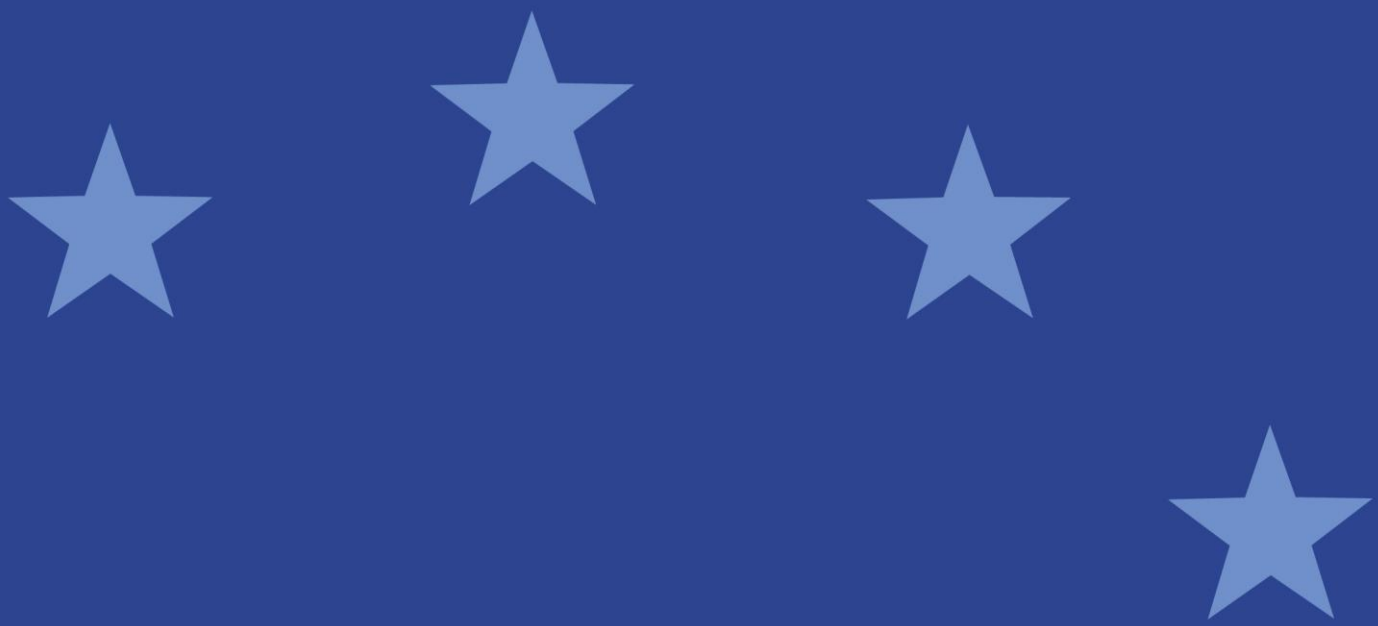
esma European Securities and Markets Authority

Final Report

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



23 March 2021 | ESMA74-362-1013

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1 Legislative references and abbreviations

Legislative references

AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010
BMR	Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014
EMIR	Regulation (EU) No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
EMIR Refit	Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)
MIFID I	Directive 2004/39 of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directive 85/611/EC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC
MIFID II	Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

MIFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
RTS 22	Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities
RTS 23	Commission Delegated Regulation (EU) 2017/585 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities
STFR	Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012
SSR	Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps
UCITS	Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions

Abbreviations

ARM	Authorised Reporting mechanism
CFI	Classification of Financial Instruments Code
CP	Consultation Paper
EC	European Commission

EEA	European Economic Area
ESMA	European Securities and Markets Authority
EU	European Union
EURIBOR	Euro Interbank Offered Rate
FIRDS	Financial Instruments Reference Data System
IF	Investment Firm
ISIN	International Securities Identification Number
LEI	Legal Entity Identifier
LIBOR	London Inter-Bank Offered Rate
MTF	Multilateral Trading Facility
OJ	Official Journal
OTF	Organised Trading Facility
RM	Regulated Market
SI	Systematic Internaliser
ToTV	Traded on a Trading Venue
TV	Trading Venue
TVTIC	Trading Venue Transaction Identification Code
UPI	Unique Product Identifier
UTC	Coordinated Universal Time
UTI	Unique Trade Identifier

Executive Summary

Reasons for publication

Article 26(10) of MiFIR requires the European Commission (EC) to present a report to the European Parliament and the Council to assess the functioning of the transaction reporting regime under this Article. This Final Report (FR) is prepared in accordance with Article 26(10) of MiFIR that requires ESMA to submit a report to the EC assessing the functioning of the transaction reporting regime under Article 26 of MiFIR and it covers the following areas:

1. Topics related to the functioning of Article 26 of MiFIR on the transaction reporting regime as per the original requirement in Article 26(10) of MiFIR.
2. Topics related to the functioning of Article 27 of MiFIR on the supply of financial instruments reference data and article 4 of MAR on the notifications and list of financial instruments, on which ESMA has decided to provide an additional assessment considering their interconnections with the above topics.

Contents

Section 1 of this report contains the list of legislative references and abbreviations used in the report. Section 2 is the executive summary of the document. Section 3 explains the background to the proposals and covers the broad themes raised in the feedback from stakeholders across all questions, including transversal issues such as the streamlining of reporting channels and the reliance on new technologies. Sections 4 and 5 cover the scope of the transaction reporting and reference data obligations both in terms of entities subject to the transaction reporting obligation and in terms of instruments to be reported under both obligations. Importantly, section 4.1 includes a recommendation to extend the scope of reporting requirements under Article 26 of MiFIR to UCITS and AIFM firms when they provide at least one MIFID service to third parties. With respect to the scope of financial instruments to be reported, section 5.2 includes proposals for simplification of the ToTV concept in light of the considerations made in the ESMA70-156-3329 Final Report on the transparency regime for non-equity instruments and the trading obligation for derivatives and section 5.3 includes proposals to further align the transaction reporting obligation with the more recent Benchmark Regulation.

Sections 6, 7, 8 and 9 cover the specific data elements that should be reported under the transaction reporting obligation that are explicitly mentioned in the Level 1 provision under Article 26(3) of MiFIR. ESMA has assessed each of these data elements and for each of them has included proposals as to whether the data element should be maintained, removed, replaced or further clarified. In particular, section 8.2 recommends simplifying reporting with the removal of the short sale indicator. Furthermore, sections 6, 7 and 9 contain proposals for four additional elements to be included in the set of details to be reported in order to maximise the usage of transaction reporting data. Notably, the inclusion of information on client categories and buyback programs as well as the proposal for a

specific empowerment to ESMA to specify the conditions for linking specific transactions and for identifying aggregated orders resulting in the execution of a transaction.

Section 10 and 11 relate to the order transmission regime and the delegation of the reporting obligation to ARMs. Section 12 covers the interaction with reporting obligations under EMIR and includes proposals to ensure further alignment between the two reporting regimes. Section 13 covers the use of the LEI of the issuer of the financial instruments for reference data reporting purposes and includes proposals to enhance the effectiveness of such obligation.

Next Steps

This report is submitted to the European Commission and is expected to feed into any review of the transaction reporting regime in MiFIR. ESMA stands ready to provide any additional technical advice on the legislative amendments suggested in the report.

3 Introduction

3.1 Scope of the Report

1. MiFID II/MiFIR requires the European Commission, after consulting ESMA, to submit reports to the European Parliament and the Council reviewing many provisions in MiFID II/MiFIR. This Report is prepared in accordance with Article 26(10) of MiFIR that requires ESMA to submit a report to the EC assessing the functioning of the transaction reporting regime under Article 26 of MiFIR. National competent authorities (NCAs) use the transaction data received in accordance with Article 26 of MiFIR in combination with the instrument reference data published under Article 27 of MiFIR and Article 4 of MAR; both data sets are essential for the purpose of market monitoring under Article 24 of MiFIR. Given the interconnection between the transaction data and the reference data, ESMA has decided to provide in this report an additional assessment of the functioning of Article 27 of MiFIR on the supply of financial instruments reference data and Article 4 of MAR on the notification and list of financial instruments.

2. The deadline for delivery of this report as set in Article 26(10) of MiFIR has been modified, in coordination with the European Commission, in the context of Brexit and the Covid-19 crisis[1].

3. The transaction reporting and reference data requirements under Articles 26 and 27 of MiFIR have been introduced in the wake of the financial crisis, which revealed weaknesses in the former reporting requirements due to their narrow scope and lack of harmonization. The MiFIR reporting requirements were designed to provide NCAs with a full view of the market when conducting their market surveillance activities. To achieve this goal, Articles 26 and 27 introduced a uniform and standardised reporting regime across the EU; such regime replaced the national regimes in existence under the former MiFID I and increased the scope of financial instruments to be reported. Each national supervisor in the EU receives transaction data under Article 26 of MiFIR. This data contains information about each executed transaction, which is combined with the reference data related to the instrument in which the transaction is executed that is published by ESMA under Article 27 of MiFIR[2]. In addition to Article 27 of MiFIR, Article 4 of MAR on the notifications and list of financial instruments introduced a mirror requirement to provide instrument reference data. Given the common purpose of the two provisions, ESMA developed Level 2 rules prescribing a common set of reference data elements and standards to be reported, such rules have been implemented into one single reporting system and the reported information is published via the FIRDS database on the ESMA website (link).

4. Transaction and reference data reporting under MiFID enable NCAs to monitor for abuses under the Market Abuse Regulation (MAR)[3]. Such data is also useful for broader market monitoring activities as referred in Article 24 of MiFIR; it provides insight into how firms and

[1] An overall planning for the MiFID II/MiFIR review reports is available on the ESMA website (here).
[2] The scope of Article 27 covers all instruments in scope of Article 26(2) that are traded on a trading venue or a Systematic Internaliser. For the pure OTC instruments covered by Article 26 that are not reported to FIRDS, the information is directly reported to the NCAs in each transaction report instead of being published once on ESMA website.
[3] Recital 32 of MIFIR states that "The details of transactions in financial instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms.")

markets behave and can be used by supervisors for various purposes, including monitoring market stability, data reporting service providers activities, transparency waivers/deferrals and analysing market trends including speculation during times of uncertainty.

5. An additional set of information that is used by NCAs to conduct their market monitoring activities under Article 24 of MiFIR is the order data collected in accordance with Article 25 of MiFIR. NCAs gather such data through requests to the trading venues. In this respect, ESMA considers that an assessment of such obligation has already been made within the context of the MAR review and thus a second consultation on the review of Article 25 of MiFIR is not necessary. The proposals made in the Final Report on the MAR Review[4] should be considered when reviewing Article 25 of MiFIR (section 10.1 of the MAR Report – ESMA70-156-2391). In the MAR Final Report, ESMA proposes that trading venues should record and subsequently submit order book data upon the NCAs' requests in an electronic and machine-readable form and using a common XML template in accordance with the ISO 20022 methodology.

3.2 General feedback to the Consultation

6. In order to help producing informed proposals of the issues to be considered and addressed in its report to the European Commission, ESMA published a Consultation Paper (CP) on September 24, 2020,[5] with an initial assessment of the impact of the transaction and reference data reporting obligations and seeking stakeholders' views on some suggested amendments to the respective Level 1 texts. The consultation period ended on November 20, 2020.

7. ESMA received 70 responses to the CP. A summary of the responses received is provided in Annex II and the feedback from market participants is also described in each specific section below.

8. Regarding the more general feedback received, the growing complexity and scale of the datasets provided to regulators, as well as the need to ensure their quality and usability, was identified across the board as the main challenge underlying the review of these reporting regimes. ESMA shares this view as evidenced by already ongoing actions and the respective data strategies produced[6]. Accordingly, the recommendations in this Final Report are made with this main issue in mind. This is notably the case for the recommendations on simplification of certain reporting concepts such as ToTV, the increased reliance on international standards, the removal of certain data elements such as the short sale indicator, or through further alignment with other reporting regimes such as MAR, EMIR and Benchmark Regulation (BMR). These proposals are indeed in line with the long-term solutions to this challenge that were mentioned by respondents and on which

[4] MAR Review Report (ESMA70-156-2391), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf

[5] Consultation Paper: MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-773), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

[6] A European strategy for data COM(2020) 66, published on 19 February 2020 on the European Commission website: https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf

ESMA has started to act. The long-term solutions mentioned by respondents are the following:

9. First, respondents advocated for ensuring a holistic approach to reporting by maximising the potential usage of transaction reporting for all suitable purposes. This is an area in which ESMA has already taken action and in which it plans to continue doing so:

   (a) ESMA is already engaged in an effort to maximize the usage of data from transaction reporting. Indeed, as highlighted in Article 24[7] and Recital 32[8] of MiFIR, transaction data is collected for the purpose of general market monitoring, not only for market abuse surveillance purpose. As such, market abuse surveillance should not be the only mandate considered. Other mandates under the broad concept of market monitoring should be considered, e.g. DRSP supervision, product intervention and market integrity in the larger sense. Furthermore, it is ESMA intent to further developing the synergies amongst reporting requirements to reduce dual reporting. Indeed, deepening these synergies is one of the highest priorities of ESMA's Data Strategy and a key objective in ESMA's annual Work Programme[9]. Several proposals in this Final Report are aimed at this broader objective, notably the revision of the ToTV concept, the inclusion of information on client categories and buy back programs, and proposals to ensure further alignement between EMIR and MiFIR reporting regimes as well as the Benchmark Regulation;

   (b) additionally, there are already synergies in the way that the different ESMA databases function. For example, the reference data submitted under Article 27 of MiFIR is not only used for transaction reporting purposes but also for the purposes of transparency calculations displayed in FITRS. Indeed, MiFIR introduced rules with respect to transparency obligations that require the publication of transparency thresholds applicable to each financial instrument. All transparency reference and quantitative data are loaded and stored in the FIRDS Transparency database and undergo transmission validations, XML format validations, content validations, and consistency validations against reference data reportable under Article 27 of MiFIR.

10. However, convergence of reporting across regulatory frameworks and the use of reported data for multiple purposes is limited by certain elements. As highlighted in Section 12.2 of this report, certain fundamental differences are due to the different purposes of reporting and should be taken into account to avoid compromising the financial stability and market integrity objectives of the reporting obligations.

11. Second, respondents recommended that ESMA leverage new technologies to improve system performance and the handling of increasing data flows. ESMA acknowledges this as an important objective for the following reasons:

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[7] Article 24 of MiFIR provides that "Without prejudice to the allocation of responsibilities for enforcing Regulation (EU) No 596/2014, competent authorities coordinated by ESMA in accordance with Article 31 of Regulation (EU) No 1095/2010 shall monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market."

[8] Recital 32 of MiFIR provides that "the details of transactions in financial instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms".

[9] 2021 Annual Work Program (ESMA20-95-1273), published on 2 October 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma20-95-1273_2021_annual_work_programme.pdf

(a) the application of new technologies to reporting requirements would have a direct effect on the issues of data usability and quantity as RegTech and SupTech would allow for increased efficiency of data transfers and increased capacity for data handling and analysis. As identified in the Commission's Digital Finance Strategy for the EU, this would not only reduce current issues but also ensure that ESMA's capacities are 'fit for the digital age'.[10]

(b) furthermore, as highlighted in the European Commission's Fitness Check on Supervisory Reporting [11] and Digital Finance Strategy for the EU [12], these technologies would help reducing the burden on reporting entities by further enhancing interoperability of datasets and streamlining reporting across the EU. Indeed, RegTech and SupTech would allow for straight-through processing which would reduce both ambiguity and implementation burden. This would help streamline reporting across different NCAs and enhance data quality.

12. While there are no proposals in this Final Report which directly address this issue, the proposals detailed in this Report, which increase the use of machine-readable electronic and consistent formats and standards and further harmonize reporting across jurisdictions would contribute to creating an environment that facilitates the implementation of new technologies and allows them to express their full potential. However, while the benefits of these new technologies are promising, a fast roll out of their application is confronted with multiple issues, most notably that of funding. Indeed, while the implementation of these technologies would help meet the objectives set out in the Digital Finance Strategy for the EU, the development of these technologies is costly and requires proper allocation of resources to the relevant EU institutions entrusted with its implementation.

13. Third, respondents suggested streamlining reporting channels, notably through the use of data hubs. In this respect, they pointed out that some aspects of transaction reporting are not fully harmonized across NCAs in the EU and that Brexit will add further complexities due to the duplication of transaction reporting obligations. The need for a streamlining of reporting channels has already been considered as part of the European Supervisory Authorities (ESA) review[13] and resulted in the strengthening of the ESAs' direct access to data, where necessary for the performance of their tasks. In the particular case of reference data reporting, direct reporting to ESMA has been proposed based on the direct experience resulting from the delegation of the reporting obligation from the NCAs to ESMA, which allowed for central data collection since the application of MiFID II and enabled further consistency in the data format and validations performed across Europe. While direct reporting to ESMA has not been proposed in the case of transaction reporting, ESMA considers that there is room for exploring a proposal for transactions to be reported centrally and subsequently dispatched to the relevant competent authorities through a

[10] Digital Finance Strategy for the EU. COM(2020) 591, published on 24 September 2020 on the European Commission website: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0591&from=EN

[11] Commission Staff Working Document Fitness Check of EU Supervisory Reporting Requirements. SWD(2019) 402, published on 2 April 2020 on the European Commission website: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191107-fitness-check-supervisory-reporting-staff-working-paper_en.pdf

[12] Digital Finance Strategy for the EU. COM(2020) 591, published on 24 September 2020 on the European Commission website: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0591&from=EN

[13] No significant substantial changes were introduced to Article 26 and 27 of Regulation (EU) No 600/2014 following the ESA review: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0600-20200704.

routing mechanism. As evidenced by the experience with the reference data reporting, this centralisation will increase the efficiency of sharing among various NCAs the relevant information needed for the purpose of carrying out their duties under MiFIR (see section 4.4 of this report); it will reduce duplication of reporting processes and will increase consistency in the data format and validations performed across Europe. For all these reasons, this possibility should still be considered as a long-term objective. Besides the increase in reliance on new technologies highlighted in paragraph 11 above, an important premise to this is the harmonization and standardisation of reporting templates to increase data quality and the usability of data for all stakeholders. To achieve this goal, ESMA notably set as a high priority in its Data Strategy the establishment of a reporting requirement framework to promote the use of the same standards and formats across supervisors and data sets. Several proposals in this Final Report are aimed at increasing the use of standards and further harmonizing reporting across jurisdictions. For example, proposals such as the reporting of issuers' LEI as well as further alignement between EMIR and MiFIR reporting regimes would help expand the use of international standards.

14. The above solutions are long-term solutions as they are in the process of being developed or further refined. However, to meet the general challenge of increasing complexity and quantity of data reporting required of industry participants and received by regulators in the short term, ESMA has developed the following mechanisms to ensure an increase in data quality and usability:

    (a) as required by Article 5 of the Commission Delegated Regulation 2017/385 (RTS 23), ESMA and NCAs have developed data quality action plans which are reviewed on a periodic basis to ensure that the most to important data quality issues are prioritized and are included in NCAs' assessments;

    (b) furthermore, automatic consistency checks of the FIRDS system have been implemented. For instruments traded on several trading venues, the FIRDS system automatically performs consistency checks among all reference data records reported for the same instrument. If two records do not hold the same strict value for a specific field, data is considered as inconsistent and the submitting entity is notified with a warning so that it can send the corrected file to the system;

    (c) finally, data quality issues can be identified and communicated to NCAs and ESMA by trading venues, issuers or other market participants consulting the information published on ESMA website, as well as ad hoc analyses performed on the data by NCAs or ESMA.

15. Once data quality issues have been identified as a result of any of the mechanisms above, NCAs and ESMA assess their priority and impact, decide on and implement the remedial actions and monitor their impact on the overall improvement of the data quality.

16. Respondents also raised the additional general remarks:

    (a) in their feedback to a few proposals, respondents recurrently expressed the need for a full Cost-Benefit Analysis to be produced before they could express an opinion on or support a proposal made in the Consultation Paper. However, ESMA would like to clarify that the provision of Cost-Benefit Analyses does not appear at this stage of the regulatory revision process (i.e. during the consultation and recommendation phase). Indeed, the Consultation Paper and the following Final

Report contain ESMA's recommendations to the European Commission and its suggestions of amendments that should be made to Level 1 legislation. It is if the European Commission were to move forward with the recommendations made by ESMA, that a full Cost-Benefit Analysis will be done on the proposals recommending to amend the relevant provisions of MiFIR. While ESMA's role is not to produce Cost-Benefit Analyses at this stage of the regulatory revision process, ESMA does stand ready to provide further advice and clarifications on the proposals included in this Final Report;

(b) many respondents requested that ESMA produce a market "golden source"[14] (e.g. Benchmark register, FIRDS) or define an external data source to be treated as such (e.g. ANNA, GLEIF). This suggestion concerned different reporting requirements as respondents notably suggested using a "golden source" for transparency purposes, for reference data (CFI, LEI, ISIN), and for benchmarks. With respect to the ESMA registers, ESMA acknowledges the need of market participants for clarity on which financial instruments are reportable and which are not. However, the reportability of a financial instrument is subject to the legal scope in the respective Level 1 provisions (e.g. Article 26(2) MiFIR) and ESMA does not have the legal mandate to overrule the Level 1 scope by defining the reportability of a financial instrument only by its availability on its registers, even though the ESMA registers should still be considered a good reference source for market participants. These legal limits apply even more to external non-institutional data sources. In addition, ESMA believes that an increased reliance on external data sources is problematic as such an approach would create another layer of dependencies which would require further legal mandates and appropriate governance arrangements;

(c) some respondents noted that MiFIR covers the whole range of asset classes, shares, bonds and derivatives and that despite only being in place for 3 years, important changes were being suggested to it. Thus, they suggested a more phased approach. In this respect, ESMA recalls that the EU legislative process allows for different phases starting with the Level 1 review, then Level 2 and finally the implementation phase. Accordingly, the revised reporting rules stemming from this review are expected to be finalized in a couple of years following the completion of the review of the Level 1 and after more detailed industry consultation. At the same time, ESMA acknowledges that the introduction of a revision of an existing reporting framework normally requires extensive and resource intense work in respect of design, construction, testing and operation of IT systems. Such work can only start when the more detailed Level 2 rules are finalized; it is therefore highly important to ensure that sufficient timelines for development and implementation of reporting regimes are envisaged in the Level 1 at the outset of the legislative process. Section 12.3.2 of this Final Report includes a recommendation to address this issue.

[14] Meaning that only those financial instruments/indices in the ESMA registers should fall under the MiFIR reporting obligations.

4 Entities subject to transaction reporting and arrangements for sharing reports (Article 26(1), Article 26(5) and Article 26(8) MiFIR)

4.1 AIFMD and UCITS firms

4.1.1 Legal framework

17. Article 26(1) of MiFIR defines in its first paragraph the scope of entities that are subject to the transaction reporting obligation. It should be noted that any change in the scope of the entities that should be directly subject to the reporting obligation will also have an impact on the obligation for trading venues under Article 26(5) of MiFIR to '*report the details of transactions in financial instruments traded on its platform which are executed through its systems by a firm which is not subject to this Regulation* (MiFIR)'.

18. According to Article 6(4) of AIFMD, Member States may authorise external AIFMs to provide the following services:

    (a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis;

    (b) non-core services comprising:

        (i) investment advice;

        (ii) safe-keeping and administration in relation to shares or units of collective investment undertakings;

        (iii) reception and transmission of orders in relation to financial instrument.

19. Pursuant to Article 6(3) of UCITS Directive, Member States may authorise UCITS management companies to provide the following services: management of portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Annex I, Section C to Directive 2004/39/EC.

20. Member States may also authorise UCITS management companies to provide the following non-core services:

    (a) investment advice concerning one or more of the instruments listed in Annex I, Section C to Directive 2004/39/EC;

    (b) safekeeping and administration in relation to units of collective investment undertakings.

21. These services correspond to the MiFID services defined under Article 4(2) of MiFID II. Should the provision of any of these services trigger the execution of a transaction, any MiFID investment firm providing such service should report transactions according to Article 26 of MiFIR. When providing these services AIFMs and UCITS management

companies are subject to a number of MiFID requirements which are referred to in Article 6(4) of UCITS Directive and Article 6(6) of AIFMD. They relate to Article 2(2) (exemptions for public bodies, ESCB and ECB), Article 12 (Initial Capital endowment), Article 13 (Organisational requirements) and Article 19 (Conduct of business obligations) of MiFID I. However, the references to MiFID I in the respective directives has not been updated to reflect the requirements introduced with MiFID II and thus Article 26 of MiFIR is not included in the list of MiFID provisions which also apply to AIFMs and UCITS management companies providing the MiFID services listed above.

22. Given the above, and that AIFMs and UCITS management companies are not investment firms authorised under MiFID, these entities are not subject to the requirement to report transactions even in the cases where they perform MiFID services. Nevertheless, if the transactions executed by these entities are carried out on a trading venue, they should be reported by the trading venue as part of the obligation under Article 26(5) of MiFIR to report transactions on behalf of entities that are not subject to the MiFIR. These reports will contain the information available to the trading venue and identify the AIFM/UCITS management company as buyer/seller. However, the details of the decision-maker that is making the decision to acquire/sell the given financial instruments may not be available in the transaction report. Such information is essential for the purpose of market abuse surveillance. In addition, the information about transactions executed by these firms off venue will not at all be available to NCAs.

4.1.2 ESMA's proposal in the CP

23. ESMA ran a survey among NCAs to understand whether specific requirements have been put in place in order to retrieve the missing information concerning the activity of AIFMs/UCITS management companies. In order to cover this regulatory gap, some jurisdictions (CZ, RO and IT) reported having introduced specific local requirements for these entities. However, in the vast majority of jurisdictions this has not been possible due to the lack of appropriate legal basis.

24. ESMA proposed that in order to ensure data completeness for market abuse investigations and to ensure a level playing field for market participants, UCITS management companies and AIFMs providing one or more MiFID services to third parties should be subject to transaction reporting in accordance with Article 26 of MiFIR. The relevant MiFID provisions should be amended to ensure that these entities providing similar types of investment services are subject to similar regulatory standards in line with the recommendations made by ESMA in section 3 of their letter on the Review of the Alternative Investment Fund Managers Directive[15]. This proposal has the following merits (i) it ensures a level playing field among firms providing the same type of services as MiFID investment firms; (ii) it provides NCAs with the complete set of information needed to conduct their monitoring of trading activity on the trading venues, namely the information about the investment decision for trades involving AIFMs/UCITS firms and (iii) it provides NCAs with the relevant information needed to conduct their monitoring of the trading activity of these firms that is

[15] Letter to European Commission on Review of the Alternative Investment Fund Managers Directive. (ESMA34-32-551), published on 18 August 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma34-32-551_esma_letter_on_aifmd_review.pdf

taking place off-venue and (iv) it allows NCAs to compare the information about on-venue transactions involving these firms with the information about off-venue transactions involving the same firms.

