Consultation Paper - MiFIR review report on the obligations to report transactions and reference data

Executive Summary

Assogestioni[1] welcomes the opportunity to respond to the consultation MiFIR review report on the obligations to report transactions and reference data.

MiFID II/MiFIR aims at promoting the integrity of markets mandating national competent authorities and ESMA to enforce this integrity by monitoring investment firms' activities as to their honest, fair and professional market behaviour. To this end, MiFID II/MiFIR introduces a comprehensive reporting regime designed to enable authorities to apply their surveillance mandate efficiently.

While all investment firms and trading venue operators are subject to the transaction reporting obligation, UCITS and AIF management companies that perform (some) MiFID services are not. ESMA proposes to extend the MiFIR transaction reporting also to these entities to gather additional information, including details of the decision-maker who is making the decision to acquire/sell the given financial instruments, even if the management company is identified as buyer/seller.

Assogestioni fully agrees that competent authorities must have access to sufficient information to fulfil their supervisory functions and is positive with some proposals to improve the current regime, however we strongly disagree on the extension of the transaction reporting regime to AIFMs/UCITS management companies providing MiFID services.

We understand this as a political demand caused by level playing field rather than the need to detect and investigate potential cases of market abuse or to monitor the fair and orderly functioning of markets.

We invite ESMA to review its approach and to consider the different core business and services of investment firms and of management companies, where the latter cannot execute orders on behalf of clients, nor dealing on own account. Furthermore, we believe that the quality of overall reporting is not really improved with the request of identification of the decision-maker: in the actual performance of the management activity (i.e. discretional individual portfolio management), various employees of the management company are involved in various capacities, especially in large and complex structures. Indeed, in case of an investigation, the competent authority goes very deeply in the analysis on the whole investment process. Management companies also act on an agency model; therefore, the name of the end-client is also irrelevant.

Assogestioni believes that the proposal of expanding the realms of firms subject to transaction reporting should find no sufficient justification in the creation of level playing field among different entities (delivering some common services) but should respond to an actual need.

[1] Assogestioni is the trade body for Italian asset management industry and represents the interests of members who manage funds and discretionary mandates around € 2,336 billion (as of September 2020).

Extending transaction reporting obligations would cause very high costs - without providing any real improvement in the quality of overall reporting - and we would therefore require a cost-benefit analysis. Indeed, we see a real lack of proportionality between the risks involved and the administrative burden resulting from a change to Article 26 to widen the entities subject to transaction reporting.

Transaction reporting limited to market-facing firms, i.e. investment firms and trading venues as in the current regime, is commensurate and proportionate with the objective to be achieved as it provides sufficient information to ensure proper supervision and to protect the integrity of the markets.

Principle of proportionality should remain a cornerstone to European legislations and implementing acts. Against this background, should ESMA envisage to impose additional reporting, burden is to be minimised. This can be achieved without extending the entities subject to transaction reporting but by amending the current transaction report, for example, by simply adding two more data fields to be filled in by investment firms or trading venue to collect information (only) on end-clients issuing binding orders to an AIFM/UCITS management company during the execution of the discretionary portfolio mandate.

Q.1Do 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

Yes, Assogestioni expects a significant impact if AIFMs/UCITS management companies providing MiFID services are subject to the requirement to report transactions in accordance with Article 26 of MiFIR. Management companies should build up technical capabilities to manage and report transactions to the NCAs in order to give more details than those already made available today, without providing any real improvement in the quality of reporting.

While we fully agree that competent authorities must have access to sufficient information to fulfil their supervisory functions, we strongly believe that transaction reporting limited to market-facing firms, i.e. investment firms and trading venues as in the current regime, is commensurate and proportionate to the objective to be achieved as it provides sufficient information to ensure proper supervision and to protect the integrity of the markets.

Indeed, the request of widening the current regime appears to respond more to the pursuit of a level playing field than be justified by a real need on a significative number of cases where ESMA or NCAs have detected market abuse beyond the rich data basis already in place.

Assogestioni believes that an extension of the transaction reporting regime to management companies providing MiFID services finds no sufficient justification in the creation of level playing field among different entities delivering some common services but should respond to an actual need. Extending transaction reporting obligations would cause very high costs to management companies providing MiFID services and we would therefore require a cost-benefit analysis.

We invite also ESMA to take into account the different core business and services of investment firms and of management companies, where the latter cannot execute orders on behalf of clients, nor dealing on own account. In addition, management companies play

an agency role when investing on behalf of their end-clients (i.e. retail or institutional investor) when managing a discretionary portfolio (or a collective scheme, or a pension fund, or a mandate as well).

Indeed, we see a real lack of proportionality between the risks involved which should be monitored improving the current regime and the administrative burden resulting from a change to Article 26 to widen the entities subject to transaction reporting. In addition, such extension will imply enormous amount of data that regulators would need to store but could hardly be in a position to cross-reference, resulting in high costs without any clear benefit.

A duplication of infrastructure would be also very costly and could potentially threaten the offer of this service of several management companies.

In any case, should more information be required, we suggest an alternative approach.

Below are more detailed comments on why we do not believe it is necessary to widen the entities subject to transaction regime and why some differences between such entities should remain in the future as well.

1. Core activities: management companies vs MiFID firms

With regards to the objectives of level playing field ESMA aims to achieve by proposing the extension of scope of Article 26 of MiFIR, (para. 14 of the CP), we understand this as a political demand rather than a demand that stems from the need to detect and investigate potential cases of market abuse or to monitor the fair and orderly functioning of markets.

Therefore, we believe it is important to remember the different core business and services of investment firms and management company where the latter (buy-side firm) cannot execute orders on behalf of clients (MiFID Annex 1, Section A(2); RTS 22, Art. 3(1)(b)) nor dealing on own account (MiFID Annex I, Section A(3); RTS 22, Art. 3(1)(c)).

A market abuse is more likely to occur if the decision maker enters into transactions for its own account. However, those transactions are already reported under Art. 26 MiFIR by the investment firm maintaining the decision makers private securities account today. In this sense also the ESMA Q&A n.6 on transaction reporting of a scenario where ESMA confirms, where an investment firm (Bank B) executes a reportable transaction under a discretionary mandate for a client A (portfolio management), that there is an obligation to report this transaction if the client A is an investment firm because it provides the service under Art. 3(1)(c) RTS 22 "dealing on own account".

The characteristic MiFID service provided by a management company is "portfolio management" (MiFID Annex I, Section A(4); RTS 22, Art. 3(1)(d)), which, although it necessarily involves giving effect to decisions to buy and sell, is a distinct activity from "executing transactions". The execution by an asset manager of its investment decisions is an integral part of its service of "portfolio management". We refer to the agency model whereby the intermediary, the management company, acts on behalf of an end-client, except in the rare case of binding orders.

Management companies usually place orders to a counterparty (investment firm) that will in turn execute on a market venue either directly or through another counterparty (investment firm). Transactions could also be carried out directly by an asset manager on

a trading venue. In any case, both transactions are already reported today to NCA. It is worth noting that, in the experience of our members, Italian asset management companies do not directly access regulated markets but transmit orders to counterparties (investment firms) or access certain trading venues (such MTFs), mainly for the trading of bonds.

AIFM management companies may provide also the service of reception and transmission of orders, but this is a non-core activity. In the same way, the provision of the other MiFID services are non-core activities and usually do not trigger a transaction report (please, see the table below).

According to the above, we invite ESMA, in line with the principle of proportionality which is set out in Art. 5 para. 1 and 4 of The Treaty on European Union, to not extend the reporting obligation to management companies providing MiFID services, nor ask more information in case of individual portfolio management (see also para. 2 below).

Regulation (EU) 600/2014 (MIFIR)	**Commission delegated regulation (EU) 2017/590 (RTS 22) - Art. 3 Meaning of execution of a transactions**		**MiFID firm**	**UCITS/AIFM ManCo and MiFID services**		**Trigger for reporting for a ManCo**
				UCITS ManCo	AIFM ManCo	
Article 26. Obligation to report transactions. 1. Investment firms which execute transactions in financial instruments shall report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day	Art. 3(1)(a)	Reception and transmission of orders in relation to financial instruments	x		x	Rare case
	Art. 3(1)(b)	Executions of orders on behalf of clients	X			
	Art. 3(1)(c)	Dealing on own account	X			
	Art. 3(1)(d)	Making an investment decision in accordance with a discretionary mandate given by a client	x	x	x	Rare case if limited to binding orders by end clients. Differently normal case.
	Art. 3(1)(e)	Transfer of financial instruments to or from accounts.	x	x	x	Rare case
Investment advice						NO
Collective management activities						NO