4.1.3 Feedback to the consultation

25. While a slight majority of overall respondents opposed the proposal, support varied depending on the market sector. Indeed, respondents on the buy-side were mainly against the proposal while respondents categorized as trading venues, data vendors, and DRSP mainly supported the proposal. Responses from the sell-side of the industry were split.

26. The respondents supporting the proposal highlighted that many of the AIFM/UCITS management companies already traded on EU regulated trading venues, which meant that implementation costs for the UCITS/AIFM companies should be low. They also argued that the proposal would help level the playing field between MiFID Investment Firms and AIFM/UCITS management companies. Furthermore, some respondents did not see any additional challenges for the AIFM/UCITS management companies.

27. The respondents opposing the proposal focused on the added costs associated with being subject to transaction reporting both in terms of higher IT costs and the complexities involved with the system itself. Some respondents stated that currently there is no un-level playing field between MiFID Investment Firms and AIFM/UCITS management companies authorised to perform MiFID services because the latter are already subject to a separate set of requirements under AIFMD/UCITS and that the proposal would create an unfair playing field between EU and UK AIFM/UCITS. It was also highlighted that the current MAR surveillance conducted by the firms themselves should be sufficient to ensure market fairness.

28. Other respondents opposing the proposal argued that the requirement in Article 26(5) of MiFIR for trading venues to report transactions conducted by non-MiFID Investment Firms would create overreporting if the proposed change was retained. Additionally, it was argued that this was only a political demand as NCAs do not use the data in question for market surveillance purposes and that the additional information provided by the proposal would have no clear benefits.

29. Finally, multiple respondents proposed an alternative solution, where the current reporting would be expanded for trading venues already subject to MiFIR transaction reporting under 26(5) to include details in the transaction chain.

4.1.4 ESMA's assessment and recommendations

30. The feedback received from the respondents has been reviewed and ESMA considers that the proposal to include AIFM/UCITS management companies providing one or more MiFID services to third parties should be retained.

31. ESMA still sees a need for receiving transaction reports from AIFM/UCITS management companies as the details of the entity that is making the decision to acquire/sell a given financial instruments is essential for the purpose of market abuse surveillance and should also be available when AIFM/UCITS firms are providing a MiFID service. Despite the points raised by the respondents against the proposal, ESMA believes that such a proposal will

ensure a level playing field between the AIFM/UCITS firms based in the jurisdiction with local requirements to obtain the relevant information for market abuse purposes and those based in the jurisdictions where such requirements are not in place. Most importantly, it will ensure an even playing field among the MiFID Investment Firms and AIFM/UCITS management companies providing one or more MiFID services to third parties; especially since a move from operating under a MiFID Investment Firm license to being licensed under AIFMD or UCITS Directive has been observed by some NCAs.

32. With respect to the concerns raised regarding overreporting, ESMA would like to clarify that the proposed change should only affect AIFM/UCITS management companies when providing one or more MiFID services that would trigger the obligation to report transactions under Article 26 of MiFIR, it will not cover transactions stemming from other activities conducted by the AIFM/UCITS firms. This also means that trading venues should no longer be obliged to report the same transactions under Article 26(5) of MiFIR as AIFM/UCITS firms providing MiFID services should no longer be considered as '*firms not subject to MiFIR'* as a result of not being exempted from the general obligation under Article 26(1) of MiFIR.

33. ESMA acknowledges that these firms will not be subject to Article 26 as entities for their whole activity. Rather, their reporting obligation is triggered depending on the activity they are undertaking, i.e. whether they are providing a MiFID service or not. As a consequence, the term *'firm subject to this Regulation'* could be interpreted as not covering these firms even when providing MiFID services and these trades might also be captured by the venues' reporting obligation under Article 26(5) should such firm be a member, participant or user of the venue. To avoid duplicate reports and inconsistent reporting, ESMA recommends to clearly reflect this specific case in Article 26(5) text.

34. Additionally, ESMA understands that it may happen that AIFMs and UCITS could provide by mistake transaction reports of services which are not considered MiFID-related. Such case would qualify as overreporting as the specific transactions are not relevant for market abuse surveillance. However, ESMA would like to clarify that the monitoring of this specific case of overreporting will not be considered as a supervisory priority from the start of the application of this new requirement.

35. With respect to the expressed need for a full cost-benefit analysis, ESMA would like to clarify that the purpose of this report is to provide to the EC recommendations on possible amendments to the relevant Level 1 text. Should the EC include the recommendations in this report in their proposal for the review of the relevant MiFIR and AIFMD provisions, a full Cost-Benefit Analysis will be performed, both in the context of the MiFIR review and the AIFMD review.

4.2 Reference to 'members/participants/users' of Trading Venues

4.2.1 Legal framework

36. Under Article 26(5) of MiFIR Trading Venues have to submit transaction reports on transactions in financial instruments traded on their platforms which are executed through their systems by '*firms*' that are not subject to MiFIR.

37. The reference to *'a firm'* has proven to be problematic because there is no definition of *'firm'* in MiFID II/MIFIR. The definition of '*investment firm*' in MiFID II covers '*any legal person whose regular occupation…*'. Thus, a mere 'firm' could be considered in the broad sense to mean '*any legal person'*. However, 'firm' in another context could be interpreted in a narrow sense as a commercial company. This narrow interpretation lead to situations where some NCAs did not receive the full set of information relating to the trading activity taking place on the trading venues under their supervision. For example, it is not sufficiently clear whether or not special cases such as state debt management offices fall under this definition. In addition, the term has been interpreted differently in different jurisdiction leading to an inconsistent set of information being reported across jurisdictions. Lastly, the term 'firm' is not consistent with the term used for the purpose of the order record keeping obligation under Article 25 of MiFIR. Under Article 25 of MiFIR, trading venues are obliged to maintain a record of all orders in financial instruments which are advertised through their systems. The records should contain the relevant data that constitute the characteristics of the order, '*including those that link an order with the executed transaction(s) that stems from that order'*. This data includes, among others, the identification of the *'member or participant which transmitted the order'*.

4.2.2 ESMA's proposal in the CP

38. To avoid any doubts on the application of this obligation, ESMA considers that the reference to '*firm*' should be replaced. ESMA considers that the term used in Article 25(3) of MiFIR is more precise and would clearly encompass any entity that executes transaction on trading venues. This approach has the following benefits: (i) it ensures that the information on the trading activity on a given EU trading venue is complete and consistent with the information provided by other trading venues and (ii) it ensures a better alignment with the order record keeping requirements under Article 25 of MiFIR, thereby allowing for a better linking of orders with the executed transactions stemming from the orders.

39. Article 25(3) of MiFIR refers to a '*member or participant which transmitted the order*'. Section 6.2 of the Guidelines on transaction reporting, order record keeping and clock synchronization[16] clarifies that this term also include 'users' of OTFs.

40. Throughout MiFID II and MiFIR, there are several provisions which refer to the '*member or participant*' of a trading venue. The meaning of 'trading venue' is defined in Article 4(1)(24) of MIFID II and captures regulated markets, multilateral trading facilities (MTFs) and organised trading facilities (OTFs).

41. The terms '*member*' and '*participant*' are generally used in the context of regulated markets and MTFs. Recital 16 of MiFID II clarifies that '*persons having access to regulated markets or MTFs are referred to as members or participants. Both terms may be used interchangeably…*'

42. However, a different terminology is used for OTFs reflecting the fact that MiFID client-facing obligations apply to OTF operators as opposed to operators of MTFs and RMs. For

[16] Guidelines on Transaction Reporting, Order Record Keeping and Clock Synchronisation Under MiFID II (ESMA2016-1452) published on 10 October 2016 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf

example, Article 18(7) of MiFID II states that MTFs and OTFs should have 'at least three materially active members or users' whereas Article 20 contains a prohibition against an OTF executing 'client' orders against the proprietary capital of the OTF. In both cases, it appears that the term 'user' and 'client' are used interchangeably when referring to an OTF and that consequently they are analogous with the terms 'member' or 'participant'.

43. Given that OTFs are included within the scope of the Market Abuse Regulation and given the need to apply the MiFID II/MiFIR requirements consistently across different types of Trading Venues, ESMA proposed that Article 26(5) should refer to '*members or participants or users*' instead of '*firm'*, and read as follows:

'*The operator of a trading venue shall report details of transactions in financial instruments traded on its platform which are executed through its systems by* ***any member, participant or user ~~a firm~~ which is not subject to this Regulation*****'.**

4.2.3 Feedback to the consultation

44. A large majority of respondents supported the proposal. This support was present throughout all sectors of the industry with only some sell-side respondents opposing it.

45. The respondents opposing the proposal recognized some clarity was needed and suggested legally defining the term 'firm' rather than changing the text in Article 26(5) of MiFIR. They argued that this way the legibility and thus the clarity of the legal text could be significantly increased.

46. Respondents agreeing with the proposal also had comments. Respondents commented on the ambiguous usage of the phrase '*member or participant which transmitted the order*' found in Article 25(3) of MiFIR. They argued that in Article 25 the intention is to capture the direct market facing participant sending the order to the venue, whereas in Article 26 and in the associated RTS and Guidelines, '*order transmission*' refers to reception and transmission of orders in cases other than direct market execution. Additionally, it was proposed to amend the text to clearly state that the 'user' should only mean a user (and a direct participant) of an OTF to avoid the term be interpreted too broadly to mean any firm in the transaction chain not subject to MiFIR.

4.2.4 ESMA's assessment and recommendations

47. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained. The vast majority of respondents supported the proposal. This was especially the case for respondents representing trading venues, to whom this change is most relevant.

48. ESMA takes note of the suggestion to define the term *'firm'* in the legal text. However, ESMA is of the opinion that the clarity that this suggestion seeks is better achieved by changing Article 26(5) as proposed. The merit of keeping the original proposal is that the venues would not need to assess if their non-MiFID members meet the conditions of being a *'firm'*, whether legally defined or not. Indeed, the newly added reference to a '*user*' only relates to users of an OTF, and trading venues would not need to report transactions for non-MiFID clients of their members, participants or users. However, ESMA believes that

the proposed wording is clear enough and consistent with how the term is used elsewhere in the legislation. Thus, ESMA stands by its original proposal in this regard.

49. Finally, ESMA acknowledges the need for unifying the terminology in Articles 25 & 26 of MiFIR. As pointed out by respondents, the current text in Article 25(3) of MiFIR reads '*…identification code of the member or participant which transmitted the order…*'. ESMA proposes to amend this to say *'…identification code of the member, participant* ***or user*** *which* ***transmitted*** *the order…*'. In addition, with respect to the use of the term '*transmitted*', ESMA notes that the term has a different meaning under MiFIR Article 26 and related Article 4 of RTS 22. To avoid confusion, the term '*transmitted'* used in Article 25(3) should be replaced with a different one.

4.3 Branches of EEA Entities

4.3.1 Legal framework

50. The Level 1 provision in Article 26(8) seems to indicate that reports of transactions executed through a branch should be first submitted to the NCA of the host members state, which in turn would transmit them to the NCA of home member state. When developing the Level 2 provisions on the application of transaction reporting obligations to branches of investment firms in accordance with the mandate under Article 26(9)(g) of MiFIR, ESMA considered that this process may lead to unecessary complexities and duplicative reporting.

51. As indicated in Article 4(1)(30) of MiFID[17], a '*branch'* is not an independent entity, it is, by definition, a part of the parent investment firm, which is the entity that has executed the transaction through its branch. On this basis, Article 14 of RTS 22 prescribes that reporting investment firms should submit the reports in relation to transactions executed through branches to the NCA of their **home** Member State. More specifically, Article 14 of RTS 22 provides that: (i) where an investment firm executes a transaction, it should submit the report to the NCA of the home Member State of the investment firm irrespective of whether or not a branch is involved, or whether the reporting firm executed the transaction through a branch in another Member State and (ii) where a transaction is executed wholly or partly through a branch of an investment firm located in another Member State, the report should be submitted only once to a single NCA, i.e. the NCA of the home Member State of the investment firm.

4.3.2 ESMA's proposal in the CP

52. To avoid any doubts on the application of this obligation, ESMA considers that the text in Article 26(8) should be aligned with the process described in RTS 22. This proposal has the merits of avoiding further routings of the same report among NCAs and reducing the risk of duplicative reporting.

[17] 'branch' means a place of business other than the head office which is a part of an investment firm, which has no legal personality and which provides investment services and/or activities and which may also perform ancillary services for which the investment firm has been authorised; all the places of business set up in the same Member State by an investment firm with headquarters in another Member State shall be regarded as a single branch;

53. In order to ensure further clarity and consistency with RTS 22, ESMA proposed in the Consultation Paper that Article 26(8) should be replaced by the following:

'*An investment firm shall report transactions executed wholly or partly through its branch to the competent authority of the home Member State of the investment firm. The branch of a third country firm shall submit its transaction reports to the competent authority which authorised the branch. Where a third country firm has set up branches in more than one Member State within the Union, those branches shall define the competent authority that will receive all the transaction reports*.'

In order to meet the obligations set out in Article 35(8) of Directive 2014/65/EU, a copy of the reports provided for under this Article shall also be transmitted to the competent authority of the host Member States of the in the transaction involved branches.'

4.3.3 Feedback to the consultation

54. A vast majority of the respondents do not foresee any issue with the proposal as it reflects the current practice; no respondent disagreed.

55. Respondents agreed that the current way of sending all transactions of branches to the home NCA is a clear, easy, and precise way to send transactions for branches. However, some read the proposal in a slightly different way, with reporting entities having to report to both the home and the host NCAs. Those respondents in effect supported the proposal as they suggested to stick to the current approach by sending to the home NCA only.

4.3.4 ESMA's assessment and recommendations

56. With regard to respondents reading the proposal as reporting entities having to report to both the home and the host NCAs, ESMA's intention was and is that firms report transactions, in which a branch is involved, to the home NCA **only**. The home NCA will make sure the host NCA will also receive the transation report.

57. In light of the overwhelming support from the industry to this proposal and the absence of opposition to it, ESMA considers that its proposals should be retained.

4.4 Arrangements for sharing reports

4.4.1 Legal framework

58. In order to ensure efficient market monitoring and avoid duplicative reporting, transaction reports should be submitted only once and to a single NCA that can route them to other relevant NCAs. To achieve these goals, the current Level 1 provision refers to the '*arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives that information*.' If an NCA receives a transaction report on a financial instrument, it will share the same report with the relevant NCA (RCA) for that specific financial instrument. The RCA is the NCA responsible for the supervision of the trading activity in the given financial instrument. The legal requirement is further defined in Article 16 of RTS 22 which clarifies the rules to

determine the most relevant market where the financial instrument is traded, depending on the type of instrument. This provision covers the rules for transferable securities, emission allowances, UCITS, money market instruments and derivatives. The current Level 1 text states that reports are only shared with the relevant NCA for the financial instrument in which the reported transaction was executed. However, the supervisory needs of the NCAs have proven to be broader than that. For example, another NCA may be relevant for a transaction executed through a branch if the investment decision was made within the branch. More generally, there may be cases where an NCA has expressed an interest for receiving the information on transactions on a specific financial instrument on an ongoing basis.

4.4.2 ESMA's proposal in the CP

59. ESMA considers that the reference in Article 26(1) to the '*arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives that information*' is too narrow and does not adequately reflect NCAs' supervisory needs. Hence, in the Consultation Paper, ESMA proposed that this provision should be accompanied with a more general reference to the possibility for NCAs to share the information received under this article '*where a request has been made'* and/or *'the NCA has agreed to share the information'*.

4.4.3 Feedback to the consultation

60. A large majority of respondents supported the proposal arguing that transaction reports should still be sent to the home NCA of an IF under the revised provisions. In response to the concern raised, ESMA would like to clarify that the proposed changes will not impact thethe transaction reporting systems that IFs have currently in place. Indeed, the intention of this proposal is to strengthen the current legal framework to allow for the possibility of exchanging transaction reports between NCAs on the basis of additional criteria.

61. Some respondents agreeing with the proposal suggested that transaction reports should only be shared between NCAs with robust data security. Additionally, it was also suggested that transaction reports should be sent directly to ESMA instead to the home NCA.

62. Finally, respondents opposing the proposal raised concerns that the exchange of transaction reports among NCAs might be in conflict with data protection legislation.

4.4.4 ESMA's assessment and recommendations

63. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained.

64. In response to concerns, from sell-side respondents, about potential conflicts with data protection legislation, it should be noted that, in accordance with Article 15(8) of RTS 22, NCAs must already use secure electronic communication channels when exchanging transaction reports with each other. In light of this and considering Article 79 of MiFID II which says that NCAs shall cooperate with each other for the purpose of carrying out their duties under MiFIR, the aforementioned amendments to Article 26(1) of MiFIR do not

compromise the security and the confidentiality of the exchanged data. In particular, it must be noted that NCAs already automatically exchange transaction reports among each others based on criteria other than the RCA of an instrument with respect to Article 79 of MiFID II. Therefore, the amendment to Article 26(1) of MiFIR should be considered as an adjustement of Article 26(1) of MiFIR to Article 79 of MiFID II.

65. It must be noted that the proposed amendments will have no impact on the configuration of the reporting entities' reporting system. Furthermore, because NCAs already exchange transaction reports among each other with respect to Article 15(8) of RTS 22 and because NCAs shall exchange information with each other for the purpose of carrying out their duties in accordance with Article 79(1) of MiFID II, concerns in relation with data protection can be considered unsubstantiated.

66. Lastly, with respect to the considerations made on the possibility of direct reporting to ESMA, as already clarified in section 3.2 of this report, this was identified as one of the broad themes raised by stakeholders in response to several questions in the consultation. As evidenced by the experience with the reference data reporting under MiFIR Article 27, ESMA acknowledges that this centralisation could, among others, increase the efficiency of sharing among various NCAs the relevant information needed for the purpose of carrying out their duties under MiFIR and reduce duplication of reporting processes. In section 3.2 above, ESMA recommends the EC to still consider this possibility as a long-term objective.

5 Scope of instruments subject to reporting obligations (Articles 26(2) and 27(1))

5.1.1 Legal framework

67. Article 26(2) and Article 27(1) of MiFIR define the scope of financial instruments to be reported under the respective obligations.

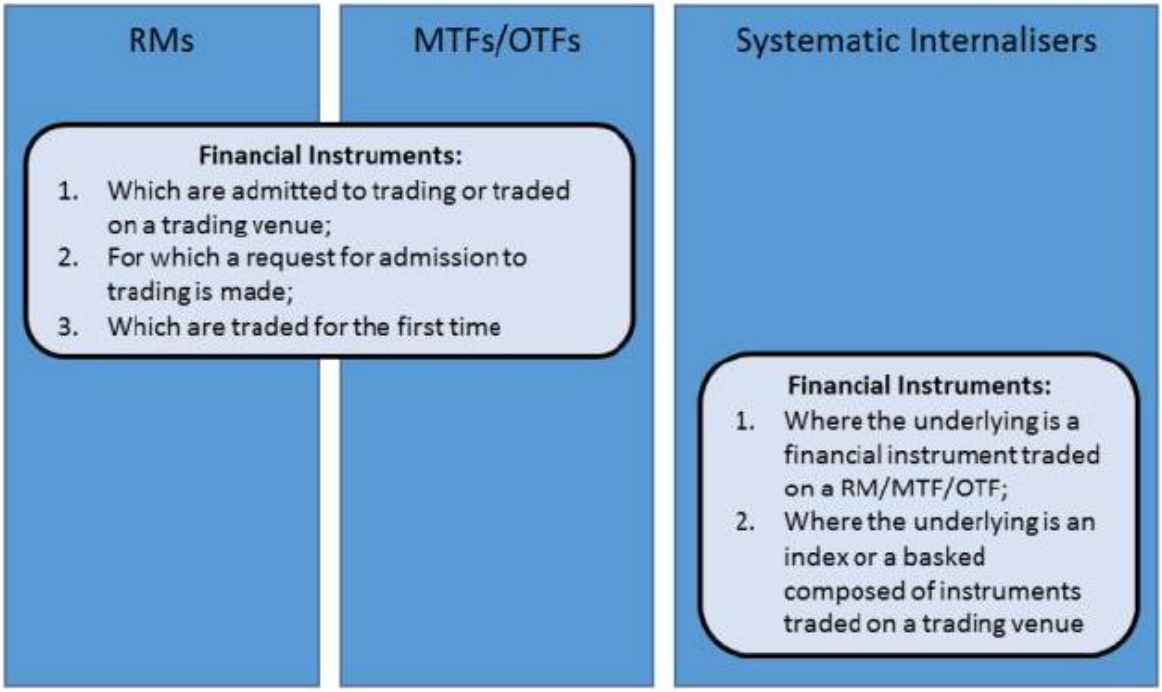
68. The transaction reporting obligation covers three categories of instruments. First, any financial instrument which is subject to a request for admission to trading, which is admitted to trading or which is traded on a trading venue is reportable; the obligation applies to these financial instruments '*… irrespective of whether or not […] transactions are carried out on the trading venue*'. Second, financial instruments where the underlying is a financial instrument traded on a trading venue. Third, all instruments based on indices or baskets which include in their composition at least one component that is a financial instrument admitted to trading or traded on a trading venue.

69. The reference data obligation covers financial instruments admitted to trading on a RM or traded on a MTF or an OTF. Moreover, comparable requirements apply to Systematic Internalisers for financial instruments covered by Article 26(2) of MIFIR other than those admitted to trading on regulated markets or traded on MTFs or OTFs (see figure 1 below). Financial instrument reference data plays an important role in enriching the information in transaction reports submitted by investment firms and hence supports the monitoring activity conducted by NCAs. In addition, the financial instrument reference data facilitates the exchange of transaction reports between NCAs. It is therefore crucial that the scope of

instruments covered by this requirement is clearly defined and sufficiently broad to enable NCAs monitoring activities.

70. It should be noted that both Article 27 of MiFIR and Article 4 of MAR establish a requirement on the provision of financial instrument reference data. Both provisions are aimed at providing NCAs with the necessary tools to fulfil their supervisory duties. Considering the common purpose of the two provisions and the common reference data elements to be provided, ESMA has kept the respective Level 2 rules aligned to the maximum extent feasible, the rules are implemented into one single reporting system and the information received is published via the FIRDS database on ESMA website (link).

Figure 1[18] - scope of instrument reference data



5.2 Concept of Traded on a Trading Venue (ToTV)

5.2.1 Legal framework

71. The concept of '*traded on a trading venue*' (ToTV) is an important notion in Level 1 included in various provisions of MiFIDII/MiFIR. References to ToTV can be found to define the scope of the transparency regime;[19] the trading obligation for shares and derivatives[20] and the reference data and transaction reporting obligations that were covered in the CP. It is

[18] Source: FIRDS reference data reporting instructions available on ESMA website.
[19] Articles 3, 6, 8, 10, 11, 14, 18, 20 and 21 of MiFIR;
[20] Articles 23 and 32 of MiFIR

worth outlining that a similar concept is also mentioned in Article 2(3) of MAR, which defines the scope of the regulation[21]. The concept of ToTV is not further defined in Level 1 and was not required by the legislators to be further defined or elaborated in Level 2, neither in the context of transparency nor for transaction reporting purposes.

72. Article 26 of MiFIR uses the concept of ToTV to determine part of the scope of instruments subject to transaction reporting. In particular, financial instruments that are *'traded on a trading venue*' in accordance with Article 26(2)(a) are subject to the requirements irrespective of whether or not the transaction for the given instrument was executed on a trading venue. While the concept of '*traded on a trading venue*' seems to be self-explanatory for instruments that are centrally issued and that are fully standardised, such as shares and bonds as well as exchange traded derivatives, it is less straightforward for OTC derivatives. Given that bilateral derivatives are not standardised, each time two parties enter into a contract, such contract might be slightly different from the otherwise similar one entered into by two other counterparties. For this reason, it becomes challenging to determine when a bilateral derivative that was traded OTC is different or is the same as another one traded on a trading venue.

73. In May 2017, ESMA issued an opinion[22] further specifying the concept of ToTV for OTC-derivatives. The ESMA opinion is based on a narrow interpretation of the concept of ToTV by clarifying that only OTC derivatives sharing the same reference data details as the derivatives traded on a trading venue should be considered ToTV. The notion of '*same reference data details*' should be understood as the OTC-derivatives sharing the same values as the ones reported to the Financial Instruments Reference Data System (FIRDS) in accordance with the fields of RTS 23 for derivatives admitted to trading or traded on a trading venue, except for the venue related fields (5-11). Hence, OTC-derivatives not sharing the same reference data as instruments reported to FIRDS, including the same ISIN, would not be considered ToTV.

74. ESMA considers that an initial assessment of the ToTV concept has already been made within the context of the Final Report on the MiFIR review of the non-equity transparency regime[23] and thus this section of the Final Report should be read in conjunction with the considerations made in the relevant section of the Final Report on the non-equity transparency regime; a second consultation on the proposals made therein is not necessary.

75. The responses received during the consultation on the review of the non-equity transparency regime indicated a clear split of views between trading venues and proprietary traders on the one hand and banks and SIs on the other hand. The latter supporting the *status quo* while the former agreeing with ESMA's outlined concern that only a very limited proportion of OTC derivative trading is currently subject to transparency and reference data reporting.

[21] Article 2(3) of MAR states "This Regulation applies to any transaction, order or behaviour concerning any financial instrument as referred to in paragraphs 1 and 2, irrespective of whether or not such transaction, order or behaviour takes place on a trading venue".
[22] ESMA Opinion OTC derivatives traded on a trading venue (ESMA70-156-117), 22 May 2017, accessible at: https://www.esma.europa.eu/sites/default/files/library/esma70-156-117_mifir_opinion_on_totv.pdf
[23] See section 3.2.2.3. of the CP available on ESMA website: https://www.esma.europa.eu/press-news/consultations/consultation-paper-mifir-review-report-transparency-non-equity-tod

76. Respondents who supported an extension of the transparency and reporting obligations to a larger portion of OTC derivatives did not necessarily support the idea of expanding the ToTV concept with many respondents highlighting that such an expansion would (i) introduce additional complexity and (ii) increase arbitrage opportunities for market participants and SIs to design products avoiding post-trade transparency. They instead indicated a preference for an option that would remove the ToTV concept for derivatives altogether and apply transparency and transaction reporting to all OTC trades (option 3). This option has however been discarded by ESMA as it would bring also bespoke derivative contracts into scope. Imposing transparency on those non-standardised derivatives might not only represent an unnecessary burden for reporting entities but it might, more generally, introduce reporting noise for other participants rather than meaningful transparency.[24]

77. Further to the assessment of the scope of the reference data and transaction reporting obligations and taking into consideration the outcome of the consultation on the review of the non-equity transparency regime (see paragraphs 75-76 above)[25], ESMA decided to consult on an additional proposal that departs from the ToTV concept altogether and is based on a different criterion to define which OTC instruments should be brought into the scope of the relevant transparency and reporting obligations. All the considerations and related analysis made in the relevant section of the Final Report on the non-equity transparency regime[26] also apply to this additional proposal.

5.2.2 ESMA's proposal in the CP

78. Taking the above into account, ESMA reflected on several options to increase the scope of (i) reference data reporting, (ii) transaction reporting and (iii) transparency by including derivative instruments traded through an SI.

79. Such an extension means that derivative instruments that are exclusively traded through SI systems would have to be reported under Articles 26 and 27 of MiFIR and made transparent. In particular, for the purpose of transaction reporting under Article 26, this type of off-venue transactions in derivatives instruments would need to be reported also including for instruments where the underlying is not traded on a trading venue. These transactions would fall within the scope of the obligation in addition to the pure OTC transactions in instruments where the underlying is traded on a trading venue or where the underlying is an index, or a basket composed of instruments traded on a trading venue (i.e. uToTV instruments) as envisaged in the current Article 26(2)(b) and (c) of MiFIR. In this respect, it should be noted that transaction reporting data is collected to enable NCAs to fulfill their general obligation to uphold the integrity of markets under Article 24 of MiFIR.

[24] See paragraph 239 of section 3.2.3.2 of the ESMA MiFID II MiFIR review report available on ESMA website (ESMA70-156-3329):https://www.esma.europa.eu/sites/default/files/library/esma70-156-3329_mifid_ii_mifir_review_report_on_the_transparency_regime_for_non-equity_instruments.pdf

[25] See section 3.2.3.2 of the ESMA MiFID II MiFIR review report available on ESMA website (ESMA70-156-3329): https://www.esma.europa.eu/sites/default/files/library/esma70-156-3329_mifid_ii_mifir_review_report_on_the_transparency_regime_for_non-equity_instruments.pdf

[26] ESMA MiFID II MiFIR review report available on ESMA website (ESMA70-156-3329): https://www.esma.europa.eu/sites/default/files/library/esma70-156-3329_mifid_ii_mifir_review_report_on_the_transparency_regime_for_non-equity_instruments.pdf

80. ESMA preliminarily considered that this approach based on an extension of the scope to instruments traded by SIs presents several benefits. First, it increases the scope of public and regulatory transparency on instruments actively traded without bringing pure bespoke OTC transactions into the scope. Second, it does not seem to imply major system updates for market participants and regulators as SIs are supposed to have already systems in place to report both transactions and reference data. Third, it ensures a better alignment of the scope of instruments reported to the ESMA Financial Instrument Reference Data System and the instruments subject to transparency requirements, which facilitates the monitoring of the quality of the data reported and published.

81. ESMA's initial evaluation of this proposal can be found in the relevant section of the Consultation Paper[27]. A more up to date assessment can be found below in Section 5.2.4 of this Final Report.

82. With respect to the scope of transaction to be covered, ESMA considered three alternative options:

Option 1: reporting obligations are extended beyond derivatives for which the IF qualifies as SI. SIs in one derivative or class of derivatives *(e.g. fixed-to-float 'cross-currency' USD-EUR10 Yrs swaps)* would have to report quotes and transactions undertaken in any derivatives belonging to the same derivatives sub-asset class regardless of whether the IF is acting in its SI capacity or not *(e.g. all fixed-to-float cross-currency swaps, regardless of currencies and maturities, executed by the IF but not other interest rate derivatives)*. This option may be the easiest to implement and supervise since the reporting rules apply at a less granular level similar to the current approach under the reference data reporting regime. But it would bring more transactions into the scope than the other options.

Option 2: reporting obligations cover all transactions in derivatives or class of derivatives (e.g. fixed-to-float 'cross-currency' USD-EUR10 Yrs swaps) for which the IF qualifies as SI regardless of whether the IF is acting in its SI capacity or not (e.g. all Fixed-to-Float 'cross-currency' USD-EUR 10 Yrs swaps executed by the IF but not any other interest rate derivative). This option may be easier to implement than option 3 as it will not be necessary to check whether an investment firm is acting in its SI capacity on a transaction basis. It would bring more transactions into the scope than option 3 but less than option 1.

Option 3: reporting obligations cover all transactions in derivatives or class of derivatives (e.g. fixed-to-float 'cross-currency' USD-EUR10 Yrs swaps) for which the IF qualifies as SI and the IF is executing the transaction in its SI capacity (e.g. only Fixed-to-Float 'cross-currency' USD-EUR 10 Yrs swaps executed by the IF when acting in an SI capacity). This option may be more difficult to implement as it will be necessary to check whether an investment firm is acting in its SI capacity on a transaction basis. It would bring less transactions into the scope than the other

[27] Paragraph 44 of Consultation Paper: MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-773), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

options. Practical examples of how each of the above options would apply are outlined in the table below:

	Description	**Derivatives for which the IF qualifies as SI**	**Derivatives reported by the IF**
Option 1	SI in one derivative (or class of derivatives) would have to report quotes and transactions undertaken **in any derivatives belonging to the same derivatives sub-asset class.**	Fixed-to-Float 'cross-currency' USD-EUR10 Yrs swaps	All fixed-to-float cross-currency swaps (regardless of currencies and maturities) executed by the IF but not other IRD (e.g. bond options)
Option 2	SI in one derivative (or class of derivatives) would have to report quotes and transactions undertaken **in this derivative (or class of derivatives).**	Fixed-to-Float 'cross-currency' USD-EUR 10 Yrs swaps	All Fixed-to-Float 'cross-currency' USD-EUR 10 Yrs swaps executed by the IF but not any other IRD derivatives (e.g. Fixed-to-Float 'cross-currency' JPY-EUR 2 Yrs swaps)
Option 3	SI in one derivative (or class of derivatives) would have to report quotes and transactions undertaken **in this derivative (or class of derivatives) and when acting in an SI capacity**	Fixed-to-Float 'cross-currency' USD-EUR 10 Yrs swaps	Only Fixed-to-Float 'cross-currency' USD-EUR 10 Yrs swaps executed by the IF when acting in an SI capacity (and not, e.g., when trading at their own initiative).

5.2.3 Feedback to the consultation

83. The vast majority of sell-side respondents, which also represents the overall majority of the respondents, disagreed with the SI approach. Many SIs are operated by sell-side firms and hence, this group of stakeholders would be significantly impacted by the proposed change. Sell-side respondents would like to see a transformation of the existing ESMA ToTV Opinion into a corresponding Level 1 text. They believed that the SI approach would have a detrimental effect to the liquidity of the market, would only create noise and add to bad data quality. Interestingly, a small minority of sell-side respondents (prop traders) nevertheless expressed their agreement with the SI approach.

84. The buy-side respondents agreed with the SI approach. The main benefits identified by the respondents include (a) improving the degree of post-trade transparency data available in respect of OTC derivatives and ultimately, supporting liquidity and price formation to the benefit of all market participants; (b) ensuring a level playing field between non-equity SIs and trading venues; (c) supporting the implementation of a post-trade consolidated tape for non-equity instruments; (d) clarifying the ToTV concept without imposing significant system changes; (e) increasing harmonisation with other jurisdictions (mainly the US) and

reducing systemic risk. A study[28] was quoted by the buy-side respondents to support the concern that transparency in this area is not sufficient with 95% of off-venue trading activity in Interest Rate derivatives currently not considered ToTV. In the view of those respondents the current situation hinders the price formation process and investors' ability to make informed decisions when trading these instruments.

85. The majority of trading venues/Data vendors/DRSP respondents agreed with the SI proposal. The main benefit cited by those respondents was that this proposal would greatly reduce the complexity around the determination of the scope of reporting, thus reducing inconsistent reporting among various reporting entities. In addition, respondents concurred with the arguments expressed by the buy-side that this proposal would deliver an even playing field between SIs and trading venues and increase transparency.

86. Finally, concerning the details of the SI approach and how it should be applied in practice, the majority of respondents supported the first implementation option as outlined in the CP, i.e. the broadest scope. This support also included sell-side respondents which did not support an extension based on the SI approach but did consider the first option as the preferred one if ESMA were to recommend this SI approach to the Commission. In addition, for the same simplicity reasons, the majority of respondents concurred with ESMA's preliminary view that the extension should equally apply to the SIs subject to the mandatory regime (i.e. an investment firm qualifying as SI as it exceeds the relevant threshold for the given (class of) derivatives) and the ones that opted-in the regime on a voluntary basis (voluntary SIs).

5.2.4 ESMA's assessment and recommendations

87. Given that one of the main arguments of the sell-side for rejecting the proposal was the claim of major disruptions of the market due to the magnitude of the increase in the scope of transactions and instruments to be reported, ESMA has conducted an analysis based on EMIR OTC derivatives data in order to assess whether such claim is well founded.

88. The results of ESMA's analysis show that the estimated number of off-venue trades carried out by SIs that are outstanding on a given October date in 2020 amounted to approximately 11 Million[29]. This number gives an indication of the maximum possible[30] increase in the cumulative[31] number of records that would need to be reported to FIRDS, it does not represent the daily number of records[32]. This maximum possible increase, without considering that the number is expected to overestimate the total number of new FIRDS records, is still substantially lower than the 40 Million increase feared by some respondents

[28] https://www.clarusft.com/what-we-need-to-do-to-fix-mifid-ii-data/.
[29] Quotes that are not executed are not included in this figure. However, SI quotes in liquid instruments and that are of a size below the size specific to the instrument (SSTI) are firm and the execution rate is considered to be high. The obligation to submit reference data when the first quote is placed was included to clarify the moment in time when reference data should be submitted.
[30] It should be noted that under the SI approach, these entities will only be obliged to submit reference data in derivatives belonging to the sub-asset class as derivatives for which they are SIs. In addition, a given SI may have multiple outstanding transactions on the same derivative contract (e.g. with different counterparties) in EMIR. For these reasons, the analysis provides an overestimated number of instruments.
[31] The number is cumulative because in FIRDS all reference data records submitted every day are stored and available to the public until termination of the instrument.
[32] SI reporting today is non-cumulative, i.e. the instruments for which reference data has to be provided on a given day are those that were traded or for which quotes were placed between 18:00 CET on the previous day and 18:00 CET on that day. So, the daily number of records should be much lower.

to the CP. In addition, the results of ESMA's analysis also show that the number of off-venue trades concluded by SIs in one selected week in October 2020 amounts to approximately 1 Million. This number gives an indication of the maximum possible increase in the number of weekly trades[33] that should be reported to FITRS. With respect to transaction reporting under Article 26, it should be noted that the impact on the local system should be even lower because this number covers all EU trades, which will be split among the various NCAs depending on where the SI is authorised.

89. Thus, after reviewing the feedback received from respondents, a majority of which in terms of market sectors supported the proposal, reiterating the main reasons which have led ESMA to make this proposal, ESMA considers that option 1 illustrated in the CP should be retained.

90. Under this approach, SIs would be subject to reference data and transaction reporting (Articles 26 and 27 of MiFIR) and should make transparent quotes and transactions they execute (Articles 18 and 21 of MiFIR) in derivatives belonging to the same sub-asset class[34] of derivatives for which they are SIs. This would apply to both SIs subject to the mandatory regime[35], i.e. investment firms qualifying as SIs as they exceed the relevant threshold for the given class of derivatives and the ones that opted-in the regime on a voluntary basis (voluntary SIs). By way of example, this means that an investment firm which qualifies as SI for a 10 years fixed to float cross currency swaps would have to report and make transparent all transactions it executes in any fixed to float cross currency swap (regardless of the currency or maturity) but not in any other interest rate derivative (e.g. bond options). In addition, the obligation to report transactions under Article 26 of MiFIR will apply to both the SIs and their counterparties (see paragraph 93 for further details).

91. Concerning the transparency requirements under Articles 18 and 21 of MiFIR, the extension of the scope will only affect SIs and will result in the following:

    (a) the SI obligations contained in Article 18 of MiFIR would not be limited to ToTV derivatives but would apply to all derivatives belonging to the same sub asset class as derivatives for which the concerned investment firm is an SI. SIs would therefore not need to check reference data reported to FIRDS to determine whether the quoting obligations apply to the concerned derivatives;

    (b) with respect to derivatives, the obligations set out in Article 21 of MiFIR would be limited to transactions where at least one counterparty is an SI in a class of derivatives belonging to the same sub asset class as the traded derivative, therefore, OTC transactions in such derivatives between non-SI investment firms would be excluded from the scope of Article 21 of MiFIR. There would be *ex ante* clarity on whether derivatives (and trading counterparties) are subject to

[33] To approximate for the levels of trading activity in a week, only reports with last action type N/P were considered.
[34] Derivatives sub asset classes are defined under Annex III of CDR (EU) 2017/583 (RTS 2).
[35] The SI regime requires investment firms to assess whether they are SIs in a specific instrument (for equity, bonds, ETCs and ETNs and SFPs) or for a (sub-) class of instruments (for derivatives, securitised derivatives and emission allowances) on a quarterly basis based on data from the previous six months. For each specific instrument/sub-class, an investment firm is required to compare the trading it undertakes on its own account compared to the total volume and number of transactions executed in the European Union (EU). If the investment firm exceeds the relative thresholds determined in the Commission Delegated Regulation (EU) No 2017/565 it will be deemed an SI and will have to fulfil the SI-specific obligations.

transparency or not without the need to check whether the traded instruments are ToTV;

(c) In practice, transparency would apply to OTC derivatives that are frequently traded but that do not have an ISIN or, due to the requirement to have a different ISIN for a different maturity date, are only available in the reference data with a one-day delay and, in consequence, are currently out of the scope of transparency.

92. Concerning the obligation to submit reference data under Article 27, the extension of the scope will only affect SIs and will result in the following:

(a) each SI would need to provide reference data in all derivatives belonging to the same sub-asset class as derivatives for which it is an SI;

(b) SIs would no longer need to assess whether a derivative instrument traded on its system is uTOTV[36]. Under the SI approach, the SI reporting obligation is intended to be broader and so there will be no longer a need to only select the derivatives executed through SI systems that are uTOTV because all derivatives belonging to the sub-asset class of derivatives for which the SI qualifies as an SI will need to be reported;

(c) SIs would no longer need to compare on a trade-by-trade basis whether an OTC derivative shares the same reference data details as a derivative executed on a trading venue.

93. Concerning the transaction reporting obligation, OTC derivative instruments falling under the SI-approach will be subject to MiFIR Article 26 in addition to the uToTV ones already subject to transaction reporting by virtue of Article 26(2)(a)(b) and (c) (see paragraph 79 above). Such extension of the transaction reporting scope will result in the following:

(a) any transaction executed through an SIs in a derivative belonging to the same sub-asset class as derivatives for which they are SIs would need to be reported both by the SIs and their counterparties that are investment firms;

(b) such transaction would need to be reported also when it relates to instruments where the underlying is not traded on a trading venue. Under the SI approach, the SI reporting obligation is intended to be broader and so there will be no longer a need for the SI to only select the derivatives executed through SI systems that are uTOTV because all derivatives belonging to the sub-asset class of derivatives for which the SI qualifies as an SI will need to be reported;

(c) transactions in uTOTV derivatives between two investment firms that are not SIs would still need to be reported;

(d) transactions in derivatives that do not fall under Article 26(2)(b) and (c) between two investment firms that are not SIs (pure OTC trades) would not need to be

[36] Subject to transaction reporting by virtue of Article 26(2)(b) and (c). Accordingly, it will no longer be required to assess whether the underlying of a derivative instrument is a financial instrument traded on a trading venue or it is an index or a basket composed of financial instruments traded on a trading venue.

reported as the reference to the "ToTV" in MiFIR Article 26(2) last paragraph will be removed[37].

94. As a result, both SI and non-SI entities will no longer need to implement complex checks to compare on a trade-by-trade basis whether an OTC derivative shares the same reference data details as a derivative executed on a trading venue.

95. With respect to the obligation to report transaction for counterparties to SIs, ESMA considers that these entities should already have systems in place to assess if they trade with an SI in order to be exempted from the obligation to publish their trades via an APA. Given that the SI approach is at a less granular level (i.e. on a sub-asset class basis), the assessment of whether a counterparty to an SI is subject to transaction reporting is even simpler than what is currently required for the purpose of the exemption from the obligation to publish via an APA. The counterparty should check if it trades with an SI and if the SI is active in the sub-asset class to which the derivative being traded belongs to.

96. At present, the information to enable counterparties to SIs to comply with their transaction reporting obligation under the SI-approach is already available [38], however, ESMA acknowledges that this information is not centralised in one public register. With this in mind, ESMA recommends that the proposed change in L1 should be accompanied by more detailed implementation measures to facilitate this assessment. Several implementation options can be envisaged to facilitate compliance with the new obligation: a) An expansion of the ESMA SI register could be considered provided that adequate funding and resources are allocated to ESMA; b) Leverage on the upcoming review of the RTS 23 (upgrading the FIRDS register) and/or c) Include an obligation for SIs to communicate to their counterparties the information necessary to fulfil their transaction reporting obligation.

5.3 Transaction reporting indices under Article 26(2)(c)

5.3.1 Legal framework

97. Article 26(2)(c) of MiFIR states that '*financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue*' should be reported. ESMA considered that it was unclear whether the text '*composed of financial instruments traded on a trading venue*' only refers to baskets or it also refers to indices. Consequently, a clarification was included in the ESMA Guidelines[39] stating that the text '*composed of financial instruments traded on a trading venue*' in Article 26(2)(c) of MiFIR should be read as referring to both an index and a basket. According to the Guidelines, it

[37] MiFIR Article 26(2) last paragraph states that "*the obligation shall apply to transactions in financial instruments referred to in points (a) to (c) irrespective of whether or not such transactions are carried out on the trading venue"*

[38] From the SI perspective, no check is needed as the SI will know at all times in which sub-asset class of derivative it qualifies as SI or opted in. So, the easiest way for the counterparty to check this is through communication with the SI it trades with; this communication should be already in place because it is relevant for the transparency requirements. In addition, in the cases where the SI opted in for the whole asset class, reporting entities could combine the public information on the asset class in which the SI is active in the ESMA SI register with the CFI code of the instrument they trade to assess whether their counterparty is an SI in the sub-asset class being traded. A MiFIR ID-CFI mapping table is available on ESMA website: https://www.esma.europa.eu/sites/default/files/library/2016-1523annex9.11_cfi-rts2_field_mapping_rev.2.xlsx.

[39] Guidelines on Transaction Reporting, Order Record Keeping and Clock Synchronisation Under MiFID II (ESMA2016-1452) published on 10 October 2016 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf

is sufficient that one component is a financial instrument traded on a trading venue to trigger the obligation to report transactions.

98. Despite the clarifications provided in the Guidelines, ESMA considers that the text of this provision does not provide NCAs with the precise set of information needed for the purpose of market monitoring under Article 24 of MiFIR because MiFIR does not provide any definition or clarification of the term '*index'* referred to in Article 26(2)(c).

99. In the absence of a clear definition of '*index*', IFs report internally elaborated indices with limited or no underlying information (value and composition, among others) available to the public. This results in a situation where NCAs cannot understand the transaction based on the related report and are obliged to request further details to the executing IF. ESMA is of the view that these internally elaborated indices should not be in scope of transaction reporting.

5.3.2 ESMA's proposal in the CP

100. Considering the above, ESMA concluded that, the current definition of 'index*'* provided under Article 3(1) of the BMR[40] is more precise and appropriate in order to define the scope of transaction reporting. This definition only covers indices whose figures are published or made available to the public and are regularly determined, hence such definition should be used to better define the scope of Article 26(2)(c) of MiFIR. Among the indices covered by Article 3(1) of the BMR, ESMA considers that only the ones that are also 'benchmarks' as defined in Article 3(3) of the BMR should be covered[41]. In this respect, ESMA considers that the proposal made in ESMA's response to the EC consultation on the review of BMR to provide a central ESMA register that will include information at benchmark level, if accepted, will further enhance the clarity on the scope of the reporting obligation in relation to benchmarks.[42]

101. While the reference to the Benchmark definition of the BMR would inevitably reduce the scope of indices that would be subject to the reporting obligation, ESMA also considered the merits of expanding the scope of instruments with an underlying benchmark that should be reported under the transaction reporting requirements. In particular, ESMA considered whether the scope of instruments to be reported under Article 26(2)(c) of MiFIR should also include those that are not composed of financial instruments traded on a trading venue.

102. In this respect, it is worth outlining that Article 26(2)(c) only covers instruments traded off-venue, including the ones traded through a Systematic Internaliser. Article 26(2)(a) will remain unchanged as its scope is already rather broad and also include benchmarks that

[40] According to Article 3(1), "index" means any figure: (a) that is published or made available to the public; (b) that is regularly determined: (i) entirely or partially by the application of a formula or any other method of calculation, or by an assessment; and (ii) on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys.
Link to the relevant Regulation available here https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1011.

[41] According to article 3(3), 'benchmark' means any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees.

[42] Section 5 of the ESMA response available here: https://www.esma.europa.eu/press-news/esma-news/esma-responds-european-commission-consultation-benchmark-regulation-review.

are not referring to financial instruments traded on a trading venue (e.g. rates, FX or commodities).

103. When reflecting on the modification of the scope of benchmarks to be reported, ESMA considered the following options:

(a) all instruments traded off-venue where the underlying is a Benchmark as defined under the BMR should be in scope of Article 26(2)(c) of MiFIR. Under this option, additional instruments will be brought into the scope of reporting. These are all OTC instruments where the underlying is a benchmarks that is not composed of financial instruments regardless of whether they are traded purely OTC or via an SI; for example, stock exchange indices as well as money market indices and risks free rates (EURIBOR, LIBOR etc.). Especially in the context of the LIBOR transition, ESMA considers that there may be merits to capture all transactions in financial instruments based on alternative risk-free rates (RFR, e.g. SOFR, EuroSTR, SONIA). This option has the benefits of including all OTC transactions in these financial instruments and is simpler to implement than option 2. However, it will significantly extend the scope of transaction reporting to instruments that may neither be relevant for market abuse surveillance purposes nor subject to the BMR as the BMR does not apply to instruments that are purely traded OTC;

(b) as per the current regime, all instruments traded off-venue where the underlying is a Benchmark composed of financial instruments traded on a trading venue should be in scope of Article 26(2)(c) of MiFIR. In addition to that, only some instruments where the underlying is a Benchmark that is not composed of financial instruments traded on a trading venue should be brough into the scope of reporting. These are the instruments where the underlying is a benchmark composed of financial instruments traded though an SI and benchmarks on crypto assets. This more targeted extension has the benefit of fully aligning the scope of transaction reporting to the BMR, which also applies to financial instruments traded via a systematic internaliser without bringing additional instruments that are not covered by the BMR into the scope. However, it may be more complex to implement as it requires reporting entities to check the composition of the benchmark;

(c) only the instruments traded off-venue where the underlying is a Benchmark composed of financial instruments traded on a trading venue should be in scope of Article 26(2)(c) of MiFIR. No additional instruments should be brought into the scope of the reporting obligation. Under this option, the *status quo* is maintained, thus regulators will not receive information on some instruments that are covered by the BMR because the current scope of reporting excludes instruments traded via SIs that are based on benchmarks not composed of financial instruments.

5.3.3 Feedback to the consultation

104. The majority of respondents across industry sectors supported the proposal to replace the term ‘index’ with the term ‘benchmark’ as defined under the BMR (question 8 in the Consultation Paper).

105. The sector of the industry of respondents had little bearing on their response as sell-side, trading venues and DRSPs respondents were split (no buy-side respondent gave feedback on this topic).

106. Most disagreeing respondents did not provide any alternative suggestions but made the following comments. Some respondents asked whether the upcoming ESMA benchmark register would be considered as a "golden source". The importance of having the ESMA benchmark register operational before the proposal be applied was also highlighted.

107. Other respondents argued that the dependence on a new register would add complexity to the reporting logic, leading to increased costs. Many respondents highlighted the unclear scope of application of the current BMR. They argued that the scope of the 'benchmark' definition is not clear and that additional uncertainty comes from the fact that BMR is currently under review. Additionally, the term *'being made available to public'* was viewed by a respondent as unclear and potentially leading to an unnecessary wide scope. Moreover, the respondent highlighted that BMR Article 3(1)(16) brings in scope instruments traded on an SI, which might create an unintended dependency between the ongoing MiFIR review and BMR.

108. Concerning the question on the scope of benchmarks to be included (question 9 in the Consultation Paper[43]), a majority of respondents supported option 3 and few respondents opposed all options. Whereas a majority of the sell-side respondents expressed a preference for option 3. Among trading venue, data vendors, and data service providers respondents views were split.

109. A common argument put forth in support of option 3 was that it most closely resembles the *status quo* and would therefore be less burdersome for reporting entities to implement. This option was also supported because it is seen as not extending the scope beyond what is relevant for market abuse surveillance purposes. Indeed, it was also emphasized by some respondents that this option's inclusion of the benchmark definition under the BMR in the wording of 26 be used to have a clearer definition of what is reportable and not to extend the scope of this provision.

110. Option 1 was supported for its simplicity of implementation and because it would enable to bring more instruments relevant for broader market monitoring purposes into the scope of transaction reporting.

5.3.4 ESMA's assessment and recommendations

111. ESMA does not see blocking issues in the responses relating to the proposal for replacing the reference to 'index' with a reference to 'benchmark' as defined under BMR. In this respect, ESMA considers that the ongoing BMR review should not affect the first proposal to replace the term 'index' with the term 'benchmark'. Thus, ESMA recommends that the reference to 'benchmark' is maintained for the following reasons: (i) it ensures legal certainty as it provides a reference to a term that is defined under EU law (ii) it ensures

[43] Consultation Paper: MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-773), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

alignement with the terms used under the BMR as well as the MAR and (iii) it allows for increased reliance on the ESMA central register provided that such register is expanded as per ESMA recomendations[44].

112. As for the three options considered on the scope of benchmarks to be reported, ESMA acknowledges the following:

113. Option 3 proved to be by far the preferred option among respondents, mainly because this is closest to the *status quo* and limits the scope to instruments which are clearly of interest for market abuse surveillance purposes. However, concerns were raised on the unclear scope of the definition of 'benchmark' in the BMR, in addition, it remains unclear what would be the oucome of the upcoming review in 2021. As such, any change considered to the scope of MiFIR Article 26(2)(c) will have to take this uncertainty into account.

114. There seems to be a common desire from respondents for a solution in which the instruments in scope of MiFIR Article 26(2)(c) can be clearly identified. Although option 3 is considered to be the preferred way forward, it remains uncertain whether a centrally administered ESMA registry that will include information at benchmark level as per ESMA recommendations[45] could be operational.

115. Given that the preference for option 3 was supported because it limits the scope to instruments which are clearly of interest for market abuse surveillance prupose, ESMA would also like to clarify that as highlighted in Article 24[46] and recital 32[47] of MiFIR, transaction data is collected for the purpose of general market monitoring, not only for market abuse surveillance purpose. As such, market monitoring mandates such as DRSP supervision, product intervention, and market integrity in the larger sense, should be considered, not only market abuse surveillance.

116. Furthermore, the scope of indices subject to reporting may need to be reconsidered in light of the new upcoming legal frameworks. This is specifically the case of the 'digital operational resilience for the financial sector' or DORA regulation[48] and the regulation on Markets in Crypto-assets[49] which are currently in the process of being adopted.

117. Finally, extending the scope of instruments and indices for which information is collected in order to cover the additional mandates above would maximise the potential usage of the data collected under the transaction reporting system, in line with the objectives outlined

[44] Section 5 of the ESMA response available here: https://www.esma.europa.eu/press-news/esma-news/esma-responds-european-commission-consultation-benchmark-regulation-review.
[45] Section 5 of the ESMA response available here: https://www.esma.europa.eu/press-news/esma-news/esma-responds-european-commission-consultation-benchmark-regulation-review.
[46] Article 24 of MiFIR provides that "Without prejudice to the allocation of responsibilities for enforcing Regulation (EU) No 596/2014, competent authorities coordinated by ESMA in accordance with Article 31 of Regulation (EU) No 1095/2010 shall monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market."
[47] Recital 32 of MiFIR provides that "the details of transactions in financial instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms".
[48] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937. COM/2020/595, published on 24 September 2020 on the European Commission website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0595
[49] Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014. COM/2020/593, published on 24 September 2020 on the European Commission website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593

in the strategy of the European Commission for supervisory data in EU financial services[50]. This would minimize costs by ensuring that data can be reused for different purposes.

118. Given the arguments made in the above three paragraphs, the uncertainty around the BMR Review as well as the timelines and precise content of the ESMA Benchmark Registry, ESMA proposes to keep the scope of benchmarks to be reported as it currently stands in MiFIR Level 1 and considers that it would be more appropriate to further detail the scope of reportable indices in Level 2 legislation. As a consequence, neither of the three options regarding the scope of benchmarks to be reported under Article 26(2)(c) of MiFIR should be retained at this stage. Instead, a specific empowerment should be included analogous to the existing empowerment under MiFIR Article 26(9)(e)[51] for ESMA to specify the relevant categories of indices to be covered in light of the upcoming reviews of the legal frameworks for Benchmarks and Crypto-assets.

5.4 Scope of reference data: merging Article 4 of MAR into Article 27 of MiFIR

119. When reviewing Article 27 of MiFIR, ESMA has also considered the requirements under Article 4 of MAR. Given the common purpose of the two provisions, ESMA developed Level 2 rules prescribing a common set of reference data elements and standards to be reported, such rules have been implemented into one single reporting system and the reported information is published via the FIRDS database on ESMA website (link).

120. Despite the full alignment of the Level 2 provisions and their implementation into one single system a few discrepancies between the respective Level 1 texts remain and have created confusions among market participants around the scope of the reporting obligation. Some of these differences are currently addressed only at the level of ESMA RTS 23 and related Q&As.

121. It must be stressed that the proposed amendments will not impact the current scope of reference data to be submitted under Article 27 of MiFIR. In fact, the aforementioned proposed amendments must already be applied by reporting firms under Article 27 of MiFIR in order for investment firms in scope of Article 26 of MiFIR to comply with Article 26(2)(a) of MiFIR.

5.4.1 Instrument listed on a MTF

5.4.1.1 Legal framework

122. Article 27 of MiFIR refers to *'financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs'.* Conversely, Article 4 of MAR refers to admission to trading also in relation to MTFs. The rationale for this reference in MAR is clarified in recital 8 of that regulation: *'In the case of certain types of MTFs which, like regulated markets, help companies to raise equity finance, the prohibition against market abuse also applies where*

[50] Digital Finance Strategy for the EU. COM(2020) 591, published on 24 September 2020 on the European Commission website: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0591&from=EN

[51] MiFIR Article 26(9) empowers ESMA to specify "the relevant categories of financial instrument to be reported in accordance with paragraph 2".

a request for admission to trading on such a market has been made. The scope of this Regulation should therefore include financial instruments for which an application for admission to trading on an MTF has been made. This should improve investor protection, preserve the integrity of markets and ensure that market abuse of such instruments is clearly prohibited'.

123. This reference indicates a very clear intention on the part of the co-legislators to ensure that, where there has been a request for admission to trading from an issuer, MAR should apply, even where the request for admission is on an MTF. Otherwise there is a risk that market manipulation/insider dealing would occur just before an IPO, and that this would adversely impact confidence in the IPO market and therefore companies' ability to raise capital.

5.4.1.2 ESMA's proposal in the CP

124. Given that the instrument reference data is used in relation to any market abuse investigation, ESMA considers it crucial that reference data is provided where there has been a request for admission to trading on an MTF. Otherwise, NCAs will miss the information they need in order to monitor cases of market abuse.

125. ESMA recommended amending the text of Article 27(1) of MiFIR to reflect the wording used in Article 4 of MAR. Such wording would be consistent with the text used in the related RTS 23 (fields 8, 9, 10 and 11 of RTS 23), where the fields related to '*admission to trading*' generally refer to '*trading venues*' and not only Regulated Markets.

126. The text of the amended Article 27 should read as follows:

'With regard to financial instruments admitted to trading ***or traded on a trading venue****, trading venues shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 26*.'

5.4.1.3 Feedback to the consultation

127. A majority of respondents supported the proposals with no respondent outright opposing it. No comments specifically aimed at this proposal were raised.

5.4.1.4 ESMA's assessment and recommendations

128. The feedback received from the respondents has been reviewed and, in the absence of explicit objections to its proposal, ESMA considers that itshould be retained.

129. The concerns mentioned by some respondents from the sell-side regarding the data quality of the FIRDS database was not further substantiated or supported by evidence. Furthermore, respondents with this position did not establish how the proposal in this section of the Consultation Paper would damage data quality – as alleged in their response.

130. Taking into account the broad agreement with the proposal and the given answers to the raised concerns the proposed change to the wording of Article 27 should be retained.

5.4.2 Approval of trading on an MTF or OTF

5.4.2.1 General approach and legal framework

131. For financial instruments that are only traded on a MTF, Article 27 of MiFIR currently focuses on the actual trading in the financial instrument on the MTF. However, Article 17 of MAR already refers to the date of the issuer's consent to trading, which can also take place before the actual trading ('*... issuers who have approved trading of their financial instruments on an MTF or an OTF*'). Article 27 of MiFIR should be amended in such a way that the focus is on the issuer's earlier consent to trading on this MTF. Such wording would be consistent with the text used in the related RTS 23, where the field 9 refers to the '*date and time the issuer has **approved** admission to trading or **trading** in its financial instruments on a trading venue'*.

5.4.2.2 ESMA's proposal in the CP

132. ESMA proposed that the text of the amended Article 27 should read as follows:

> *'With regard to financial instruments admitted to trading or traded on a trading venue* (see above, 5.4.1.) ***or where the issuer has approved trading of the issued instrument**, trading venues shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 26.'*

5.4.2.3 Feedback to the consultation

133. The majority of respondents supported the proposal.

134. One association from one juridiction commented that the proposed amendment to Article 27 would not meet the requirements of Article 26 of MiFIR. It argued that that under Article 26 MiFIR there was no transaction reporting requirement for instruments only approved by the issuer and that were neither admitted to trading nor actually traded. Indeed, it argued, the only instruments that fall under the scope of transaction reporting are those where an admission to trading had already been requested, or an admission to trading or trading had taken place.

135. One association representing trading venue participants commented that it should be clarified that this proposal only applies to cash equities and that it should be taken into account that there are financial instruments without an issuer (other than the trading venue where they are traded). Additionally, this respondent highlighted that although forwards on financial instruments are derivatives, the approach might add a second set of reference data on the same instrument if treated as pre-issued cash. This respondent also shared concerns that if reference data reporting is applied at an earlier stage to bonds, liquidity could be encouraged to move away from trading venues.

5.4.2.4 ESMA's assessment and recommendations

136. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained.

137. ESMA would like to point out that the amendment to Article 27 has been proposed not for the purpose of transaction reporting under Article 26 but for the purpose of Article 17 of MAR. Under this Article, issuers of financial instruments are obliged to publically disclose inside information as soon as they have approved their financial instruments to be admitted to trading on a regulated market or as soon as they are traded on a MTF or OTF. This Article also details the conditions under which issuers may delay the public disclosure of inside information, including as long as the issuer can maintain the confidentiality of the information and that the delay does not mislead the public. Finally, the Article also details that if confidentiality of the information is no longer secured, the issuer must disclose it to the public as soon as possible. This Article highlights that public disclosure of inside information by an issuer is essential to avoid insider dealing and ensure that investors are not misled. Therefore, it is necessary for regulators to be able to see in the reference data of this instrument, at which point in time the issuer's approval took place.

138. Concerning the comments of the respondent representing Trading Venues participants ESMA would like to highlight that the legal framework of the proposal is only applicable where an issuer exists. As such, intruments which do not have issuers, such as derivatives, would not be subject to the added requirement of this proposal.

139. Taking into account the broad agreement with the proposal and the answers given relative to some respondents' concerns, the proposed change to the wording of Article 27 should be retained.

5.4.3 Request for admission to trading

5.4.3.1 Legal framework

140. While Article 4 of MAR stipulates that financial instruments must be reported as soon as an application for admission to a regulated market has been made, the reporting obligation under Article 27 of MiFIR only applies as soon as the financial instrument is admitted to or is tradable on a trading venue. The wording of Article 27 MiFIR should be aligned with Article 4 MAR. The approach under MAR is preferable because it ensures consistency with both field 9 of RTS 23 and the transaction reporting requirement under Article 26 MiFIR, which refers to transactions taking place in instruments that are not yet admitted to trading, but for which a request for admission has been made.

5.4.3.2 ESMA's proposal in the CP

141. ESMA proposed that the text of the amended Article 27 should read as follows:

> *'With regard to financial instruments admitted to trading or traded on a trading venue* (see above, section 5.4.1*) or where the issuer has approved trading of the issued instrument* (see above, section 5.4.2) ***or where a request for admission to trading on a trading venue has been made****, trading venues shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 26.'*

5.4.3.3 Feedback to the consultation

142. The majority of respondents supported the proposal. Only sell-side respondents were split whereas buy-side respondents and respondents on the trading venue-, DRSPs-, and data vendors-side of the industry overwhelmingly favored the proposal.

143. The main concern raised by respondents was that the interpretation of '*request for admission to trading*' could differ between market participants. Thus, they asked for further guidance from ESMA to ensure the starting point for the submission of financial instruments' reference data is the same across the EU in case of a request for admission to trading. Other concerns relate to the envisaged replacement of the terms '*regulated markets, MTFs and OTFs*' by '*trading venues*'. Additionally, some respondents commented that the proposal would not solve a misalignment between Articles 26(2)(a) and 27(1) of MiFIR. However, this proposal would in fact remove this misalignement.

5.4.3.4 ESMA's assessment and recommendations

144. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained.

145. ESMA stresses that the aforementioned proposals will result in no change compared to the current provisions. In particular, ESMA simply intends to align the wording of Article 27(1) of MiFIR with the current market practice. In fact, for investment firms to comply with their obligations under Article 26(2)(a) of MiFIR, market operators must already submit reference data accordingly.

146. Regarding concerns relating to the envisaged replacement of the terms '*regulated markets, MTFs and OTFs*' by '*trading venues'*, it should be noted in Article 2(1)(16) of MiFIR, itself a reference to Article 4(1)(24) of MiFID II, trading venue is defined as regulated market, MTF or OTF. As a consequence, there will be no impact on the current provisions.

147. Finally, ESMA recommends the Commission to empower ESMA to define the term '*request for admission*' in Level 2 legislation with a view to ensure a common level playing field by aligning the point in time that would trigger the submission of financial instruments' reference data across the EU in case of a request for admission to trading.

5.4.4 Frequency of updates to instrument reference data (defined list)

5.4.4.1 Legal framework

148. While the obligations on the submission to the NCAs are the same under both MAR and MiFIR, the two provisions diverge when specifying the frequency and reasons for such submissions. Article 27 of MiFIR stipulates that a complete report of all financial instruments must be submitted every day. According to Article 4 of MAR, however, a report is required only in two cases: 1) when a financial instrument is first admitted to or traded on a trading venue and 2) when it is no longer tradable on that venue. Although these differences are currently harmonised with a uniform reporting system, it would be desirable for the two reporting requirements to be aligned in order to prevent misunderstandings among the market participants concerned.

149. The frequency and reasons for submission are specified in RTS 23 and the related Q&As on defined list of instruments and on termination dates (respectively sections 21 and 5 of the Q&As on MiFIR data reporting)[52]. The current rules identify two regimes, which are dependent on the Trading Venue or SI trading model: 1) TV/SI operating on the basis of a defined list of instruments should send data every day for the instrument they have on the list (concept of 'listing' is applicable to them) and 2) TV/SI operating on the basis of an undefined list of instruments should send data only where orders or quotes are placed, or the first trade occurs[53] and when the instrument ceases to be traded or expires (concept of 'listing' does not apply).

150. As already clarified by ESMA in the Final Report accompanying RTS 23, the 'defined list' approach applies to all cases '*where the relevant details pertaining to the financial instrument concerned referred to in Table 3 of the Annex to RTS 23 are definable before the start of the trading day*'. While in the case of 'undefined list', some of the basic characteristics of the instruments that are tradable on the TV/SI might be defined in advance but most of the characteristics are only defined upon submission of the order/quote. Requiring these venues to report reference data on all financial instruments that are potentially tradable every day would be disproportionate, hence the requirement to only report when an order/quote is placed. If the following day there is no order/quote, then the operator should not report reference data. However, these TV/SI are still expected to terminate the instruments for which they reported reference data when such instruments cease to be traded or expires (Q&A 4, section 5).

151. Experience has shown that TV/SI that follow this second approach often report the instrument for the first time and do not make any further changes to this instrument even when the characteristics of the instrument change (e.g. CFI, FISN) or the instrument ceases from trading. As a consequence, many instruments remain in the ESMA FIRDS database even if they are no longer tradable because the TV/SI has not terminated the FIRDS entry.

5.4.4.2 ESMA's proposal in the CP

152. The problem identified in the above paragraphs could be avoided if all trading venues and SIs were obliged to send a daily file, since in this case they would have to actively reflect whether all of their FIRDS entries are still correct or need to be changed. At present, this is the regime applicable to trading venues operating on the basis of a defined list of instruments, which send reference data every day for the instruments they have on the list. In order to ensure a level playing field among market operators, ESMA considers that the requirement of daily submission should be extended to the trading venues and SIs that do not operate on the basis of a defined list. To achieve this while accommodating the inability of obtaining all relevant details pertaining to the financial instrument concerned before the start of trading, ESMA proposed that these trading venues and SIs should be required to

[52] ESMA70-1861941480-56 "Questions and Answers on MiFIR data reporting", last updated on 8 July 2020, available at: https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-56_qas_mifir_data_reporting.pdf

[53] Section 7.2, paragraph 11, p. 380 of the Final Report on draft Regulatory and Implementing Technical Standards MiFID II/MiFIR (ESMA/2015/1464), published on 28 September 2015 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_-_final_report_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

submit a daily file upon the first submission of an order or quote in the given instrument and up until the instrument ceases to be traded.

5.4.4.3 Feedback to the consultation

153. A majority of respondents did not support the proposal. This opposition was mostly concentrated in the sell-side of the industry with most buy-side respondents and respondents on the trading venue-, DRSP-, and data vendors-side of the industry supporting or being neutral to the proposal.

154. Firms currently acting as SIs argued that the current regime should not be changed in a way that would treat them equally to a Regulated Market operating on the basis of a defined list. Other respondents opposing the proposal suggested to rely more on external data sources for instrument reference data rather than on reporting entities to provide this information (e.g. ANNA).

155. On the other hand, respondents supporting the proposal argued that the approach has clear benefits as it is easy to implement, less error prone, and thus leads to better data quality.

5.4.4.4 ESMA's assessment and recommendations

156. After reviewing the industry feedback and thorough considerations ESMA believes that the current system is more appropriate to address data quality concerns as it is less error prone and allows NCAs to better monitor data completeness and quality.

157. Indeed, ESMA explored suggestions by respondents to move towards the submission of only delta files and to rely more on external data sources of instrument reference data. Indeed, the solution of sending only delta files is unsatisfactory as it would mean removing the current system of reminders for trading venues when a reference data record was not submitted, thus reducing the ability of NCAs and ESMA to monitor data completeness. Additionally, ESMA believes that an increased reliance on external data sources is problematic as such an approach would create another layer of dependencies which would require governance arrangements and further legal mandates. Indeed, while reporting entities are subject to MiFIR the external data sources generating some of the reference data elements are not.

158. Thus, ESMA recommends maintaining the current approach but at the same time acknowledges that there are areas which should be further clarified to the industry, these clarifications are also dependent on the replacement of the ToTV concept with the SI approach, under section 5.2 of this Final Report, in the EC final proposal for the review of the relevant MiFIR provisions. ESMA will consider the relevant inputs from market participants in its work on Level 2 requirements and supervisory convergence.

5.4.5 Reference to Articles on transparency requirements

5.4.5.1 Legal framework

159. Reference data submitted under Article 27 of MiFIR is also used for the purpose of the transparency requirements under Articles 3, 6, 8, 10, 11, 14, 18, 20 and 21 of MiFIR. In particular, the reference data is used for the purpose of the transparency calculations displayed on the ESMA website through the Financial Instruments Transparency System (FITRS). The current text of the Article 27 of MiFIR states that reference data should be provided to regulators for the purpose of transaction reporting under Article 26 of MiFIR. ESMA considers that Article 27 of MiFIR should also state that this data is provided for the purpose of transparency under the relevant provisions in MiFIR.

5.4.5.2 ESMA's proposal in the CP

160. ESMA suggested that the full text of the amended Article 27 should read as follows:

With regard to financial instruments admitted to trading or traded on a trading venue or Systematic Internaliser or where the issuer has approved trading of the issued instrument or where a request for admission to trading has been made, trading venues and SIs shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 26 ***and the transparency requirements under Articles 3, 6, 8, 10, 11, 14, 18, 20 and 21 of MiFIR****.*

5.4.5.3 Feedback to the consultation

161. Respondents were split regarding this proposal. Opposition to the proposal was concentrated in the sell-side of the industry with most buy-side respondents and respondents on the trading venue-, DRSPs-, and data vendors-side of the industry supporting or being neutral to the proposal.

162. Most respondents on the sell-side disagreed with the proposal. However, responses received from disagreeing respondents suggest they misinterpreted the question. Indeed, respondents suggested the proposal would lead to increased costs for firms for implementation and to an increased burden on SIs. As developed below, this is not the case as this proposal would just formalize what is happening in practice.

5.4.5.4 ESMA's assessment and recommendations

163. The feedback received from the respondents has been reviewed and ESMA considers that the proposal should be retained. Essentially, as stated in paragraph 160 ESMA's proposal was to simply add a reference into Article 27 of MiFIR to clarify the current practice where ESMA and NCAs use the reference data submitted under Article 27 of MiFIR not only for transaction reporting purposes but also for the purposes of transparency calculations displayed in FITRS. Indeed, MiFIR introduced rules with respect to transparency obligations that require the publication of transparency thresholds applicable to each financial instrument based on its liquidity. All files received by the FIRDS Transparency System undergo transmission validations, XML format validations, content validations and

consistency validations against the reference data submitted under MiFIR Article 27. Transparency reference and quantitative data are loaded and stored in the FIRDS Transparency database.Therefore, this proposal has no bearing on other questions asked elsewhere in the consultation paper, specifically the questions 5 through 7 corresponding to section 5.2 of this document, related to the extension of the SI obligation to report instruments.

164. As the proposed amendment to Article 27 of MiFIR is just formalizing what is actually happening in practice with regards to how ESMA performs the transparency calculations pursuant to Article 13 of CDR 2017/583 and Article 17 of CDR 2017/587 the proposed insertion to Article 27 should be maintained as currently drafted.

5.4.6 Deletion of Article 4 MAR

5.4.6.1 ESMA's proposal in the CP

165. ESMA proposed that Article 4 of MAR should be repealed and all additional requirements foreseen under this Article should be brought under Article 27 of MiFIR as proposed in sections 5.4.1 – 5.4.5 above. Article 4 of MAR should be replaced with a reference to the amended Article 27 of MiFIR. Accordingly, Article 27 of MiFIR will contain all provisions relevant for both regimes, so that for future revisions only one provision will need to be changed and there will not be an issue of synchronising timelines of such changes as it is currently the case for MAR and MiFIR review that take place under different timelines.

5.4.6.2 Feedback to the consultation

166. A large majority of respondents supported the proposal. Only a few respondents from the sell-side opposed it.

5.4.6.3 ESMA's assessment and recommendations

167. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained.

168. ESMA would like to clarify that the concerns raised regarding an extension of the ToTV requirement is already covered in section 5.2 above. Furthermore, ESMA is of the view that the proposal to delete Article 4 of MAR would reduce complexity and costs for both regulatory authorities and reporting firms. Finally, for future revisions only one provision would need to be changed and there would be no need to synchronize timelines of thechanges resulting from separate reviews of the relevant requirements.

169. Taking into account the broad agreement with the proposal and the answers to the raised concerns, the proposed change to the wording of Article 27 MiFIR and the repeal of Article 4 MAR should be retained.

6 Details to be reported (Article 26(3)): Trading Venue Transaction Identification; chain of transactions.

6.1 Legal framework

170. Field 3 of RTS 22 prescribes that should be up to 52 alphanumerical characters, generated by the trading venue and disseminated to both the buyer and the seller in accordance with Article 12 of RTS 24. Article 12 of RTS 24 prescribes that: a) the TVTIC should be maintained for each transaction resulting from the full or partial execution of an order; b) it should be unique, consistent and persistent per MIC and per trading day; c) its component should not disclose the identity of the counterparties.

171. According to Fields 7 and 16 of RTS 22, the INTERNAL code (INTC) '*shall be used to designate an aggregate client account within the investment firm in order to report a transfer into or out of that account with an associated allocation to the individual client(s) out of or into that account respectively*'.

6.2 ESMA's proposal in the CP

172. With regards to the TVTIC, ESMA proposes that this code TVTIC should not be limited to transactions executed on a trading venue, the obligation related to the TVTIC should also apply to transactions executed by a Systematic Internaliser.
In addition, it should be clarified in Level 1 that TVTICs should be generated by the market operator (or IF in case of transactions executed by a SI) and the same code should be assigned to both sides of the trade. This requirement is currently reflected in two separate ESMA RTSs (RTS 22, (field 3) and RTS 24, (Article 12)[54]).

173. With respect to the use of INTC, ESMA sees the merit in linking both sides of a transaction where this code is used, since it would allow matching the venue executions with their client allocations. For this purpose it is proposed to include a new code (similar to the complex trade component ID of Field 40 RTS 22) that the IF has to generate, which enables NCAs to identify the market legs that pertain to the client legs when grouping orders. For example, for two executions of 100 + 500 allocated to three clients 150+200+250, the five reports should contain the same unique INTERNAL ID CODE = abc)

174. Finally, ESMA considers important to have a separate code that would enable regulators to link all transactions pertaining to the same transaction chain. All counterparties included in such a transaction chain must make sure to transmit the code to its direct counterparty. This implies that, even transaction reports where field 36 is populated with XOFF, but relating to a transaction executed on a trading venue or a SI should include this code.

175. ESMA proposed that text of the amended Article 26(3) of MiFIR should read as follows:

> *'The reports shall, in particular, include details of […].* ***For transaction carried out on a trading venue and Systematic Internaliser or an organised trading platform outside of the Union, the reports shall include a designation to identify the venue***

where the transaction has been executed and a transaction identification code generated and disseminated by the trading venue or Systematic Internaliser.

For transaction carried out on a trading venue and Systematic Internaliser, the reports shall include a designation to link all transactions pertaining to the same execution of the financial instrument on the trading venue or Systematic Internaliser. The member or participant or user of the trading venue or Systematic Internaliser as well as all the investment firms being part of the transaction chain shall disseminate the code generated by the trading venue or SI down the transaction chain.'

6.3 Feedback to the consultation

176. A large majority of respondents opposed the proposal to apply a TVTIC code to transactions executed by a SI and to include a new code to link both sides of the transaction where INTC is used (question 18 in the Consultation Paper[55]). Support was split by sector of the industry. Indeed, whereas all respondents on the trading venue, DRSPs, and data vendors side of the industry all favored the proposal, an overwhelming majority of buy and sell sides of the industry opposed the proposal.

177. Respondents opposing this proposal raised the following concerns:

(a) the similar treatment of SIs and trading venues was a major concern with respondents arguing that there is a legal distinction between them and that the approach would override the current legislation;

(b) some respondents were concerned that the dependencies stemming from the proposal would create several risks (delayed reporting, underreporting, potential errors) ultimately reducing data quality. Respondents also argued that there should instead be a focus on the review of the existing TVTIC to increase the quality of reported data as they highlighted that due to inconsistent methods of TVTIC generation processes among trading venues, the dissemination ultimately impacts the accuracy of the data reported;

(c) additionally, some respondents were concerned that reporting entities cannot comply with the obligations if non-EEA entities are involved in the transaction chain and that the extension of the TVTIC will require considerable IT development, implementation, and organizational effort on the part of each SI. Indeed, the process of forwarding the codes to external entities is seen as a difficult technical challenge due to different IT systems;

(d) in general, respondents opposing the proposal viewed the proposal for a 'INTC' transaction ID as a smaller challenge since there is only one IF involved and the exchange process is an internal one.

[55] Consultation Paper: MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-773), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

178. Respondents supporting the proposal argued that it would provide clarity on where a transaction has been executed and would level the playing-field between trading venues and SIs. Additionally they said that giving a rule of responsibility for generating this TVTIC (e.g. When both counterparties are SIs) would provide further clarification. Regarding the proposal for the INTC code specifically, it was argued that this proposal would enable NCAs to identify the market legs that pertain to the client legs when grouping orders.

179. An overwhelming majority of respondents, from all sectors of the industry, opposed the proposal on 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 (question 19 in the Consultation Paper[56]).

180. Respondents opposing the proposal raised the following comments:

    (a) many respondents argued that, despite high of implementation, the difficulty and complexity of implementation would risk leading to an inefficient system in which the new identifiers linking transactions would not be of good quality and unusable for analysis. Additionally, respondents questioned the benefit of such an implementation and argued that the link between transactions of the same execution can be performed by other means (price, quantity, trade date, counterparts or using other reporting files containing identifiers which permit to do the link);

    (b) some respondents were strongly opposed to the idea of including organised trading platforms from outside the EU. They argued it is close to impossible to get theses entities to comply with such obligations because the relevant trading venues are not subject to MiFIR and therefore cannot be obliged to generate a TVTIC;

    (c) finally, respondents mentioned problematic declarative schemes for the use of TVTIC as a unique identifier to disseminate in the transaction chain. The most common are the cases of aggregate client account (if it is INTC) or OTC executions.

181. Respondents neutral to the proposal suggested that ESMA should ensure that the new requested data is not yet reported in other reporting files such as orders reporting (RTS 24). Other respondents argued that clear guidelines on how to structure the codes would negate particular challenges in implementation. Finally, one respondent recognized the benfits of the proposal while highlighting he difficulty of implementation to all IFs notably in the case of grouped orders which can be segmented on several Trading Venues (if it is the TVTIC).

6.4 ESMA's assessment and recommendations

182. The majority of the respondents raised several concerns and challenges to the extension of the TVTIC generation to SIs as well as to the dissemination of the TVTIC or of a separate code along the transaction chain. In case of the INTC (grouping orders), although

[56] Consultation Paper: MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-773), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

challenges around its implementation were identified, this proposal caused less concern and was supported by some respondents.

183. The feedback received from the respondents has been reviewed and ESMA considers that its proposals regarding the dissemination of the TVTIC or a separate code along the transaction chain and the creation of a TVTIC by SIs should not be retained as currently described, whereas the one concerning the generation of the INTC should be retained.

184. However, ESMA believes it would be beneficial to explore an alternative solution to the linking of SI transactions as well as transaction chains that limits the burden on the industry and on NCAs.

185. It could be relevant to integrate a new identifier in the case of grouping orders (chapter 5.23 of the ESMA guidelines[57]) and for which only a single entity per market execution would have to report this code in its reports. Indeed, these transactions currently represent a real burden for NCAs in order to rebuild the chain of execution. Thus, to reduce the burden for the industry and for NCAs, ESMA suggests that the current value 'INTC' be removed and replaced by a code, internal to the investment firm but obviously unique for the market-side reports and the client-side reports. This specific change could be addressed as part of the review of the Level 2 reporting template and following the additional industry consultation accompanying that review. It does not require a change in the Level 1 text.

186. With respect to the revision of the relevant Level 1 provision, ESMA recommends that a specific empowerment is included in order to specify the conditions for linking specific transactions and the means of the identification of aggregated orders resulting in the execution of a transaction for the benefit of several clients.

7 Details to be reported: the identifiers to be used for parties (Articles 26(3) and 26(6)).

7.1 Legal Framework

187. Article 26(3) of MiFIR prescribes to include in the transaction reports the details of the relevant parties involved in the transacitons, these are '*the designation to identify the clients on whose behalf the investment firm has executed that transaction' and 'a designation to identify the persons within the investment firm responsible for the investment decision and the execution of the transaction'*.

188. In addition, MiFID II introduces provisions to ensure investor protection, and, in particular, requirements for investment firms when they provide services to clients. Further to Article 24 of MiFID II, clients are to be categorised in function of their financial literacy. This allows NCAs to assess, among others, whether a financial instrument is suitable for its target market. Annex II of MiFID II sets out the criteria and the categories for clients:

[57] Guidelines on Transaction Reporting, Order Record Keeping and Clock Synchronisation Under MiFID II (ESMA2016-1452) published on 10 October 2016 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf

a. professional clients;

b. clients treated as professionals on request (and after a fitness assessment), in general or for a specific investment service, transaction or product;

c. retail clients.

7.2 ESMA's proposal in the CP

189. Regarding the details to report as per Article 26(3), ESMA proposed that the identification of the decision maker for clients should be explicitly mentioned in the Level 1 text. The term 'client' used in Article 26(3) is considered too restrictive and should be replaced with a more general term such as 'parties' to identify all participants. This approach is consistent with the terminology used under EMIR reporting.[58]

190. Concerning the identification of parties under Article 26(6), ESMA proposed to refer in the Level 1 text to ISO 17442 for Legal Entity Identifiers (LEIs). In accordance with the ESMA Guidelines on transaction reporting[59] and the European Commission FAQ on EMIR[60] and consistent with the LEI ROC guidance[61], the obligation to use the LEI applies to all entities that are eligible for the LEI regardless of their legal status and the way in which they are financed. ESMA considers that this aspect should be explicit in the Level 1 provision referring to ISO 17442. Regarding clients that are natural persons and are not eligible for an LEI, ESMA recommended including in the Level 1 text a specific reference to the use of national identifiers.

191. With respect to the client categories, in order for NCAs to be able to monitor the distribution of certain complex products to investors or identify market trends when analysing the data on transaction reporting, the client category should also be included in the details to be reported under Article 26(3), in addition to the client details already included in the reporting schema.

192. ESMA proposed that the text of the amended Article 26 (3) should read as follows:

> *The reports shall, in particular, include details of the names and numbers of the financial instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the* ***parties*** *on whose behalf the investment firm has executed that transaction, a designation to identify the person* ***acting as decision maker*** *and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, a designation to identify the applicable waiver under which the trade has taken place, means of identifying the investment firms concerned.*

[58] The fields in Table 1 of the Annex to CDR 104/2017 are grouped under the heading "parties to the contract". See Article 9(1) of EMIR and the Annex to Commission Delegated Regulation 104/2017, where fields in Table 1 are grouped under the heading "Counterparty Data" and the sub-heading "parties to the contract".

[59] Guidelines on Transaction Reporting, Order Record Keeping and Clock Synchronisation Under MiFID II (ESMA2016-1452) published on 10 October 2016 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf

[60] Point 14 of the European Commission FAQ on EMIR from 10 July 2014, available on the EC website: https://ec.europa.eu/info/sites/info/files/emir-faqs-10072014_en.pdf.

[61] ROC statement on individuals acting in a business capacity, available on the ROC website: http://www.leiroc.org/publications/gls/lou_20150930-1.pdf.

193. ESMA proposed that the text of the amended Article 26(6) should read as follows:

> *In reporting the designation to identify the parties as required under paragraphs 3 and 4, investment firms shall use a* ***ISO 17442*** *legal entity identifier* ***code*** *established to identify parties that are* ***eligible for the LEI regardless of their legal status and the way in which they are financed*** *and* ***a national identifier*** *established to identify parties that are natural persons* ***and are not eligible for the LEI****.* ***Clients shall be categorised according to Article 24 of Directive 2014/65/EU.***

7.3 Feedback to the consultation

194. Most respondents supported the proposal on LEI and identifiers whereas no respondent supported the inclusion of client categorisation.

195. Respondents opposing the requirement to identify end clients, argued that in light of the extension of the transaction reporting scope to AIFMs and UCITs managers, such an implementation would be costly and have questionable benefits. Additionally, on respondent said that information on end client and decision maker can only be provided for the investment firm's own client, not for the counterparty.

196. The main arguments against the introduction of the MiFID client categorisation were that the information is not pertinent for market surveillance purposes and that client classification may vary (over time, financial instruments or services, and firms) meaning that reporting parties would need to collect the information from another system thus amend their reporting schemas. Therefore, it was argued that the cost for the industry would be disproportionate and that NCAs may obtain the information via ad hoc requests

7.4 ESMA's assessment and recommendations

197. On client identifiers, ESMA confirms that investment firms are expected to provide details and decision maker pertaining to their own clients and the clients of any firm that would have transmitted an order for execution within the meaning of Article 4 of RTS 22 but not for the client of the counterparty. With respect to the concerns raised on the proposed extension to AIFMD/UCITS firms in section 4.1 of this Report, such entities would fall under the transaction reporting obligations only when providing one or more MiFID services that would trigger the obligation to report transactions under Article 26 of MiFIR, it will not cover transactions stemming from other activities conducted by the AIFM/UCITS firms. As also mentioned in section 4.1, in some jurisdictions such as CZ, IT and RO, AIFMs and UCITS are already subjects to specific national requirements to provide information to NCAs on transactions in financial instruments.

198. On client categorisation, ESMA is of the view that the information is relevant for NCAs, in particular in order to monitor the distribution of particularly complex financial instruments provided to a large number of retail investors. The absence of this information in transaction report will lead to a proliferation of ad-hoc requests for information, especially in the case of instruments provided to a significant number of investors.

199. Moreover, the use of MiFIR transaction data is not restricted to market surveillance purposes. Indeed, recital 32 of MiFIR provides that '*the details of transactions in financial*

instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms'.

200. Using MiFIR transaction data for several purposes would maximise the potential usage of this reporting system, in line with the objectives outlined in the strategy of the European Commission for supervisory data in EU financial services[62]. In particular, transactions data could be linked to other securitites and derivatives market data from different reporting regimes. For instance, accurate and comparable transaction data could be used to supervise the quality of the data provided under other regimes. Ultimately, enhanced transaction data would ensure a holisitic approach for supervisors and it would improve their risk management frameworks.

201. Market participants would indeed incur an initial cost for collecting from their systems the information on client category and adapting the reporting schema, but this cost would be lower than the set-up of a specific new reporting system to provide this information to their NCA.

202. ESMA will follow and take into account any changes that might stem from a potential review of the current client classification regime in order to ensure that the details to be provided on the client categories are fully aligned with the ongoing review.

8 Details to be reported (Article 26(3)): a designation to identify the computer algorithms and a short sale;

8.1 Algo ID

8.1.1 Legal framework

203. Article 26(3) of MiFIR prescribes to include in the transaction reports the details of a '*designation to identify the the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction'*. The field was originally designed to understand the mechanics of algorithmic trading by IFs carrying such activities and detect potential market abuses schemes. Since the start of the MiFIR reporting regime, ESMA and NCAs focused their supervisory activities on more critical information for the exercise of their mandate.

204. This information has proven useful by some NCAs to monitor investment firms compliance with their authorized activities while a majority of them don't use this indicator.

8.1.2 ESMA's proposal in the CP

205. Since one of the key aspects of MiFIR was to take into account development of market practices such as algorithmic trading that were not covered by MiFID and the fact that

[62] Digital Finance Strategy for the EU. COM(2020) 591, published on 24 September 2020 on the European Commission website https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0591&from=EN

supervisory priority was not given to this indicator as of today, ESMA proposed to keep this data element.

8.1.3 Feedback to the consultation

206. Most respondents supported the proposal. Support varied depending on the sector of the industry with sell-side respondents split and respondents on the trading venue-, DRSP-, and data vendors-side of the industry overwhelmingly favoring the proposal. The only buy-side respondent opposed the proposal.

207. Respondents opposing the proposal argued similarly that the Algo ID should be removed to limit the amount of information that has to be reported as it is not used by a majority of NCAs while the costs of including it for reporting entities is high.

208. Respondents supporting the proposal argued that this indicator is useful to monitor IFs' compliance with their authorized activities, that there is a need for ESMA to harmonise requirements with this respect, that the information already needs to be collected for order record keeping purposes and that a decision to consider the Algo ID as non-relevant information would need to be assessed on a wider basis.

209. A neutral responded suggested to clarify the definition of what constitutes a trading algorithm since the Algo ID seems to capture more than what was originally intended.

8.1.4 ESMA's assessment and recommendations

210. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained.

211. With respect to the clarification requested on algorithmic trading, ESMA is of the view that Article 4(39) MiFID II encompasses all concepts linked with algorithms and should not be further amended.

212. ESMA will continue to assess whether the national, trading venues, and European requirements concerning algorythmic identification need harmonisation. A common understanding of these requirements is important in order to be able to accurately assess the usefulness of this information as well as to consider giving it higher supervisory priority going forward. ESMA will consider the relevant inputs from market participants in its work on Level 2 requirements and supervisory convergence.

8.2 Short sale indicator

8.2.1 Legal framework

213. The current regime requires investment firms to report whenever the beneficiary of a transaction is engaging in a short selling transaction. This identification of a short sale is based on the definition given in SSR whereby the net short position is calculated on an end of day basis while the reporting is made on a transaction by transaction basis.

214. Furthermore, as per Article 11(2) of RTS 22, the investment firm engaging in a sell order on behalf of a client shall collect on a best effort basis the information whether or not the

client is short selling. This is due to the fact that the person within the client giving the order may not know in real time if the group has acquired a net short position or not.

215. Due to these limitations, NCAs are not in a position to utilise this information in their mandates of supervision and market surveillance. However, in certain market conditions, the compliance to a short ban issued by NCAs could be monitored with transaction data, if the reporting of this information was adjusted to the specificities of transaction reporting.

8.2.2 ESMA's proposal in the CP

216. ESMA proposed two options:

a. the removal of this information from the transaction reporting considering that the definition of a short sell in the short selling regulation and its application within MiFIR transaction reporting cannot be reconciled;

b. the definition of a new indicator more in line with the transaction reporting. Such indicator should not be based on the definition of short sale given in SSR, which applies at the position level and it should not be populated on a 'best efforts' basis. ESMA should have a mandate to define what should be considered as short sale indicator for the purpose of transaction reporting.

8.2.3 Feedback to the consultation

217. Support for the proposal to remove the short sale indicator was unanimous.In addition, respondents strongly opposed trying to adapt the current indicator. It was argued that this might create a new definition that could replace the current one because of the incompatibility of the legal requirements of the Short Selling Regulation regarding net short positions and MiFIR transaction reporting.

8.2.4 ESMA's assessment and recommendations

218. The feedback received has been reviewed and ESMA considers that its proposal to remove the short sale flag should be retained.

9 Details to be reported (Article 26(3)): indicators for waivers; OTC post-trade deferrals; commodity derivatives; buy-backs programs

9.1 Indicators for pre-trade waivers; OTC post-trade deferrals; commodity derivatives

9.1.1 Legal framework

219. The current regime under Article 26(3) requires investment firms to indicate in the report whether the transaction was excuted under a pre-trade waiver. In particular, this obligation only covers the waivers applied to transactions executed on trading venues in accordance with Articles 4 and 9 of MiFIR. ESMA considers that the waivers regime also apply to transactions in non-equity instruments executed through an SI in accordance with Article 18(2) of MiFIR. Under this Article, NCAs may waive the quoting obligations for SIs for illiquid non-equity instruments. However, under the current regime, if a pre-trade waiver applies to these transactions, such waiver will not be indicated in the respective transaction report.

9.1.2 ESMA's proposal in the CP

220. ESMA proposed to extend the scope of this obligation to the transactions in non-equity instruments executed on a Systematic Internaliser. As the quoting obligations for SIs may be waived by NCAs in accordance with Article 18(2) of MiFIR, this additional requirement would provide NCAs with the complete set of information regarding transactions executed under a waiver from pre-trade transparency in non-equity instruments, both on-venue and on SIs.

221. Regarding the other two indicators covered by this section of the CP, ESMA proposed that the respective level 1 provisions are sufficiently clear and saw no need to review these provisions.

9.1.3 Feedback to the consultation

222. A majority of respondents opposed the proposal to extend the scope of the obligation to the transactions in non-equity instruments executed on a SI (question 24 in the Consultation Paper[63]).

223. Support varied depending on the sector of the industry with sell-side respondents opposing the proposal and respondents on the trading venue-, DRSPs-, and data vendors-side of the industry overwhelmingly favoring the proposal. Buy-side respondents did not foresee

[63] Consultation Paper: MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-773), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

specific challenges related to the proposed approach, but acknowledged the potential increased burden on SIs.

224. Sell-side respondents focused on costs and operational issues of its implementation. They argued that despite information on the use of pre-trade waivers per trade being available on the in-house databases of IFs, a costly investment would be needed to make this information available on the transaction reporting information flow. It was also suggested to avoid further changes to the approach until the outcome from two other consultations proposing changes on this topic are known.

225. Respondents on the trading venue-, DRSPs-, and data vendors-side of the industry argued that the proposal would provide a level playing field between SIs and trading venues. It was suggested to the clarificaty whether the waiver should be included in both counterparties' reports, or only in the report provided by the SI.

226. A large majority of respondents supported the proposal on OTC post-trade and commodity derivative indicators (question 25 in the Consultation Paper[64]). Strong support was consistent across the industry, except for the few buy-side respondent who highlighted that the population of these flags increases the burden on IFs and SIs without a clear benefit for the industry.

227. Sell-side respondents, most of which supported the proposal, highlighetd the different scope of transparency and transaction reporting obligations, as well as the challenging and costly activities carried out to gather the OTC post-trade transparency indicator. In this respect, one respondent pointed out that investment firms may outsource this eligibility and flag definition to their APAs, but conversely, an other respondent highlighted, no requirements exist for ARMs/APAs to pass on this information free of charge to market participants.

228. Some respondents also made recommendations. One respondent recommended an approach based either on only requiring parties responsible for the pre-trade transparency waiver for on-venue executions to populate the waiver indicator on their transaction reports or on coordinating the provision of the waiver indicator and post-trade indicator flag from trading venues to investment firms. Another respondent proposed to require transaction reports to be populated only if the default deferral regime is being overridden and asked ESMA to clarify the value added of having the flags in the transaction reports.

229. Respondents on the trading venue-, DRSPs-, and data vendors-side of the industry mostly indicated that they did not face difficulties in applying the requirements under discussion. However, ESMA was asked to clarify the application of the post-trade and commodity derivative indicators, particularly for AMND and CANC flags for the OTC post-trade field. Additionally, lack of understanding of the meaning of the commodity derivative indicator field was raised as an issue.

[64] Consultation Paper: MiFIR review report on the obligations to report transactions and reference data (ESMA74-362-773), published on 24 September 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

9.1.4 ESMA's assessment and recommendations

230. The feedback received from the respondents has been reviewed. In light of this feedback and of proposals made in ESMA's non-equity SI review report to delete Article 18(2) of MiFIR[65], ESMA considers that the proposal to extend the obligation to transactions in non-equity instruments executed on an SI should not be retained.

231. Regarding the proposal on OTC post-trade indicator and the commodity derivative indicator, ESMA considers that it should be retained, possibly clarifying in Level 2 (RTS 22, Table 2, Annex I) the use of such indicators.

9.2 Buy backs programs

9.2.1 Legal framework

232. Article 5(3) of MAR requires issuers to report transactions in buyback programs on their financial instruments to the NCA of the trading venue where the financial instrument has been admitted to trading or traded. These transactions must include information specified in Article 25(1) and (2) and 26(1), (2) and (3) of MiFIR. Issuers of financial instruments must report this information in order for their Buy-Back Programs to benefit from the exemption from certain provisions of MAR.

233. The Commission Delegated Regulation 2016/1052[66], specifying the conditions applicable to buy-back programmes and stabilisation measures, does not lay down requirements on the format for reporting those transactions, hence issuers are obliged to comply with format requirements defined at the national level. As a consequence, issuers of financial instruments that are admitted to trading or traded on trading venues in more than one country need to adapt to each of the local format requirements, which puts them at a disadvantage compared to the issuers of instruments that are not traded in more than one country. Furthermore, the lack of alignment of the format with the existing reporting obligations under Article 26 of MiFIR) increases the burden on national NCAs as it complicates the task of comparing buyback programs reports with the related MiFIR transaction reports.

234. These transactions are, for a significant part, carried out by investment firms on behalf of the issuer. The same investment firms are subject to the transaction reporting requirements under MiFIR making the issuer's reporting obligation redundant. In order to avoid double reporting of the same information, reports submitted to NCAs in accordance with Article 26 which contain all the required information for buy-backs reporting purposes should not need to be reported to NCAs twice.

[65] Consultation Paper on MiFIR report on Systematic Internalisers in non-equity instruments (ESMA70-156-1757) Published on 3 February 2020 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma70-156-1757_consultation_paper_-_mifir_report_on_si.pdf

[66] Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures

9.2.2 ESMA's proposal in the CP

235. In order to reduce the burden on NCAs as well as issuers of financial instruments traded in more than one country, ESMA proposed an additional requirement to include a designation to identify transactions in buy-back programs that have been carried out by investment firms on behalf of an issuer in the transaction report in accordance with Article 26 of MiFIR.

236. With respect to the potential amendments needed to avoid double reporting under Article 5(3) of MAR, at the time of the publication of the CP, ESMA was publishing the MAR review final report that addresses BBP transactions and the obligation of issuers to report BBP transactions under Article 5(3) of MAR. ESMA is aware that this new reporting flag should have the benefit of facilitating the identification of BBP transactions by NCAs, eventually rendering the reporting of issuers to NCAs under Article 5(3) of MAR superfluous. However, ESMA considers that it is necessary to ensure the effectiveness of this new BBP flag in the transaction reports before recommending the deletion of Article 5(3) of MAR since that effectiveness would heavily rely on the effective transmission of BBP information by investment firms. As a consequence, ESMA stands ready to reassess the necessity to maintain the reporting obligation under Article 5(3) of MAR in a context where a BBP flag would be operational in the transaction reporting regime.

237. These proposals are without prejudice to the ESMA proposals on the simplification of the scope and content of the obligation to report buy-backs programs as described in the Final report on the MAR review[67].

9.2.3 Feedback to the consultation

238. A large majority of respondents supported the proposal and almost all respondents saw benefits in using the MiFIR transaction reporting regime to convey the content of reporting requirements under Article 5(3) of MAR.

239. Some respondents opposed keeping the reporting requirements under Article 5(3) of MAR once the new flag is implemented in the MiFIR transaction reporting regime as they forsee a transitional period of double reporting. ESMA already clarified its position on this matter in paragraph 241 in this Final Report.

240. Finally, some respondents warned ESMA of the time and effort needed to implement any evolutions on the XSD schema and one respondent, a trading venue, stated that the proposal would add complexity for non-MIFID firms' reports.

9.2.4 ESMA's assessment and recommendations

241. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained.

[67] Section 4.1 and 4.2 of the CP available at this link: https://www.esma.europa.eu/sites/default/files/library/mar_review_-_cp.pdf Section 3 of the MAR Review Report (ESMA70-156-2391) available on ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf

242. Indeed, in response to the argument from the trading venue, ESMA highlights that this is a fact embedded in MiFID II/MiFIR requirements on trading venues' membership and cannot be waived.

243. Finally, adding such a field in the MiFIR transaction reporting list of fields (RTS 22, Annex I, Table 2), with a transitional period before the implementation of the new field is completed, would help with the harmonization of the format of the current reporting requirements under Article 5(3) of MAR.

10 Obligations for Investment Firms transmitting orders (Article 26(4))

10.1 Legal framework

244. With regard to the transmission of orders under Article 26(4), MiFIR provides a possibility for investment firms which transmit orders to be exempted from the reporting obligation provided that, in the transmission of that order, all the details as specified in paragraphs 1 and 3 of Article 26 are included. Article 4 of RTS 22 details the conditions under which an investment firm is deemed to have transmitted an order, these conditions include the conclusion of a transmission agreement with the investment firm that receives the order.

245. ESMA has identified cases when investment firms interested in the transmission of orders and seeking a transmission agreement were unable to find another investment firm willing to conclude such an agreement. These investment firms, rather smaller entities, consequently established their own reporting systems, however many data quality issues were identified in the reporting due to the basic technical level of such reporting systems.

10.2 ESMA's proposal in the CP

246. To ensure the quality of the reported data even in cases of less sophisticated reporting entities and alleviate the burden on these entities, ESMA proposed to introduce an obligation for the receiving investment firm to report the transaction which pertains to a transmitted order, when the transmitting investment firm requests to transmit its orders. This obligation would only apply when the receiving investment firm would not be transmitting the received orders to another investment firm.

247. Consequently, ESMA proposed that Article 26(4) of MiFIR should be amended as follows:

> *'Investment firms which transmit orders shall include in the transmission of that order all the details as specified in paragraphs 1 and 3. Instead of including the mentioned details when transmitting orders, an investment firm may choose to report the transmitted order, if it is executed, as a transaction in accordance with the requirements under paragraph 1. In that case, the transaction report by the investment firm shall state that it pertains to a transmitted order.* ***If the investment firm chooses not to report the transmitted order and provides all the mentioned details when transmitting orders, the investment firm to which the orders are transmitted shall report the***

transaction in accordance with paragraph 1 unless it transmits the order to another investment firm.'

10.3 Feedback to the consultation

248. A strong majority of respondents opposed this proposal. Support was split by sector of the industry. Indeed, whereas respondents on buy-side and the trading venue-, DRSPs-, and data vendors-side of the industry were split, all sell-side respondents opposed the proposal. A majority of other respondents also disagreed with the proposal.

249. Supporters of the proposal suggested that the proposal remain an optional measure and proposed an addition to the end of the proposal: ' *… or directly onto a trading venue*.'.

250. Respondents opposing the proposal were mainly concerned that it would be unbalanced and much too favorable to transmitting firms who would pass the burden of reporting to other firms down the transmission chain. In their view, the receiving firms will almost be forced to act as an ARM and develop technical changes to monitor the completeness and accuracy of all inbound order messages. Some respondents also focused on the necessity that transmitting firms who have these issues make the necessary investments themselves to be able to report.

251. Respondents argued that under the principle of contractual liberty it seems that such proposal would enter into the national civil law domain. It was also said that the proposal would create a legal responsibility for market makers and RTOs on information on which they have an entire external dependency and introduces complexities regarding data reconciliation between transmitting and receiving firms. Additionally, respondents were concerned about privacy because without agreement, receiving firms are simply being forwarded details of the relevant investment or execution decision-makers.

252. Moreover, it was expressed that the proposed change would also lead to problems with the best execution when using automatic order routing via a smart order router set up, with several brokers and IFs as potential receiving firms of these orders. One respondent said that the proposal would create the risk of errors and untimely reporting because smaller firms may still struggle to provide the necessary data to the reporting firm in a correct and timely manner.

253. Finally, respondents asked for further clarifications on the requirements of field 25 'Transmission of Order Indicator' and for a clear definition of 'transmission', particularly relating to the investment service of 'reception and transmission of orders concerning one or more financial instruments', which has not been defined in Article 4 of MiFID.

10.4 ESMA's assessment and recommendations

254. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should not be retained. Taking into account the strong negative feedback from the majority of respondents, the opinion of the industry to maintain the *status quo* and to give up the proposed update seems to be the proper way forward.

255. Additionally, the proposal was perceived as a disproportionate burden compared to the benefits. While the receiving firm would bear all the costs of further system development, the transmitting firm would be the one to benefit.

256. However, the industry feedback confirmed that most participants have made their necessary investments and are compliant with the current regulations and all changes will therefore lead to new implementation projects and drive an unnecessary increase in costs.

11 Entities entitled to provide transaction reports to NCAs (Article 26 (7))

11.1 ESMA's proposal in the CP

257. ESMA proposed that the provisions under Article 26(7) of MiFIR, clarifying that the ARMs/IFs attribution of responsibilities for accuracy, completeness and timely submission of the data, are sufficiently clear and have been effective in practice. Accordingly, ESMA saw no need to review these provisions.

11.2 Feedback to the consultation

258. Respondents overwhelmingly supported the proposal. In addition to the support for the proposal, a few suggestions were made by respondents.

259. Respondents requested further clarifications on the necessary actions to be taken by receiving firms to ensure that the data is transmitted correctly and on who bears responsibility concerning completeness and accuracy of the data in case trading venues rely on ARMs to provide transaction reports.

260. Respondents also argued that in case of errors in providing data, the transmitting firm should bear responsibility with the receiving firm. Finally, some respondents argued that trading venues may have difficulties when non-MiFIR firms and 3rd country firms do not provide all the necessary information to be included in the transaction report and that in this case trading venues should not be considered responsible if the data is not available or is not transmitted correctly.

11.3 ESMA's assessment and recommendations

261. ESMA took note of the responses received from the industry. Based on the overall positive feedback received, ESMA considers that Article 26(7) on the entities entitled to provide transaction reports to the NCAs should not be amended. However, ESMA will consider the relevant inputs from market participants in its work on Level 2 requirements and supervisory convergence.

12 Interaction with the reporting obligations under EMIR

12.1 Legal Framework

262. Under Article 26(10) of MiFIR, this Final Report should also cover "*the interaction of transaction reporting requirements under Article 26 of MiFIR with reporting obligations under EMIR*". Furthermore, under Article 85(3)(a) of EMIR, ESMA has to submit a report to the Commission on the consistency of the reporting requirements for non-OTC derivatives under MiFIR and under Article 9 of EMIR within 11 months of the entry into force of EMIR. Given the similarity of the two mandates, ESMA decided to cover both mandates in this report.

12.2 Challenges of merging the two reporting regimes into one

12.2.1 Legal framework

263. ESMA has already undertaken a review of the EMIR reporting requirements[68] and is in the process of completing a second one[69]. The reviews have been carried out taking into consideration the need to ensure consistency with the MiFIR reporting requirements. Already following the first review in November 2015, ESMA concluded that alignment of the MiFIR and EMIR reporting regimes could only be achieved to a certain extent because there are fundamental differences that impede merging the two reporting regimes into one set of requirements.

264. Indeed, the elaboration and development of any reporting regime is primarily influenced and driven by the purpose of the reporting and subsequent intended data use by regulators. MiFIR data is used by NCAs to conduct their market surveillance and detect instances of market abuse while EMIR data is needed primarily for the purpose of systemic risk detection.

265. With these considerations in mind, ESMA has focused its efforts on harmonising the two reporting regimes to the extent it was feasible and without making attempts to fully replace one regime with the other. In particular, close attention was paid to the consistency of the description of individual data elements, permissible reportable values and formats, alignment of reporting logics, methods and procedures. Such alignment will allow the reuse of existing IT systems.

266. ESMA highlights that alignment has been achieved in the following areas that are common to both reporting regimes:

    a. identification of legal entities – LEI;

[68] ESMA held a public consultation on the proposed amendments to the technical standards on trade reporting between 10 November 2014 and 13 February 2015. ESMA subsequently adopted the draft RTS on 5 November and submitted them to the Commission on 13 November 2015. The standards became applicable on 1 November 2017. Further details are available here: https://www.esma.europa.eu/policy-rules/post-trading/trade-reporting .

[69] Consultation Paper on Technical Standards on Reporting, Data Quality, Data Access and Registration of Trade Repositories under EMIR Refit, available on ESMA's website: https://www.esma.europa.eu/press-news/consultations/technical-standards-reporting-data-quality-data-access-and-registration. The consultation period ran from 26 March to 19 June 2020.

b. identification of instruments – ISIN;

c. classification of instruments – CFI;

d. identification of complex trades;

e. reporting of dates and timestamps, currencies and country codes in accordance with the respective ISO standards;

f. usage of a common XML template in accordance with the ISO 20022 methodology (*proposed in the ongoing revision of the EMIR TS*[70]).

267. Finally, ESMA has taken into account and contributed to the international developments of global data standards such as the global guidance regarding the definition, format and usage of key OTC derivatives data elements reported to TRs, including the Unique Transaction Identifier (UTI), the Unique Product Identifier (UPI) and other critical data elements[71] (see proposals to further align with newly introduced global guidance in light of the amended empowerments under EMIR Refit in section 12.3 of this Final Report).

12.2.2 ESMA's proposal in the CP

268. While acknowledging the need to avoid duplicative reporting and reduce the burden on the reporting entities, ESMA considers that the best way to achieve these goals is by ensuring the technical alignment of data elements and reporting logics, methods and procedures. This will allow the reuse of existing IT systems. Instead, the solution envisaged in Article 26(7) of MiFIR is not optimal because in practice there will never be a case where a given report under EMIR will contain all information that is necessary for transaction reporting purposes. This is because the set of data needed for the MiFIR purposes does not perfectly coincide with the data needed for EMIR purposes. Therefore, ESMA recommended removing the following paragraph from Article 26(7) of MiFIR:

> *'Where transactions have been reported to a trade repository in accordance with Article 9 of Regulation (EU) No 648/2012 which is approved as an ARM and where those reports contain the details required under paragraphs 1, 3 and 9 and are transmitted to the competent authority by the trade repository within the time limit set in paragraph 1, the obligation on the investment firm laid down in paragraph 1 shall be considered to have been complied with.'*

12.2.3 Feedback to the consultation

269. The majority of respondents expressed support for the proposal. Support varied between sectors of the industry. A slight majority of sell-side respondents opposed the proposal

[70] See *supra,* footnote **Error! Bookmark not defined.**
[71] CPMI-IOSCO Technical Guidance on Harmonisation of critical OTC derivatives data elements (other than UTI and UPI): https://www.bis.org/cpmi/publ/d175.pdf, CPMI-IOSCO Technical Guidance on the Harmonisation of the Unique Product Identifier (UPI): https://www.bis.org/cpmi/publ/d169.pdf, CPMI-IOSCO Technical Guidance on the Harmonisation of the Unique Transaction Identifier (UTI): https://www.bis.org/cpmi/publ/d158.pdf,

whereas other respondents, notably from the trading venue, DRSPs, and data vendors-side of the industry overwhelmingly favored the proposal. The only buy-side respondent did not provide explicit support but rather suggested that ESMA should consider adding fields to EMIR reporting to make it sufficient for transaction reporting purposes.

270. Respondents supporting the proposal agreed with ESMA's analysis of differences of the two reporting regimes and of limits in their possible alignment. Alignment of technical aspects and harmonizing the common data elements was supported.

271. Respondents opposing the proposal mostly expressed general concern that the proposal would put an end to the desirable consolidation of reporting requirements and highlighted that double reporting should be avoided. These respondents see some room left to streamline and to reduce reporting requirements and urge ESMA to explore these possibilities.

272. Respondents who did not express explicit disapproval of the proposal joined respondents opposing the proposal in recommending that ESMA consolidates reporting requirements of the two frameworks. Suggestions to achieve this included adding fields to EMIR reporting to make it sufficient for transaction reporting purposes with new fields required only for investment firms, identifying common MiFIR and EMIR data fields and implementing them by adopting the same logic and rationale or exploring the possibilities of reusing information reported under EMIR (or MiFIR) for MiFIR (or EMIR) reporting purposes.

273. Other comments not directly related to the proposal of deletion of paragraph from Article 26(7) of MiFIR were raised. These included harmonising the review cycles of the reporting regime to decrease the burden of frequent implementation or removing ETD reporting from EMIR reporting so that regulators focus only on position reporting. It was also suggested that the MiFIR review should also address remaining inconsistencies with SFTR reporting and in particular to reconsider the treatment of SFTs concluded with EU central banks. Finally, it was suggested for ESMA to launch a technical assessment of current IT architectures underlying different reporting regimes because even if the goals of reporting regimes are different, it should be possible to define a single set of data submitted into a single system and database where the NCAs can access data according to their needs. This was illustrated by the example of commodity derivatives which are reported into four different systems under MiFIR, MiFID, EMIR and REMIT reporting frameworks.

12.2.4 ESMA's assessment and recommendations

274. The feedback received from the respondents has been reviewed and ESMA considers that its proposals should be retained and the relevant paragraph from Article 26(7) should be deleted.

275. As mentioned in paragraphs 269-270 above, certain fundamental differences in the two reporting regimes are due to the different purposes of reporting and should be taken into account to avoid compromising the financial stability and market integrity objectives of the reporting obligations. For example, the information related to lifecycle events concerning e.g. the clearing or compression activity of an investment firm is only relevant for systemic risk detection and is not needed for the purpose of detecting abusive behaviors. This is why MIFIR/MIFIR reporting does not capture post-trade assignments and novations in

derivative contracts where one of the parties is replaced by a third party; or contracts that arise exclusively from clearing and compression activities. For market abuse monitoring it is not necessary for NCAs to be able to link the subsequent lifecycle events to the original transaction since NCAs are primarily interested in the change of position at the time of the execution. Receiving information on such post-trade activities would make it more difficult for the NCAs to conduct their market surveillance activities.

276. Besides the above-mentioned limitation, ESMA supports further alignment of different reporting regimes to the fullest extent and expects to further engage with the industry to identify possibilities for more aligned and effective reporting. As such, ESMA welcomes further suggestions and specific proposals regarding alignment between the MiFIR and EMIR reporting frameworks and has included further recommendations to achive this in the below section.

12.3 Alignment of MiFIR empowerments with EMIR Refit

12.3.1 References to international standards

12.3.1.1 Legal Framework

277. Regulators across the globe have so far been collecting very similar information from market participants in their respective jurisdictions, however in many instances they required different data standards (e.g. business definitions, codes and technical formats). On the one hand, this has resulted in high compliance costs for global market participants; on the other hand, it has created challenges for authorities in understanding the information reported to them and supervising those firms. The international regulatory community has recently shown that global harmonisation of data standards is possible through the development and implementation of the ISO 17442 Legal Entity Identifier (LEI). Ensuring further consistency in legal requirements and in reporting requirements across jurisdictions would bring high benefits for both reporting entities and the regulatory community.

278. In order to further ensure consistency across various reporting requirements, it would be beneficial if the respective EU sectoral legislations on reporting explicitly referred to existing international data standards such as LEI, ISO 10962 Classification of Financial Instruments (CFI), ISO 6166 International Securities Identification Number (ISIN), and the future ones envisaged in global guidance.

279. When reviewing the EMIR technical standards on reporting[72], ESMA has leveraged on the opportunity of the review to align, to the extent feasible, the reporting requirements in the EU with the global guidance in order to foster the data harmonisation and facilitate the reporting to the entities that must comply also with the reporting requirements in other jurisdiction(s). In particular, ESMA has taken into account the international developments of global data standards such as the global guidance regarding the definition, format and

[72] Consultation Paper on Technical Standards on Reporting, Data Quality, Data Access and Registration of Trade Repositories under EMIR Refit, available on ESMA's website: https://www.esma.europa.eu/press-news/consultations/technical-standards-reporting-data-quality-data-access-and-registration

usage of key OTC derivatives data elements reported to TRs, including the Unique Transaction Identifier (UTI), the Unique Product Identifier (UPI) and other critical data elements[73]. In addition, the FSB has recently published[74] a report on the governance arrangements on a Unique Product Identifier for those financial instruments traded OTC and not admitted to trading or traded on trading venues.

12.3.1.2 Proposal in the CP

280. Considering all the data elements envisaged in the new global guidance, ESMA acknowledges that the specific one related to UTI was designed to work for the purpose of TR reporting as it facilitates the pairing and reconciliation process among trade repositories. Given that this function is not relevant for MiFIR reporting purposes, the guidance contains elements that are specific to TR reporting. For example, it considers post-trade events, it gives priority to CCPs when defining the UTI generation responsibility and is envisaged to work for reporting at both transaction and position level. For all these reasons and given that this data element is not foreseen under the current MiFIR reporting regime, ESMA preliminary view is that this data element should not be considered because it is not relevant for MIFIR reporting purposes.

281. However, ESMA believes that there may be merits in considering the application of the other aspects of the global guidance: the Unique Product Identifier (UPI) and other critical data elements, where relevant for MiFIR reporting. Initially developed within the context of TR reporting, some of the critical data elements are also required to be reported under MiFIR.

282. Regarding the reference to global UPI, in April 2019, the FSB designated the Derivatives Service Bureau (DSB) as the service provider for the future UPI system and decided that DSB will perform the function of the sole issuer of UPI codes as well as operator of the UPI reference data library[75]. DSB is a subsidiary of the Association of National Numbering Agencies (ANNA) and generates ISINs for derivatives reported under MiFIR. It is ESMA's understanding that the framework established for ISINs allocation to financial instruments under MiFIR can be leveraged for the purpose of assignment of UPIs for OTC derivatives. Accordingly, ESMA proposals in the review of the EMIR technical standards on reporting assume that the implementation of the UPI under EMIR could in principle be consistent with the ISIN framework[76]. In particular, in the case of realisation of a multi-level identifier hierarchy, the more granular level already used for MiFIR reporting could be retained for the purpose of identifying derivatives that are currently reported under EMIR (in reports submitted to TRs) in order to ensure consistency of reporting under MiFIR and EMIR.

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[73] CPMI-IOSCO Technical Guidance on Harmonisation of critical OTC derivatives data elements (other than UTI and UPI): https://www.bis.org/cpmi/publ/d175.pdf, CPMI-IOSCO Technical Guidance on the Harmonisation of the Unique Product Identifier (UPI): https://www.bis.org/cpmi/publ/d169.pdf; CPMI-IOSCO Technical Guidance on the Harmonisation of the Unique Transaction Identifier (UTI): https://www.bis.org/cpmi/publ/d158.pdf.

[74] Governance arrangements for the UPI. FSB. Published on 9 October 2019 and available on the FBB website: https://www.fsb.org/2019/10/fsb-publishes-upi-governance-arrangements/

[75] For further information refer to: https://www.fsb.org/2019/05/fsb-designates-dsb-as-unique-product-identifier-upi-service-provider/ .

[76] See paragraph 102 of the Consultation Paper on Technical Standards on Reporting, Data Quality, Data Access and Registration of Trade Repositories under EMIR Refit, available on ESMA's website: https://www.esma.europa.eu/press-news/consultations/technical-standards-reporting-data-quality-data-access-and-registration.

283. Taking the above into account, ESMA preliminary view is that the UPI could be considered as an alternative to the ISIN required in the transaction and reference data reports only in the event that the scope of MiFIR reporting was extended beyond ToTV instruments traded via an SI as recommended in section 5.2 of this Final Report. Importantly, ESMA considers that the choice of the ID to be used should not be left to the reporting entities. In order to ensure full alignment with the EMIR reporting requirements that are currently under review, the conditions under which UPI should be used instead of ISIN should be further determined by ESMA. However, ESMA acknowledges that these views are subject to the final implementation of the UPI.

12.3.1.3 Feedback to the consultation

284. While there was overall support for the proposal not to use UTIs for the purpose of MiFIR reporting, respondents were split on the UPI proposal with no clear majority in favor or against the proposal. Indeed, 10 respondents either provided a response that was more relevant to section 12.2 of this Final Report, pointed out that it is too early to provide feedback or provided clarifications without expressing views; this was mostly the case of buy-side respondents.

285. Respondents on the sell-side were split in their opinion of the proposal. Respondents agreeing with the proposal made it conditional on ESMA providing both clear guidance on the residual use of the UPI and a cost-benefit analysis as part of a separate consultation before implementation. Respondents opposing the proposal argued that where both an ISIN and a UPI are available for a trade, the reporting requirements should make clear what identification should be reported as there would be limited value in reporting both ISIN and UPI for the same transaction. They argued out that for MiFIR to remain consistent with global reporting regimes and because the UPI was developed as a global standard of product identifier for OTC derivatives, the UPI should be consistently reported as a product identifier for OTC derivatives and be prioritised over the ISIN.

286. Respondents on the trading venue-, DRSPs-, and data vendors-side of the industry were split based on their activity. Indeed, if MiFIR reporting were to be extended, Regulated Markets would not support the introduction of UPI as an alternative to the ISIN required in the transaction and reference data reports. On the other hand, other trading venues and data vendors argued that UPI should be reported for all OTC derivative transactions and not only for transactions without an ISIN. For the latter group, the views expressed were in line with part of the sell-side respondents in paragraph 290.

12.3.1.4 ESMA’s assessment and recommendations

287. ESMA notes respondents’ overall support for the proposal not to use UTIs for the purpose of MiFIR reporting. Therefore, ESMA considers that its proposal should be retained.

288. As for the use of UPIs, it should be noted that most of respondents that did not support the proposal expressed this view because they did not agree with the extension of the scope of MiFIR reporting beyond what is currently being reported (i.e. TOTV instruments according to the current ESMA opinion). Among these respondents, many claimed that, should an extension of the scope be finally envisaged, they would support the use of the

UPI. Taking this into consideration, it can be concluded that on the matter of use of UPIs under MiFIR, the views were split into two camps:

(a) residual use of UPI. i.e. only for instruments that would be subject to reference data and transaction reporting in the case the scope of MiFIR reporting is extended beyond ToTV instruments traded via an SI or in the case the ToTV concept is extended;

(b) UPI should replace ISINs for all OTC derivatives. I.e. UPI should be reported for all OTC derivative transactions and not only for transactions without an ISIN.

289. Furthermore, in response to the conditions laid out by sell-side respondents supporting the proposal, ESMA highlights that the first condition could be fulfilled by stipulating in the empowerment to ESMA that ESMA should specify the conditions under which UPI should be used. Furthermore, a cost-benefit analysis is automatically envisaged should the European Commission move forward with ESMA's proposal.

290. Given the mixed feedback received, it is proposed that the final report recommends including a general reference to the need to '*take into account international developments and standards agreed upon at Union or global level and their consistency with the reporting under Article 9 of EMIR*'.

291. No specific reference to UPI should be included so that ESMA has flexibility to identify the need for UPI under MiFIR and, if yes, the conditions under which UPIs should be used at a later stage once EMIR Level 2 reporting rules are finalised and the UPI is fully operational.

12.3.2 Frequency and date of the reports

292. Successful implementation of any new reporting requirements can only take place if the industry is granted sufficient time to prepare for reporting under the new rules. Moreover, the industry can work efficiently on the implementation only once all the requirements, including any technical details thereof, are finalised. Too limited timelines as well as lack of detailed guidance and technical requirements make the implementation costly, inefficient and, often, close to impossible to be finalised in a correct and timely manner. These concerns were voiced by many respondents to the EC's Fitness Check. As highlighted in the report on results of the Fitness Check[77], longer implementation timelines, starting from the finalisation of the detailed technical requirements, would decrease the reporting burden and enable companies to better comply with the new requirements.

293. ESMA notes that the observations made in the above report are equally applicable to MiFIR reporting. Under the current MiFIR regime, the lack of sufficient lead-time for implementation was evidenced by the fact that the application date for MiFIR was postponed by one year. ESMA's main argument for supporting the delay was the

[77] Page 9 of the Summary Report of the Public Consultation on the Fitness Check on Supervisory available on the EC website: https://ec.europa.eu/info/sites/info/files/2017-supervisory-reporting-requirements-summary-report_en.pdf

complexity of the IT system needed for the intake and processing of the significant amount of data requested under the Regulation[78].

294. Comparing with the more recent empowerment in EMIR Refit and SFTR, ESMA proposed including into the MiFIR empowerments under Articles 26 and 27 the mandate to specify:

a. '*the frequency of the reports*';

b. '*the date by which financial instrument reference data and transactions are to be reported*'.

12.3.3 Proposal for alignment of MiFIR empowerments with EMIR

295. Considering the analysis outlined in sections 12.3.1 and 12.3.2 above, ESMA proposed to leverage on existing empowerments included in EMIR Refit and SFTR, and aims to harmonize the wording of the empowerments, especially the obligation to take into account the international developments and standards:

Article 26(9)

296. ESMA considers that Article 26(9) of MiFIR should be amended as follows:

'*ESMA shall develop draft regulatory technical standards to specify:*

*(a) data standards and formats for the information to be reported in accordance with paragraph 1 and 3**, which shall include at least the following:***

(i) global legal entity identifiers (LEIs);

(ii) international securities identification numbers (ISINs);

(iii) international classification of financial instruments (CFI);

(b) methods and arrangements for reporting financial transactions and the form and content of such reports;

(c) the date by which transactions are to be reported and the frequency of reports

In developing those draft implementing technical standards, ESMA shall take into account international developments and standards agreed upon at Union or global level, and their consistency with the reporting requirements laid down in Article 4 of Regulation (EU) 2015/2365 (*) and Article 9 of Regulation (EU) No 648/2012 Article 26 of Regulation (EU) No 600/2014.'

[...]

Article 27(3)

[78] Letter of Steven Maijoor to the European Commission on the Implementation timeline for MIFID/MiFIR (ESMA2015/1513) Published on 17 November 2015 and available on the ESMA website: https://www.esma.europa.eu/sites/default/files/library/esma-2015-1513_letter_sm_to_ec_-_implementation_timeline_mifid_mifir.pdf

297. ESMA considers that Article 27(3) of MiFIR should be amended as follows:

ESMA shall develop draft regulatory technical standards to specify:

(a) data standards and formats for the financial instrument reference data in accordance with paragraph 1, ***which shall include at least the following:***

(i) global legal entity identifiers (LEIs);

(ii) international securities identification numbers (ISINs);

(iii) International classification of financial instruments (CFI)

(b) methods and arrangements for supplying the data and any update thereto to competent authorities and transmitting it to ESMA in accordance with paragraph 1, and the form and content of such data;

(c) the date by which reference data are to be reported and the frequency of reports;

(d) technical measures that are necessary in relation to the arrangements to be made by ESMA and the competent authorities pursuant to paragraph 2.

In developing those draft regulatory technical standards, ESMA shall take into account international developments and standards agreed upon at Union or global level, and their consistency with the reporting requirements laid down in Article 4 of Regulation (EU) 2015/2365 and Article 9 of Regulation (EU) No 648/2012.'

[....]

12.3.4 Feedback to the consultation

298. An overwhelming majority of respondents supported the proposal with none opposing it.

299. Respondents supporting the approach urged ESMA to closely collaborate and consult with industry participants and associations. They also pointed out that not all National Numbering Agencies (NNAs) consistently apply the CFI ISO standard and do not follow the logic set out by ESMA. Other practical issues regarding invalid or incorrect CFIs were raised and the respondent raising them urged regulators to make data available through official sources. A respondent also suggested to mandate the renewal of LEI for all parties required in transaction reporting in order to ensure that the LEI reference data is accurate and up-to-date.

300. One of the concerns raised by respondents regards the frequency of reports due to the introduction of possible intraday reporting. Additionally, respondents recurrently stressed the importance of avoiding expensive implementation costs and of providing sufficient implementation time to the industry. Respondents highlighted that flexibility is important in the formulation, so that new data standards can be used as needed.

301. Some respondents who did not support the proposal considered this level of detail in Level 1 to have little value. They suggested that changes to standards can be managed as well in the technical standards.

12.3.5 ESMA's assessment and recommendations

302. The feedback received from the respondents has been reviewed by ESMA. No significant objections were raised by the respondents to the submitted proposal. To address the concerns about intraday frequency of reporting, ESMA confirms that it is not envisaged to introduce intraday reporting. ESMA also confirms that various examples and scenarios will be provided in the guidelines to reporting.

303. Taking into account the broad support from the industry and the clarifications above, ESMA considers that its proposals should be retained. The relevant Article 26(9) and Article 27(3) of MiFIR should be amended as proposed by ESMA.

13 LEI of the issuer of the financial instrument

13.1 Legal framework

304. Under the MiFIR RTS 23 and MAR TS on reference data, trading venues are obliged to identify each issuer of a financial instrument traded on their systems with an LEI when making daily data submission to the Financial Instruments Reference data System (FIRDS).

305. The LEI of the issuer allows for a unique and persistent identification of issuers of financial instruments. This identification is important to support NCAs in their market monitoring activities. The LEI of the issuer is also needed to support ESMA work on transparency as it allows for the identification of the underlying reference entity single name CDS and the issuers of the underlying bond of interest rate derivatives.

306. Finally, the reference data in the LEI database which comes with the LEI code is essential to determine which national authority is responsible for supervising relevant instruments such as bonds and related derivatives. For these instruments, MiFID II says that the responsible supervisor should be the one where the issuer is located even if the instrument is traded elsewhere. For example, where a bond issued by a French issuer is traded in Frankfurt, the NCA receiving the transaction data (BaFin) would need to transfer it to the NCA where the issuer is located (AMF). Given that the information about the location of the issuer is only available in the LEI database, the lack of an LEI for a given financial instrument would mean that it would not be possible to establish which authority is responsible for supervising that instrument.

13.2 Proposal in the CP

307. While the obligation for EU investment firms to identify their clients with the LEI is enshrined in the MiFIR Level 1 framework, this is not the case for the LEI of issuers. Similar to the requirement for clients behind transactions in financial instruments under Article 26 of MiFIR, the use of the LEI to identify the issuer of the financial instrument should also be explicitly referred in Article 27 of MiFIR.

308. In addition to the above, since the start of reference data collection in January 2018, ESMA has observed that there is a general need to identify the fund manager when collecting reference data on funds, including their LEI. ESMA is therefore considering the necessary legislative changes required to accommodate for the inclusion of the LEI of the fund manager in the reporting requirements as specified in RTS 23.

309. In the CP, ESMA proposed that the text of the amended third paragraph of Article 27(1) of MiFIR should read as follows:

> *'Identifying reference data shall be made ready for submission to the competent authority in an electronic and standardised format before trading commences in the financial instrument that it refers to.* ***In reporting the designation to identify the issuer, trading venues and SIs shall use a legal entity identifier established to identify issuers that are legal entities. Issuers of financial instruments shall provide their legal entity identifier to the trading venues or Systematic Internalisers where their instruments are traded or admitted to trading.'***

13.3 Feedback to the consultation

310. While nearly all respondents to this questions across all market sectors concurred with ESMA's assessment of the problem, the majority of them raised concerns with the proposed solution.

311. In respect to the feedback received, it should be highlighted that a common concern is that issuers are not directly subject to MiFIR, thus reporting entities have no effective legal means to force these entities to provide the LEI. Additionally, a few respondents stressed that derivative instruments have no issuers or have multiple issuers. Respondents made the following suggestions:

    (a) some respondents proposed that during the creation process of an ISIN, the issuer should be obliged to apply for a LEI, if the LEI is not yet available;

    (b) some respondents suggested that the field relating to the issuer's LEI should be made optional for secondary market trading;

    (c) it was proposed that reporting parties should be allowed to buy an LEI on behalf of their clients.

13.4 ESMA's assessment and recommendations

312. The feedback received from the respondents has been reviewed and ESMA considers that its proposal should not be retained in its current form. In particular, the current proposal should be accompanied with further amendments to the relevant provisions on admission to trading under MiFIR in order to enhance the legal means that would enable trading venues to obtain the LEI of the issuers traded on their systems.

313. Accordingly, ESMA proposes that, market operators should not make financial instruments available for trading based on their own particular trading rules until they have obtained all relevant instruments' reference data (including the issuer's LEI). In particular, ESMA proposes to include a mirror obligation to obtain the relevant reference data prior to the

commencement of trading under Article 27(1), third paragraph of MiFIR into Articles 51(1) and Article 18(2) of MiFID II which relate to the trading rules of regulated markets and of MTFs and OTFs respectively.

314. ESMA is of the opinion that these amendments would lead to a significant strengthening of the obligation under Article 27(1) of MiFIR as this obligation to make financial instrument reference data '*ready for submission [...] before trading commences*' will need to be embedded into the trading venues' own trading rules as defined in Articles 18(2) and 51(1) of MiFID II.

315. While acknowledging that this amended proposal does not include instruments traded by Systematic Internalisers, ESMA notes that Systematic Internalisers are subject to the obligation to submit reference data for derivative instruments and that such instruments are not considered as having an issuer in the strict sense. In light of this last consideration ESMA also recommends that a specific mandate should be included in Article 27(3) MiFIR to further elaborate the conditions under which the LEI of the issuer is required for the purpose of reference data submissions under Article 27 of MiFIR depending on the specificities related to the financial instrument subject to the reporting obligation.

Annexes

Annex I – Summary of responses to the Consultation Paper

Q1. Do you foresee any challenges for UCITS management companies and AIF managers in providing transaction reports to NCAs? If yes, please explain and provide alternative proposals.

316. The total number of respondents was 43. 16 respondents supported the proposal, 21 respondents did not support the proposal, and 6 had no clear opinion or were neutral.

317. Respondents representing the buy-side were mainly against the proposal. Their responses focused on the added costs associated with being subject to transaction reporting from both higher IT costs and the complexities involved with the system itself.

318. Respondents from the buy-side also requested to run a cost-benefit analysis to assess the impact to the industry.

319. Additionally, some respondents stated that currently there is no un-level playing field between MiFID Investment Firms and AIFM/UCITS management companies authorised to perform MiFID services. It was also highlighted that the current MAR surveillance conducted by the firms themselves should be sufficient to ensure market fairness. Finally, multiple respondents proposed an alternative solution, where the current reporting would be expanded for Investment Firms already subject to MiFIR transaction reporting to include details in the transaction chain.

320. The views from the respondents representing the sell-side were split. The respondents against the proposal argued, like the buy-side, that the proposal would lead to added costs and increased complexity of the reporting regime. The respondents supporting the proposal believed this would help level the playing field between MiFID Investment Firms and AIFM/UCITS management companies. Furthermore, some respondents did not see any additional challenges for the AIFM/UCITS management companies.

321. Views of the respondents categorized as trading venues, Data vendors, and DRSP mainly supported the proposal. The respondents highlighted that many of the AIFM/UCITS management companies already traded on EU regulated trading venues, which meant that implementation costs for the UCITS/AIFM companies should be low. The respondents also highlighted that the requirement in Article 26(5) of MiFIR for trading venues to report transactions conducted by non-MiFID Investment Firms would create overreporting if the proposed change was retained.

322. In addition to the comments raised above, other arguments against the proposal were that this was a political demand as NCAs do not use the data for market surveillance purposes, that the longer chains would add to the complexity when NCAs conduct their surveillance, and, that it would create an unfair playing field post-Brexit between EU and UK AIFM/UCITS.

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

323. The total number of respondents was 34. 21 supported the proposal and 8 respondents did not support the proposal. 5 respondents gave no opinion or comment on the proposal.

324. The 8 respondents on the buy-side supported the proposal unanimously.

325. Of the 18 sell-side respondents, 5 agreed with the proposal, and 8 proposed alternative course of action. Five respondents in this category didn't provide any comment.

326. All 8 sell-side respondents whom opposed the proposal suggested legally defining the term 'firm' rather than changing the text in Article 26(5) of MiFIR. They argued that this way the legibility and thus the clarity of the legal text could be significantly increased.

327. All 11 respondents representing trading venues, data vendors, and data reporting service providers supported the proposed amendment. A few of them raised the following comments.

    (a) Two respondents commented on the ambiguous usage of the phrase 'member or participant which transmitted the order' found in MiFIR 25(3) of MiFIR. In Article 25 the intention is to capture the direct market facing participant sending the order to the venue, whereas in Article 26 and, most notably, in the associated RTS and Guidelines, 'order transmission' refers to reception and transmission of orders in cases other than direct market execution.

    (b) One respondent highlighted a risk that the newly added term 'user' could be interpreted too broadly to mean any firm in the transaction chain not subject to MiFIR. Thus, the respondent proposed to amend the text to clearly state that the 'user' should only mean a user (and a direct participant) of an OTF.

    (c) Some respondents pointed out in their feedback to the previous section the possible double-reporting that could arise when UCITS/AIFMD firms would be obliged to report themselves.

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

328. A vast majority of the respondents do not foresee any issue with the proposal as it reflects the current practice.

329. The total number of respondents was 36. 29 respondents supported the proposal and non was against it. 7 respondents provided no opinion or particular comment.

330. The majority of the respondents agreed that the current way of sending all transactions of branches to the home NCA is a clear, easy, and precise way to send transactions for branches. However, some read the proposal in a slightly different way, with reporting entities having to report to both the home and the host NCA. Those respondents in effect supported the proposal as they suggested to stick to the current approach by sending to the home NCA only.

331. To clarify, the intention of ESMA was and is that firms report transactions, in which a branch is involved, to the home NCA **only**. The home NCA will make sure the host NCA will also receive the transation report.

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

332. The total number of respondents was 32. 21 respondents supported the proposal and 5 did not support the proposal. 6 respondents provided no opinion or comment. However, it is apparent from the feedback received that several respondents did not fully understand the implications of this proposal. A frequent remark was that transaction reports should still be sent to the home NCA of an IF under the revised provisions. ESMA would like to clarify that the proposed changes will have no impact for IFs on the current transaction reporting framework. Indeed, the only goal of the proposal is to strengthen the current legal framework to allow for the possibility of exchanging transaction reports between NCAs on the basis of additional criteria.

333. 5 respondents on the buy-side[79] had no strong objections to the proposal. Among these, one respondent outlined that transaction reports should only be shared between NCAs with robust data security. Two other respondents stressed that, in light of the proposed amendments, IFs should always have to send a single transaction report to their home NCA. Finally, one respondent proposed that transaction reports should be sent directly to ESMA instead to the home NCA.

334. On the sell-side 12 respondents[80] had no strong objections to the proposal, whereas 2 respondents[81] raised concerns. These concerns related to the exchange of transaction reports among NCAs might be in conflict with data protection legislation.

335. On the trading venue, data vendors, and data reporting service providers-side, 4 respondents[82] had no strong objections whereas 3[83] raised similar concerns to the ones raised by the sell-side and outlined in the previous paragraph.

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

336. The total number of respondents was 53. 14 respondents supported the proposal and 33 respondents did not support the proposal. 6 respondents provided no comments or clear position. However, support varied depending on the sector of the industry and opposition was concentrated in the sell-side.

337. The vast majority of sell-side respondents, which also represent the majority of the respondents to this question, disagreed with the SI proposal. They would like to see a transformation of the existing Opinion ESMA70-156-117 into a corresponding Level 1 text. It is evident from the responses that there are a lot of sell-side entities who are against this proposal and believe it will have a detrimental effect to the liquidity of the market and will

[79] AIMA & MFA, Amundi, Natixis, CFA Institute, Retail Derivativev Forum
[80] Amafi, Association of German Public Bank, Assogestioni, Bank of Ireland, Bundesverband deutscher Banken, European Association of Public Bank, German Banking Industry Committee, Italian Banking Association, Landesbank Baden-Württemberg, Amundi, Credit Agricole Group, SSMA (former SSDA)
[81] International Swaps and Derivatives Association and Association of Foreign Banks in Germany
[82] London Stock Exchange Group, Wiener Börse AG, Deutsche Boerse Group, and Euronext
[83] Federation of European Securities Exchange, Tradeweb Europe, and EVIA

only create noise and add to bad data quality. However, the feedback provided by some respondents also made clear that there was a misunderstanding of the scope of this proposal as these respondents understood that all instruments traded on an SI would be covered whereas the proposal would only include derivatives.

338. The buy-side respondents agreed with the proposal put forward. The main benefits identified by the respondents who agreed include:

    (a) aligning with the goal of improving the degree of post-trade transparency data available in respect of OTC derivatives will help support liquidity and price formation to the benefit of all users of the market;

    (b) level the playing field between non equity SIs and trading venues;

    (c) could help support the implementation of a post-trade consolidated tape;

    (d) no significant system change;

    (e) other benefits of introducing this proposal included providing sufficient time to hedge, increased harmonisation with other jurisdictions (mainly USA) and a reduction in systemic risk

339. The majority of trading venues/Data vendors/DRSP respondents agrees with the SI proposal. Their comments were the following:

    (a) Numerous entities believed that if all instruments within FIRDS were deemed reportable under this new proposal, then this would greatly reduce the confusion regarding what is due to be reported and not reported. Entities stated that this new proposal would deliver an even playing field between SIs and trading venues. Increasing transparency was cited as a benefit of implementing this proposal.

    (b) Respondents who supported the proposal also believed Level 1 text should be reviewed to provide a new obligation for SIs to share with counterparts the product ISIN when facing them as an SI (which does not seem to represent additional burden for SIs since the ISIN should be created for their own report to the NCA) if this proposal was to be implemented. Also, it was suggested that ESMA should produce a market “golden source” of SIs, which would be helpful for market participants to identify whether or not the transaction should be reported to the regulator in the first place.

    (c) One respondent suggested that the ISIN concept for OTC-derivatives is expensive and non-functional (MiFID works only properly for highly standardized products as equities, bonds and exchange-traded derivatives) and suggested the derivatives ISIN concept shall be replaced by a UPI (unified payment interface) concept with the following advantages :CFI code enhanced by sufficient differentiation criteria and maturity date; such a concept allows all relevant market participants to produce a UPI by themselves; this procedure avoids that products with the same features are reported serval times with different ISINs from different issuers (which would be the case if for derivatives the LEI of the issuer of the financial instrument would be additionally introduced and trading venues and SIs would have to report reference data for the same products).

340. Some sell-side respondents feel the narrow interpretation of ToTV should be kept with the removal of the notion of SI for Bonds and Derivatives.

341. One respondent stated that instead of extending the scope of instruments under MiFIR reporting (duplicating with EMIR), in RTS 2, RTS 22 and RTS 23, and instead of extending the size of the unnecessary ISIN factory for non-ToTV derivatives, we should focus on the following core objectives: data quality improvement on the current scope of instruments, simplification and streamlining of the regulatory reporting requirements. access of the transparency data, and set-up of the consolidated tape.

342. Many respondents referenced the need for a phased approach while noting that MiFIR is not even 3 years old. It was noted that MiFIR covers the whole range of asset classes, shares, bonds and derivatives and that we keep attempting massive changes.

343. Greater use of the existing ANNA-DSB data was suggested as a better solution to improve transparency for regulators. The respondent stated that ANNA-DSB already has visibility over which entities are creating and requesting ISINs. If the ISIN framework were also to be amended to better suit transparency needs this would have more significant benefits without expanding the current scope and scale of reporting.

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

344. The total number of respondents was 43. 24 respondents supported the proposal and 17 respondents did not support the proposal. 2 respondents provided no comments or clear position.

345. It should be noted that many respondents disagreeing with the previous proposal (question 5 in the Consultation Paper[84]) simply reiterated their disagreement to that proposal rather than focusing their feedback on whether it should apply to all SIs or not. As such, they did not provide comments on this proposal beyond simple disagreement. This is especially true of banking associations.

346. The 13 respondents from the buy-side almost exclusively supported the proposal; only 2 opposed the proposal. Respondents on the buy-side who supported the proposal raised the following points in its support:

    (a) 4 respondents highlighted the importance of this proposal for the derivatives asset classes, where continuing data quality issues mean that the mandatory SI regime fails to capture many firms that are in practice acting as SIs in particular sub-asset classes.

    (b) 5 respondents supported the proposal because the alternative would give rise to double reporting standards between different SI regime and which would likely lead to a reduction in investment firms becoming an SI on a voluntary basis.

[84] https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

(c) 2 respondents also mentioned that this proposal would lead to less complexity.

347. While the 2 sell-side respondents who did not support the proposal mostly reiterated their opposition to the previous proposal, one respondent suggested to include SIs on a mandatory basis only in order not to discourage intermediaries from opting-in especially in the critical economic scenario due to the pandemic.

348. The 19 respondents on the sell-side, a majority (15 respondents) voiced opposition to the proposal but of those almost all were simply repeating their criticism of the extension of the ToTV concept without offering criticism specific to this proposal. The respondents that did offer a response specific to this proposal supported the application of the extension to all SIs, even if they didn't not support an extension in general.

349. Many sell-side respondents opposing the proposal did so by arguing that the resulting volume of transactions would be too overwhelming for NCAs and ESMA to make use of, thus making the proposal an unnecessary burden on SIs. The number brought forward by these respondents to justify this claim was an increase of 40 million instruments to be reported daily.

350. Seven respondents from the same jurisdiction suggested transforming the existing ESMA Public Statement on the ToTV concept into a corresponding Level 1 text.

351. One respondent opposed the proposal because it does not think the SI concept has any reason to exist in the bonds and derivatives market as it leads to confusion and misunderstanding. This respondent suggested that the scope of transaction reporting and post-trade reporting should be based on the nature of the instruments and apply to all investment firms and should be set-up in the most optimal reporting framework, by feeding the data from the instrument data reference golden sources.

352. One respondent said that if the extension were to move forward, it should be applied only to those SIs offering quotes for standardized derivatives on a continuous basis or make public prices at which they are willing to trade them, whereas excluding those SIs whose business model only envisages answering to RFQs, where derivatives main reference data are non-standardized.

353. One respondent opposed voluntary SIs being included in an extension ny arguing that for them the benefits to transparency would be disproportionately low relative to the costs for these SIs of being included in the extension.

354. All 6 respondents representing trading venues, data vendors, and data reporting service providers supported the proposal. These respondents raised the following points in its support:

(a) 3 respondents cited unnecessary complexity in not including all Sis;

(b) 1 respondent cited increased transparency as the reason for its support.

355. Of the other 2 respondents, one supported the proposal because it views that from a reporting standpoint, there is no difference between a mandatory or voluntary SI: both of them are centralising transactions, often using platforms that could be easily leveraged for transaction, position and reference data reporting.

Q7. Do you envisage any challenges with the approach described in paragraphs 45-46 on the scope of transactions to be covered by the extension? Please justify your

position and indicate your preferred option for SIs under the mandatory regime explaining for which reasons. If you disagree with all of the outlined options, please suggest alternatives.

356. The total number of respondents was 50. 12 respondents supported proposal 1, 5 porposal 5, and 2 proposal 3. 29 respondents supported none of the porposals.

357. The 3 buy-side respondents favored option 1 and argued it was the most straightforward to implement.

358. On the sell-side, 27 respondents did not support any proposal. 4 supported option 1, 4 supported option 2, and 1 supported option 3.

(a) The large number of respondents opposing all proposals came from banks. They argued that the proposed changes will have significant system impact,will discourage firms from being SIs, will impact derivatives that are illiquid and non standardized, will create noise and will have a detrimental effect on derivative market.

(b) Proprietary firms see option 1 as a good balance between more transparency for more standardised instruments and no extra transparency for bespoke instruments.

359. Of respondents from the trading venue-, DRSPs-, and data vendors-side of the industry, 5 favoured option 1, 1 in favoured option 2, and 1 in favoured option 3. 2 respondents were against all the proposals.

Q8. Do you foresee any challenges with the proposal to replace the reference to the term 'index' in Article 26(2)(c) with the term 'benchmark' as defined under the BMR? If yes, please explain and provide alternative proposals.

360. The total number of respondents was 36 with 14 not seeing obstacles to the proposed approach and 17 raising some issues. In terms of overall number of respondents, those asking for the reference to 'index' to remain as it is were fewer than those who agreed with the replacement of the term 'index' with the term 'benchmark' as defined under the BMR.

361. No respondents representing the buy-side answered this question.

362. Views of the respondents representing sell-side institutions, trading venues and data service providers were split regarding the proposal. A slight majority of sell-side respondents saw issues in the proposed approach, while a slight majority of trading venues and data service providers supported the proposal. Most disagreeing respondents did not provide any alternative suggestions.

363. Out of the sell-side institutions that identified problems in the proposed approach, most were questioning the way in which the potentially upcoming ESMA benchmark register would or would not be considered as a "golden source", and the consequences if a benchmark is erroneously absent from that register.

364. One market participants acting as both data service provider and trading venue argued that the dependence on a new register would add complexity to the reporting logic, leading to increased costs. Conversely, one respondent representing trading venues participants

highlighted the importance of having the ESMA benchmark register operational before this change could be applied.

365. Many respondents across industry sectors highlighted the unclear scope of application of the current BMR. They argued that the scope of the 'benchmark' definition is not clear and that additional uncertainty comes from the fact that BMR is currently under review. One respondent specifically pointed to the unclear interpretation of the term *'being made available to public'*, which in their view might lead to an unnecessary wide scope. Moreover, the respondent highlighted the fact that BMR Article 3(1)(16) brings in scope instruments traded on an SI, which might create an unintended dependency between the ongoing MiFIR review and BMR.

366. In addition, many disagreeing respondents seemed to be concerned by the increased scope of reporting. However, these concerns were not elaborated further and possibly were related more to question 9 on the options around the scope of benchmarks to be included in the reporting.

Q9. Which of the three options described do you consider the most appropriate? Please explain for which reasons and specify the advantages and disadvantages of the outlined options. If you disagree with all of the outlined please suggest alternatives.

367. The total number of respondents was 40, with 3 supporting option 1, 24 supporting option 3, and 8 opposing all options. 5 respondents had no clear opinion or no comment.

368. No respondents representing buy-side answered this question.

369. There were in total 27 respondents on the sell-side, a majority of which expressed a preference for option 3. A common argument put forth was that this option most closely resembles the current situation (i.e. *status quo*) and would therefore be less burdersome for reporting entities to implement. Furthermore, respondents expressed that this option would not extend the scope beyond what is relevant for market abuse surveillance purposes, and, thus remain in line with the intention of the reporting regime as expressed *inter alia* in the MiFIR recitals. As the option in turn relies on the inclusion of the benchmark definition under the BMR in the wording of Article 26(2)(c), it was also emphasized by some respondents that this reference should only be used to have a clearer definition of what is reportable and by no means used to extend the scope or require more information to be reported.

370. Among trading venue, data vendors, and data service providers respondents views were split. Respondents supporting option 1 emphasized its simplicity of implementation and the importance of bringing more instruments relevant for broader market monitoring purposes into the scope of transaction reporting. Among the respondents not favouring any of the options, one argued that a deviation from the current regime would add another burden in terms of complex logistical changes that market participants would need to implement in order to consult the ESMA Benchmark registry to assess the range of reportable instruments. The respondent emphasized the importance of investment firms being able to clearly identify if a traded instrument is reportable, regardless of the retained option. All other trading venue respondents (4) were supportive of option 3, with supportive arguments echoing those already outlined in paragraph 367.

371. Overall options 1 and 2 were heavily opposed by respondents although option 1 received some support from the trading venue/DRSP/data vendor sector (3/9). Respondents argued against these proposals on the basis that they would result in a substantially increased operational burden for reporting entities due to either a largely extended scope of reportable instruments (option 1) or an overly complex logic to decompose benchmarks (option 2). Respondents argued that sufficient arguments had not been provided to justify the need for this extra information from a market abuse surveillance perspective.

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

372. The total number of respondents was 29, with 20 supporting the proposal and none not supporting the proposal. 9 respondents had no opinion or comment or only made general remarks.

373. Respondents on the buy-side, including respective trade associations, did not raise any concerns.

374. A minority of sell-side respondents from one jurisdiction [85] raised a general concern regarding quality deficiencies of the FIRDS database. They advised to upgrade the system so that the database's contents could meet usual quality requirements and allow for automated processing.

375. Respondents categorized as trading venues, data vendors or DRSPs did not raise any concerns.

376. Other respondents did not raise any concerns.

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

377. The total number of respondents was 29. 19 respondents supported the proposal, 4 did not supporting the proposal, and 6 specified no opinion or did not comment.

378. Respondents on the buy-side, including respective trade associations, did not raise any concerns.

379. One respondent from one jursidiction commented that the proposed amendment to Article 27 would not meet the requirements of Article 26 of MiFIR. According to these respondents this would be the case since the only instruments that fall under the scope of transaction reporting are those where an admission to trading had already been requested, or an admission to trading or trading had taken place. These repondents highlighted that under Article 26 MiFIR there was no transaction reporting requirement for instruments where there had only been an approval by the issuer without the instrument being admitted to trading or actually traded.

[85] This group notably includes Association of German Public Banks, Bundesverband deutscher Banken, German Banking Industry Committee, Commerzbank AG, Deutsche WertpapierService Bank AG

380. One association representing Trading Venues participants, commented that it should be clarified that this proposal only applies to cash equities and that it should be taken into account that there are financial instruments without an issuer (other than the trading venue where they are traded). Additionally, this respondent highlighted that although forwards on financial instruments are derivatives, the approach might add a second set of reference data on the same instrument if treated as pre-issued cash. This respondent also shared concerns that if reference data reporting is applied at an earlier stage to bonds, liquidity could be encouraged to move away from trading venues

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

381. The total number of respondents was 30. 17 respondents supported the proposal and 8 did not support the proposal. 5 respondents provided no opinion orcomment.

382. The 2 respondents on the buy-side had no objections to the proposal.

383. On the sell-side, 6 respondents had no objections whereas 6 respondents raised concerns. The concerns this latter group raised pointed at a misalignment between Article 26(2)(a) of MiFIR and Article 27(1) of MiFIR that would still continue to exist. However, these concerns are not justified as this specific misalignment will be eliminated by the above-mentioned amendment.

384. On the trading venue, data vendors, and data reporting service providers-side, 9 respondents had no substantial objections whereas 2 respondents raised concerns. The most important concern in this context relates to the definition of the term '*request for admission to trading*'. Indeed, respondents stressed that interpretation of this term could differ between market participants. Therefore, respondents commented that ESMA needs to provide further guidance to ensure the starting point for the submission of financial instruments' reference data is the same across the EU in case of a request for admission to trading.

385. Other concerns relate to the envisaged replacement of the terms '*regulated markets, MTFs and OTFs*' by '*trading venues*'.

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

386. The total number of respondents was 37. 7 respondents supported the proposal and 24 did not support the proposal. 7 respondents provided no opinion or comment.

387. Respondents opposed to the proposal, mostly on the sell-side, raised the following comments:

(a) Many respondents argued that they did not see any advantage to populate non-ToTV instruments in FIRDS. On the other hand, the number of ToTV records in FIRDS would significantly increase which would lead to reconciliation errors.

(b) One respondent raised concerns that currently SIs are only obliged to report uToTV instruments. The extension to all non-ToTV instruments (e.g. FX derivatives) would

mean a significant change that would on the one hand have a negative impact on client choice and cost and, on the other hand, would not increase the quality of the data, since such products were in most cases non-standardized for meeting specific client needs.

(c) Many respondents suggested as alternative solution to rely on a golden source for instrument reference data such as ANNA, ANNA DSB, GLEIF and ISO, without passing it through SIs (and even trading venues). They also raised the idea of a "super golden source" to which data could be sent by of the mentioned entities and that can be accessed by regulators and market participants.

(d) Respondents were also concerned that this extension might lead to a misunderstanding of the market, since FIRDS data users might get the impression that there was a lot more activity in certain instrument types, than there actually is. As an example they mentioned around 200.000 bonds actually reported to FITRS, while liquid trading only takes place in around 1.000 of them.

(e) One respondent argued that making available to the public all ISINs traded on the SI platform could lead to a situation, where other market participants use that information to trade "against" the SI, meaning that they will offer SIs very low prices, since they know that the SI has large positions he needs to sell. In turn, next time the SI will reduce the liquidity or increase the price to avoid a loss of money. Therefore, they argue, should be no level playing field between trading venues and SIs but between trading venue and trading venue and another level playing field between SIs and other market participants.

(f) In addition, they have the concern that NCAs might set up a new "RTS 22 acceptance check" on the presence of ISIN and SI MIC in FIRDS for non-ToTV instruments".

(g) Other respondents are concerned that some of the terms used in the context of FIRDS (such as 'issuer' or 'admitted to trading') would be misleading for those instruments.

(h) One respondents asked for further specifying the text of Article 27 MiFIR to clarifiy that the scope for SIs should be limited to 'derivatives', rather than 'financial instruments'.

388. Responses from trading venues and investors associations were broadly supportive of the proposal. They mainly argue, that there should be a level playing field between trading venues and SIs, and that the same rules should apply for SIs as for trading venues.

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

389. The total number of respondents was 27. 7 respondents supported the proposal and 12 did not support the proposal. 8 respondents provided no opinion or comment.

390. The 8 respondents on the buy-side, including respective trade associations did not raise any specific comment on this point of the consultation.

391. The 12 respondents on the sell-side, including respective trade associations, did not support the proposal presented in the CP in general. They raised the following comments:

    (a) Firms currently acting as SIs mentioned that the current regime should not be changed in a way that would treat them equally to a Regulated Market operating on the basis of a defined list.

    (b) An additional industry proposal was to rely more on external data sources for instrument reference data (e.g. ANNA).

392. The 7 respondents on the trading venue-, Data vendors-, and DRSP-side of the industry generally welcomed the proposal by ESMA. They argued that the approach has clear benefits as it is easy to implement, less error prone, and thus leads to better data quality.

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

393. The total number of respondents was 37. 6 respondents supported the proposal, 27 not supporting the proposal, and 4 with no opinion/comment.

394. Respondents on the sell-side, including respective trade associations, raised the following concerns:

    (a) They commented on the excessive burden for SIs to adapt to the proposed approach, as their business model is not based on a defined list. They continuously raises that SIs are not market operators and should therefore not be treated identically. Indeed, they said that SIs have voluntarily opted in-for providing services to clients, such as post trade transparency reporting. They argued that with the proposal they would now need to suffer for this decision. Additionally one respondent mentions that such a burden would discourage them from offering niche products.

    (b) Respondents also questioned the added value of the given proposal and pointed to the costs associated. They said they would request an in depth analysis if ESMA continues on that route.

    (c) Several respondents questioned the technical capabilities of FIRDS system to handle such high volumes (they mention millions of instruments per day) of data on a daily basis and would rather draw ESMA's attention to the data quality and current deficiencies of the system. As an example they mention sending reminder files for instruments not being terminated after maturity date. They argued that the termination process seems to be not well communicated by ESMA.

    (d) Some respondents said taht current proposal lacks clarity on when an instrument shall be considered to cease to be traded on an SI.

    (e) Some other respondents again recommend to rely on a golden source of reference data like ANNA and to duplicative data bases.

395. Respondents on the trading venue-, DRSPs-, and data vendors-side of the industry see a huge additional burden with no or just little benefit. They proposed that submission of delta files, which is a well-established process according to the respondents, would reduce the

volume of data transmissions. They argued that ESMA's proposal would punish correctly terminating instruments, while ESMA should focus on those that fail to do so, e.g. sending reminders after maturity date.

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

396. The total number of respondents was 26. 11 respondents supported the proposal, 11 not supporting the proposal, and 4 with no opinion/comment.

397. Respondents on the buy-side, including respective trade associations, did not raise any concerns.

398. Respondents on the sell-side, including respective trade associations had 15 such firms responding. Of these, 11 disagreed with the proposal. However, based on the responses received from these disagreeing firms it would appear these respondents misunderstood or misinterpreted the question. Indeed, responses refered to increased costs for firms to implement with no corresponding analysis by ESMA and an increased burden this change will have on SIs.

399. The 6 respondents representing Trading Venue participants, including respective trade associations, did not raise any concerns.

400. 4 other respondents did not raise any concerns.

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

401. The total number of respondents was 25. 18 respondents supported the proposal, 3 did not support the proposal, and 4 had no opinion or comment on it.

402. Respondents on the buy-side, including respective trade associations, did not raise any concerns.

403. 3 respondents on the sell-side, including respective trade associations, raised concerns that MAR only refers to ToTV and uToTV instruments and would not be extended to non ToTV ones. Therefore, the concept of reference data reporting should not be extended to SIs either, since MAR only refers to market operators of regulated markets and investment firms and market operators operating an MTF or an OTF.

404. Respondents representing Trading Venue participants did not raise any concerns.

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

405. The total number of respondents was 45. 4 respondents supported the proposal and 38 respondents did not support it. 3 respondents provided no opinion or comment.

406. The 37 respondents on the buy- and sell-side, the majority of which opposed the proposal, raised the following comments:

(a) many respondents are concerned by treating SIs similar as trading venues. The main argument brought forward by these respondents is that there´s a legal distinction between them and that the approach would override the current legislation. Moreover, the administrative task to generate a code is seen as highly cost intensive and will force complexity in transaction reporting;

(b) respondents also highlightedthat the dissemination of the TVTIC is resulting in inconsistent methods of the generation process and the dissemination ultimately impacts the accuracy of the data reported. Indeed, there were concerns from respondents that the actual TVTIC is not codified in a consistent manner among the different trading venues. Thus, respondents called to focus on the review of the existing TVTIC. Furthermore, they argued, these issues highlight where the expansion of the TVTIC and the relating creation of a new ID will increase complexity to the reporting process;

(c) additionally, some respondents were concerned that transactions will not comply with the obligations if Non-EEA entities are involved in the transaction chain and that the extension of the TVTIC will require considerable IT development, implementation, and organizational effort on the part of each SI. This is especially the case for the generation of a TVTIC or a new code (similar to the complex code ID) for reports with INTERNAL code (INTC) which is seen as cost intensive;

(d) some buy- and sell-side respondents were concerned that these dependencies create several risks (delayed reporting, not reporting, potential errors). Moreover, the process of forwarding the codes to business partners is seen as a difficult technical challenge due to different IT systems. Additionally, respondents argued that the proposed approach to identify “chains of transactions” presents a considerable implementation problem;

(e) in general, respondents viewed the proposal for ‘INTC’ transactions ID as a smaller challenge since there is only one IF involved and the exchange process is an internal one.

407. The majority of respondents representing the trading venues, data vendors, and DRSP agreed with the inclusion of SIs in the scope of the TVTIC and did not foresee any challenges with the approach of generating a TVTIC for transactions executed by an SI. They raised the following comments:

(a) respondents argued that if a rule of responsibility for generating this TVTIC were to be given (eg. both counterparties are SIs), then this would support clarification. They said that it would provide clarity on where the transaction has been executed and that it would support level-playing field between trading venues and Sis;

(b) with regard to the proposal for the INTERNAL ID code some respondents argued that NCAs would benefit as they could identify the market legs that pertain to the client legs when grouping orders;

(c) finally, respondents argued that introducing a new field in the transactions reporting file would have an IT impact and that therefore a cost-benefit assessment should to be made.

Q19. Do you foresee any difficulties with the implementation of an additional code generated by the trading venue to be disseminated down the transaction chain in order to link all transactions pertaining to the same execution? If yes, please explain and provide alternative proposals.

408. The trading venue to be disseminated down the transaction chain in order to link all transactions pertaining to the same execution, the total number of respondents was 47. None of the respondents supported the proposal and 42 did not support the proposal. 5 respondents provided no opinion or comment.

409. The one respondent on the buy-side did not support the proposal. The respondent said it understood the benefit of creating a unique identifier throughout the transaction chain, but warned about the difficulty of implementation for all investment firms. Additionally, the respondent illustrated this difficulty (if it is the TVTIC) in the case of grouping orders given that such orders can be segmented on several Trading Venues.

410. Of the 27 respondents from the sell-side, 26 did not support the proposal and one respondent didn't express views. These respondents raised the following comments:

(a) 22 respondents mentioned the difficulty and complexity of implementation and the strong risk of not having an efficient system. Therefore, they argued the new identifiers to make the links between transactions would not be of good quality and not usable for analysis.

(b) 10 respondents argued against the proposal because of the cost of implementation. This point is often linked with the question of the benefit of such an implementation - sometimes considering that the links between transactions of the same execution can be performed by other means today (price, quantity, trade date, counterparts… or using other reporting files containing identifiers which permit to do the link).

(c) 8 respondents were strongly opposed to the idea of including organised trading platforms from outside the EU. They argued it is close to impossible to get theses 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.

(d) 13 respondents mentioned problematic declarative schemes for the use of TVTIC as a unique identifier to disseminate in the transaction chain. The most common are the cases of aggregate client account (INTC) or OTC executions.

411. Of the 10 respondents representing trading venues, data vendors, and DRSPs, 9 didn't support the proposal and one expressed no opinion. 5 respondents who did not support the proposal argued their position with the issue of cost and complexity. 2 respondents suggested that ESMA should also ensure that the new requested data is not yet reported in other reporting files such as orders reporting (RTS 24).

412. Of the 9 other respondents, 6 did not support the proposal and 3 respondents expressed no opinion. While the arguments of difficulty and costs are also put forward by this group

of respondents, 2 respondents argued that it would not result in particular challenges if clear guidelines were produced regarding how the codes should be structured.

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

413. The total number of respondents was 46, with 17 responses explicitely relating to the use of LEI and personal identifiers, and 36 responses pertaining to client categorisation. 12 respondents supported the proposal on LEI and identifiers 2 respondents did not support the proposal to report client, and no respondent supported the inclusion of client categorisation.

414. 2 respondents on the buy-side raised the following comments. They objected to the requirement to identify end clients, especially in the light of the extension of the transaction reporting scope to AIFM and UCIT managers. Such an implementation would cause costs, where the benefit is questioned.

415. On the sell-side, the EACB pointed out that information on end client and decision maker can only be provided for the investment firm's own client, not for the counterparty.

416. No respondent supported the introduction of the MiFID client categorisation. The main arguments include:

    (a) the information is not pertinent for market surveillance purpose;

    (b) reporting parties would need to collect the information from another system and the reporting schema would have to be amended. Therefore, the cost for the industry would be disproportionate, while the NCA may obtain the information via ad hoc requests;

    (c) Client classification may vary over time or depending on the category of financial instruments or service; it would be a challenge to categorise a client differently for different service;

    (d) Categorisation of a client may vary across firms, depending on opt-ins and trading history.

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

417. The total number of respondents was 31. 17 respondents supported the proposal and 6 respondents did not support the proposal. 5 respondents had no opinion or made no specificcomment.

418. One respondent from the buy-side answered this question and opposed ESMA's proposal. The respondent raised that since the algo ID is not used by the majority of NCAs, it should be removed to limit the amount of information that has to be reported.

419. Out of 20 sell-side respondents, 8 respondents supported the proposal, 6 opposed the proposal, and 6 did not take position. The main argument raised by the respondents opposed to ESMA's proposal is the same as the one raised by the buy-side respondent.

420. Out of the 10 respondents representing trading venues, data vendors, and data reporting service providers, 9 respondents supported the proposal and one respondent opposed it. The respondents supportive of the proposal made the following comments:

    (a) some respondents mentioned that this indicator is useful to monitor IF compliance with their authorized activities;

    (b) 1 respondent mentioned no issue with the proposal as the information already needs to be collected for order record keeping purposes, adding that a decision to consider the algo ID as non-relevant information needs to be assessed on a wider basis;

    (c) 1 respondent emphasized the need for ESMA to unify European and national's requirements with this respect.

421. The one respondent from this category that opposed the proposal raised the previously seen argument that the Algo ID is not used by a majority of NCAs while the costs of including it for reporting entities is high.

422. 1 respondent from this category, whom did not oppose nor supporte the proposal, mentioned that ESMA could clarify the definition of what constitutes of a trading algorithm since it seems to capture more than that of was originally intended.

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

423. The total number of respondents was 40. All respondents supported the proposal to remove the short sale indicator.

424. Respondents unanimously advocated in favour of the first option in the proposal (removal of the indicator). Furthermore, they strongly opposed trying to adapt the current indicator, which might risk in creating a new definition that could replace the current one. This is due to the incompatibility of the legal requirements of the Short Selling Regulation net short positions and MiFIR transaction reporting.

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

425. The total number of respondents was 31. All respondents supported the proposal to remove the short sale indicator and 3 of those had no specific comment regarding this questions.

426. Sell-side respondents are univocally in favour of option A to remove the Shortselling indicator from transaction reporting. They argue that NCAs will be able to focus on the core data quality and they overall would support a simplification and streamlining of the entire reporting regime(s). They also remark a longer phase in period, as MiFIR has just been established 3 years ago and already underwent changes (e.g. XML change). One association also proposes to focus on more controls of data and mentions that for example HFT firms can easily avoid populating Algo ID's.

427. Some respondents on the trading venue-, DRSPs-, and data vendors-side of the industry mentioned that its application within MiFIR transaction reporting cannot be reconciled, so it will be too complicated for poor outcome.

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

428. The total number of respondents was 30. 9 respondents supported the proposal and 18 respondents did not support the proposal. 3 respondents provided no opinion or comment.

429. The 3 buy-side respondents did not foresee specific challenges related to the proposed approach. However, they acknowledged the increased burden that may potentially arise on SIs.

430. Of the 14 sell-side respondents, most, highlighted the challenges of the proposed approach, particularly from the point of view of costs and operational issues for the implementation. In fact, although the information on the use of pre-trade waivers per trade is available on the in-house databases of investment firms, a costly investment would be needed to make this specific information available on the transaction reporting information flow. Additionally, two respondents warned that ESMA addressed proposals to amend the pre-trade transparency regime in two previous consultation papers, recommending to avoid further changes to the approach until the outcomes of the other outstanding changes are known.

431. The 10 respondents categorized as trading venues, data vendors, and data reporting service providers were in favour of the proposal, as they believe it would provide a level playing field between SIs and trading venues. One respondent also pointed out the need for clarification on whether the waiver should be included in both counterparties' reports, or only in the report provided by the SI.

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

432. The total number of respondents was 25. 19 supported the proposal and 2 respondents did not support it. 4 respondents provided no opinion or comment.

433. The 2 buy-side respondents highlighted that the population of these flags increases the burden on investment firms and SIs, without a clear benefit for the industry.

434. On the sell-side, there were 10 respondents, a majority of whom supported the proposal. They raised the following comments:

    (a) most respondents underlined the different scope of transparency and transaction reporting obligations, as well as the challenging and costly activities carried out to gather the OTC post-trade transparency indicator. In this respect, one respondent pointed out that investment firms may outsource this eligibility and flag definition to their APAs, but conversely, as the an other respondent highlighted, no

requirements exist for ARMs/APAs to pass on this information free of charge to market participants;

(b) 1 respondent recommended an approach based alternatively either on requiring only those parties that are responsible for the pre-trade transparency waiver for on-venue executions to populate the waiver indicator on their transaction reports, or adopting a coordinated approach to the provision of the waiver indicator and post-trade indicator flag from trading venues to investment firms;

(c) 1 respondent proposed to require transaction reports to be populated only if the default deferral regime is being over-ridden. The respondent asked for higher clarity about the value added by having the flags in the transaction reports.

435. Of the 8 respondents representing trading venues, data vendors, and data reporting service providers, a majority indicated that they did not face difficulties in applying the requirements under discussion. One respondent drew attention to the need for further clarifications on the application of the post-trade and commodity derivative indicators should be better clarified, particularly for AMND and CANC flags for the OTC post-trade field. The same respondent highlighted that, concerning the commodity derivative indicator, it seems there is a lack of understanding of the meaning of the field.

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

436. The total number of respondents was 21. 15 respondents supported the proposal and 6 did not support it.

437. Almost all the respondents foresaw benefits in using the MiFIR transaction reporting regime to convey the content of reporting requirements under Article 5(3) of MAR.

438. Some respondents opposed keeping the reporting requirements under Article 5(3) of MAR once the new flag is implemented in the MiFIR transaction reporting regime as they forsee a transitional period of double reporting.

439. Finally, some respondents warned ESMA of the time and effort needed to implement any evolutions on the XSD schema.

440. One respondent, a trading venue, stated that the proposal would add complexity for non-MIFID firms' reports.

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

441. The total number of respondents was 32. 6 respondents supported the proposal and 26 respondents did not support it. Thus, preferred way forward was the maintaining of the current *status quo*.

442. The 4 buy-side respondents were split equally in their support and opposition to the proposal. The respondents raised the following comments:

(a) The respondents against the proposal focused on the necessity that transmitting firms who have these issues should make the necessary investments themselves to be able to report.

(b) One respondent supporting the proposal was suggested that it needs to remain an optional measure.

443. The 19 sell-side respondents strongly disagreed with the proposal and raised the following comments:

(a) 5 respondents from the same jurisdiction argued that under the principle of contractual liberty it seems that proposal is intervening in civil law, while it's not comprehensible that transmitting investment firms, the "small" investment firms, are favored at the expense of "larger" investment firms.

(b) 3 respondents argued that smaller firms still have the responsibility to capture and transmit the required data in the first place. They continued by saying that most investment firms, including the less sophisticated or smaller entities, have already built systems to either report transactions themselves or to submit relevant information to third-party service providers and will still have to transaction report when trading with or transmitting orders to non-EU entities.

(c) 3 respondents were concerned about privacy because without agreement, receiving firms are simply being forwarded details of the relevant investment or execution decision-makers.

(d) 3 respondents argued that the proposal creates a legal responsibility for market makers and RTOs on information on which they have an entire external dependency and introduces complexities regarding data reconciliation between transmitting and receiving firms.

(e) 3 respondents highlighted that receiving firms might need to make further investments because their reporting systems have not been designed to handle all of the decision-making scenarios or different national identification formats for natural persons that the transmitting firm would need to report.

(f) 1 respondent said that the proposal would create the risk of errors and untimely reporting because smaller firms may still struggle to provide the necessary data to the reporting firm in a correct and timely manner.

444. Of the 5 respondents representing trading venues, data vendors, and data reporting service providers, 3 were in favor of the proposal and 2 objected to it. The comments raised were the following:

(a) the 3 respondents supporting the proposal suggested an addition to the end of the proposal: ' *… or directly onto a trading venue*.';

(b) the 2 respondents who objected to ESMA's proposal raised the concern that it would potentially only help a minority of firms. In their view, the receiving firms will be almost in the enforced position of an ARM, by monitoring all inbound order messages for completeness and accuracy and ensuring technological solutions in place to process them. Moreover, it was expressed that the proposed change would also lead to problems with the best execution when using automatic order routing

via a smart order router set up, with several brokers and investment firms as potential receiving firms of these orders.

445. Of the 4 other respondents, 3 categorically disagreed with the proposal, which in their view is unreasonable and unbalanced, passing the burden of reporting to other firms down the transmission chain. They also put forward the issue that most IFs did not want to report on behalf of other IFs due to the need to receive client and decision-maker personal data (i.e. national IDs) from the transmitting firm. Additionally, they also considered that the proposal places a burden on the receiving firm to ensure reporting accuracy when the accuracy of their transaction report is dependent on the transmitting firm.

446. The one other respondent whom agreed with the proposal supported the idea that the liability should remain with the transmitting investment firm for not providing accurate data.

447. Few respondents raised comments and recommendations with regards to these proposals. There is a further need to clarify the requirements of field 25 ‘Transmission of Order Indicator’ and also further guidance supplemented with a clear definition of transmission, particularly how this relates to the investment service of 'reception and transmission of orders concerning one or more financial instruments', which has not been defined in Article 4 of MiFID.

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

448. ESMA received 29 responses from the industry, which overall supported the original proposal not to change the provision. The proposal received the support of 26 entities and one negative response, while two respondents provided no comments.

449. One respondent from the buy-side with ESMA’s proposal not to change the provision because considered already clear in the current wording.

450. ESMA received 15 responses from the sell-side of the industry. They largely supported ESMA’s proposal not to change the provision. Two respondents argued that ESMA should clarify the necessary actions that should be taken by receiving firms to ensure that the data are transmitted correctly. They also argued that in case of errors in providing data, the transmitting firm should bear responsibility with the receiving firm.

451. ESMA received 10 responses from trading venues, which all agreed with the proposal. Three respondents, also provided further proposals. Two argued that trading venues may have difficulties when non-MiFIR firms and 3rd country firms do not provide all the necessary information to be included in the transaction report. In particular, one argued that trading venues should not be considered responsible in case the data is not available or is not transmitted correctly. One respondent stated that ESMA should clarify the who bears responsibilities concerning completeness and accuracy of the data in case trading venues rely on ARMs to provide transaction reports.

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

452. The total number of respondents was 32, with 13 supporting the proposal, 8 explicitly expressing that they do not support the proposal, 5 providing further comments without explicit disapproval, and 6 with no opinion/comment.

453. The only buy-side respondent did not provide explicit support but rather suggested that ESMA should consider adding fields to EMIR reporting to make it sufficient for transaction reporting purposes.

454. 6 respondents on the sell-side, 5 respondents on the trading venues/Data vendors/DRSP-side, and two other respondents supported the removal of the above mentioned paragraph from Article 26(7) and agreed with ESMA's analysis of differences of the two reporting regimes and limits in their possible alignment. Alignment of technical aspects and harmonizing the common data elements was supported.

455. 8 respondents on the sell-side explicitly disagreed with the approach. They mostly only expressed general concern that the proposal would put an end to the desirable consolidation of reporting requirements and that double reporting should be avoided. These repondents see some room to streamline and reduce the reporting requirements and urge ESMA to explore the possibilities.

456. These respondents and other respondents on the sell-side who did not express explicit disapproval raised further comments with regards to the proposal:

    a. 1 respondent recommended that ESMA consider adding fields to EMIR reporting to make it sufficient for transaction reporting purposes (new fields required only for investment firms) similarly to alignment of EMIR and REMIT reporting where EMIR fields for energy derivatives stem largely from REMIT reporting;

    b. another respondent suggested to identify common MiFIR and EMIR data fields and implement them by adopting the same logic and rationale;

    c. 2 respondents suggested exploring the possibilities of reusing information reported under EMIR (or MiFIR) for MiFIR (or EMIR) reporting purposes.

457. Few respondents raised other comments not directly related to the proposal of deletion of paragraph from Article 26(7) of MiFIR:

    a. 2 respondents pointed out that both reporting regimes have different review cycle and that it would be beneficial to harmonise the reporting cycles to decrease the burden of frequent implementation;

    a. 2 respondents commented that ETD reporting under EMIR, which offers little or no benefit in assessing systemic risk, should be removed from EMIR reporting and that regulators should focus only on position reporting;

    b. 3 associations suggested that the MiFIR review should also address remaining inconsistencies with SFTR reporting and in particular to reconsider the treatment of SFTs concluded with EU central banks. They argued that SFTs, as defined under SFTR, do not fall under the definition of transaction and are exempt from MiFIR reporting. However, they continued, SFTs with central banks are brought back into scope when the details are known to central banks and could be provided to other regulators and MiFIR framework is not suitable for reporting SFTs. These respondents considered that these SFTs do not provide

meaningful information to the regulators andsuggested excluding all types of SFTs from MiFIR reporting;

c. 1 respondent commented on the technical aspects of reporting arguing that even if the goals of reporting regimes are different, this should not prevent the possibility to define a single set of data submitted into a single system and database where the NCAs can access data according to their needs. As a specific example this respondent mentioned commodity derivatives which are reported into four different systems under MIFIR, MiFID, EMIR and REMIT reporting frameworks. The respondent proposed that ESMA should launch a technical assessment of current IT architectures underlying different reporting regimes.

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

458. The total number of respondents was 43. 12 respondents supported the proposal and 17 respondents did not support the proposal. 10 respondents either provided a response that was more relevant to section 12.2 or pointed out that it is too early to provide feedback or provided clarifications without expressing views.

459. While most respondents on the buy-side, including respective trade associations provided responses considered more relevant to section 12.2, 2 respondents pointed out that it is too early to provide feedback to the UPI question as the final technical specifications for the UPI as well as its reference data are not yet available.

460. Respondents on the sell-side, including respective trade associations were split in their opinion of the proposal.

461. While certain respondents agreed in principle with the proposal, the support was conditional on ESMA providing clear and precise guidance on the residual use of the UPI and on a data driven assessment as part of a separate consultation with cost-benefit analysis before implementation.

462. Sell-side respondents which were not in favor of using ISINs for some OTC derivatives transactions and UPIs for other OTC derivatives transactions argued where both an ISIN and a UPI are available for a trade, the reporting requirements should make clear what identification should be reported as there would be limited value in reporting both ISIN and UPI for the same transaction. They argued out that the UPI has been developed to fulfil the need for a global standard of product identifier for OTC derivatives. As such, for MiFIR to remain consistent with global reporting regimes, the UPI should be consistently reported as a product identifier for OTC derivatives, to be prioritised over the ISIN.

463. Respondents representing trading venues, data vendors, and DRSPs were split based on their activity. Indeed, in the event that MiFIR reporting would be extended, regulated markets did not support the introduction of UPI as an alternative to the ISIN required in the transaction and reference data reports. On the other hand, data vendors and trading venues other than regulated markets argued that UPI should be reported for all OTC derivative transactions and not only for transactions without an ISIN. For the latter group, the views expressed were in line with part of the sell-side respondents in paragraphe 353:

UPI should replace ISINs for the OTC derivatives that are currently subject to the reference data and transaction reporting obligations.

Q31. Are there any specific aspects relating to the ISIN granularity reported in reference data which need to be addressed? Is the current precision and granularity of ISIN appropriate or is (for certain asset classes) a different granularity more appropriate?

464. The total number of respondents was 27. 10 respondents supported the proposal and 15 opined that for certain asset classes a different granularity is more appropriate. 2 respondents provided no opinion or comment.

465. The respondents who suggested that for certain asset classes a different granularity is more appropriate made the following comments:

(a) 7 respondents argued that the ISIN regime for OTC instruments post MiFID II/MiFIR, has not delivered transparency. In some cases ISINs refer to the same products, while in other cases different products have the same ISINs. An example given by 3 respondents is interest rate swaps, which must always have a new ISIN due to new expiration date (mandatory attribute). The opposite situation occurs in the case of effective date (not a mandatory attribute), which means that the same ISIN will be used for different instruments. Furthermore, interest rate swaps should refer to the duration (tenor) of the swap instead of the maturity date, which would reduce the number of ISINs, as it is essentially the same swap product. They argued that these examples support the view that ESMA should reconsider the criteria for generating ISINs;

(b) 3 respondents argued that for OTC derivatives UPI is most appropriate regardless of where the trade occurs (for ETDs it is ISIN). One respondent added that it is necessary to test the UPI standard by market participants before final adoption;

(c) 2 respondents argued that the existing granularity of interest rate derivatives' ISINs is particularly detrimental to the purposes of public trade transparency. They pointed to a lack of clarification on the scope of interest rate derivatives, which has led to increase in the number of ISINs and deterioration in the transparency of these financial instruments. Furthermore, they argued there is ambiguity in the CDS index and the correct classification in relation to liquidity;

(d) 2 respondents proposed ESMA be guided by industry feedback on the question as to whether the level of granularity reported in reference data against an ISIN is in all cases optimal;

(e) 1 respondent had the view that the current ISIN construct is not sufficiently standardised to capture FX products accurately across the market. In many instances, it is possible for two parties trading the same instrument to assign different ISINs. The FX ISIN construct is based on settlement date, rather than instrument tenor. The respondent said it is very difficult to compare products across a time range, reduces the transparency available to clients and significantly increases the scale of ISIN data within FX and argued that the solution is based on the transition to the UPI identifier;

(f) 1 respondent said that the current granularity of ISIN continues to lead to serious data quality problems. The respondent pointed to differences in the consistency of reporting in market practice even when ESMA has given the guidance for reporting. They mentioned the example of when delivery type should be cash for interest rate derivatives when settlement currency is other then the reference currency;

466. 6 respondents gave comments unrelated to ISIN granularity:

(a) 3 respondents asked for further clarifications regarding the usage of ISINs for complex instruments in the Q&A on reference data reporting[86] and the Guidelines for Transaction reporting, order record keeping and clock synchronization under MiFID II[87] as well as in in the Level 1 or Level 2 regulation;

(b) 1 respondent recommended aligning EMIR with MiFIR so that the reporting parties are only required to report the underlying instrument data in such instances where an ISIN is not reported, which would improve matching rates;

(c) 1 respondent pointed out the problems associated with the annual renewal of the LEI. Trading systems cannot be held liable for an issuer that has not renewed the LEI. They ask to consider the possibility of extending the validity of the LEI;

(d) 1 respondent pointed out a problem with CFI allocation. One ISIN can have several different CFIs if they are reported from different trading venues or SIs. To improve the situation, they suggest that ANNA centrally generate CFI codes for ISINs. (Note: resolved by checking inconsistencies in FIRDS.)

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

467. The total number of respondents was 28. 22 respondents supported the proposal and none did not support it. 6 respondents provided no opinion or comment.

468. 5 respondents on the buy-side expressed support for the proposal. Several respondents raised the following comments:

(a) 2 respondents supporting the approach urged ESMA to closely collaborate and consult with industry participants and associations. They also pointed out that not all NNAs consistently apply the CFI ISO standard and do not follow the logic set out by ESMA;

(b) 1 respondent pointed out that development time needs to be taken into account if any changes are needed.

469. 8 respondents on the sell-side expressed support for the proposal. Several respondents raised the following comments:

[86] ESMA70-1861941480-56 "Questions and Answers on MiFIR data reporting", last updated on 8 July 2020, available at: https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-56_qas_mifir_data_reporting.pdf

[87] Guidelines on Transaction Reporting, Order Record Keeping and Clock Synchronisation Under MiFID II (ESMA2016-1452) published on 10 October 2016 on ESMA website: https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf

(a) 2 respondents considered this level of detail in Level 1 to have little value. They suggested that changes to standards can be managed as well in the technical standards. Despite this comment they did not object to the proposal;

(b) 1 respondent raised several practical issues regarding invalid or incorrect CFIs and urged regulators to make data available through official sources;

(c) 1 respondent proposed to mandate the renewal of LEI for all parties required in transaction reporting. They argued that is the only way to ensure that the LEI reference data is accurate and up-to-date. This proposal can be considered and specified in the technical standards;

(d) 1 respondent expressed the view that flexibility is important in the formulation, so that new data standards can be used as needed.

470. The 5 respondents representing trading venues, data vendors, and DRSPs expressed support for the proposal. Several respondents raised the following comments:

(a) 1 respondent expressed concerns about the frequency of reports due to the introduction of possible intraday reporting;

(b) 1 respondent asked ESMA to provide more examples and sufficient lead time for implementation.

471. 4 other respondents expressed support for the proposal. 2 respondents stressed the importance of avoiding expensive implementation costs and that development time needs to be taken into account.

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

472. While nearly all respondents to this questions across all market sectors concurred with ESMA's assessment of the problem, the majority of them raised concerns with the proposed solution.

473. In respect to the feedback received, it should be highlighted that a common concern is that issuers are not directly subject to MiFIR, thus reporting entities have no effective legal means to force these entities to provide the LEI. Additionally, a few respondents stressed that derivative instruments have no issuers or have multiple issuers. Respondents made the following suggestions:

(a) some respondents proposed that during the creation process of an ISIN, the issuer should be obliged to apply for a LEI, if the LEI is not yet available;

(b) some respondents suggested that the field relating to the issuer's LEI should be made optional for secondary market trading;

(c) it was proposed that reporting parties should be allowed to buy an LEI on behalf of their clients.

Annex II – Opinion of the Securities and Markets Stakeholder Group

474. The Securities and Markets Stakeholder Group did not opine on the ESMA CP.