2. On the request of more detailed information on buyer/seller and/or decision-maker: the agency model and the binding order of end-client in the individual discretionary mandate

In the current regime, MiFID investment firm (brokers) will submit transaction reports for the trading that follows an order sent by the management company, identified as buyer/seller. Furthermore, where the transactions are carried out directly by an asset manager on a trading venue (membership of the trading venue), the operator of a trading venue shall already report details of those transactions, including not only the AIFM (UCITS management company, as buyer/seller), but also the identity of the decision-maker. Therefore, the competent authorities will have all this information at their disposal.

However, in the CP para. 12 is highlighted that even if the management company is identified as buyer/seller, 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 and such information is essential for the purpose of market abuse surveillance.

Assogestioni does not agree with the ESMA assessment which does not take into proper consideration the role of an asset manager which makes an investment decision on behalf of its end-client in accordance with the discretionary mandate given by the client, i.e. retail or institutional investor, even if the end-client, unlike the collective management, has also the right to impose binding instructions.

Where an asset manager decides to make an investment or to change the exposure on securities or to rebalance the individual portfolio managed, it is clear that the decision-maker is only the asset manager acting on behalf of one or more clients who have signed up for an individual portfolio management service. Indeed, management companies act in their own name on behalf of clients and often aggregate into a single order to the market the needs of different clients.

Where one side of the trade there is a management company and a further investigation is needed on a specific transaction, the competent authority requests at any time information from the asset manager surrounding their investment decision making and even inspect its records. Targeted requests for information in case of suspicious transactions are already used and feasible.

Indeed, according to the experience reported by some of our members, in case of an investigation, the competent authority goes very deeply in the analysis on the investment process of the asset manager, and the name of the end-client, where there is no interference with the decision of the asset manager, is irrelevant. Furthermore, the identification of the investment decision within management company, even if available in the transaction report (as today reported by the Trading Venue in field 57), is explored further by the competent authority.

In the actual performance of the management activity, the core business of a management company, various employees are involved in various capacities, especially in large and complex structures, and the identity of the decision-maker indicated in the transaction report could again be irrelevant.

The discipline on market abuse has always placed particular emphasis on the organizational and procedural dimension of the asset management companies in order to prevent abuse, guaranteeing the protection of the principal-investor and the correctness of conduct and therefore preserve the integrity of the market, also by preventing and minimizing the risk of pathological situations, including conduct of market abuse. We recall, for example:

- the adoption of suitable procedures, the exact reconstruction and adequate vigilance on the behaviours put in place in the performance of the service;
- a continuous flow of information in order to allow a constant iteration between the body with strategic supervision and the one with management function and a continuous control over the work of the delegated subjects;
- the separation (physical and logical / Chinese walls) between the different business units of the company organization, in order to preclude circulation of information and sensitive data with the aim of preventing the arising of conflict of interest or potential abuses (Art. 33 of AIFMR).

It is true that the individual portfolio management service is institutionally characterized by the client's right to give binding instructions to the asset manager regarding the

operations to be carried out. Therefore, unlike collective management, there may be cases where the purchase or sale of a securities is driven by the end-client who is, only in this specific case, the decision-maker.

However, binding orders by the end-clients are extremely rare in the experience of our members and they will immediately catch the attention of qualified personnel of the management company who would not hesitate to report a suspicious transaction, where relevant.

Considered the above, we see a real lack of proportionality between the risks involved and the administrative burden resulting from transaction reporting if an extension of the entities subject to transaction reporting regime will be requested.

Therefore, we believe that the actual collection of information is commensurate to the objective to be achieved: no more detailed information should be collected other than the LEI code of the fund and on the LEI code of AIFM/UCITS management company, where a Trading Venue is involved, and the LEI code of AIFM/UCITS management company where an investment firm (broker) is involved.

In any case, should ESMA envisage to impose additional reporting, burden is to be minimised. The collection of information should be limited to the identity of end-clients issuing binding orders to a management company during the execution of the discretionary portfolio mandate. This can be achieved without extending the entities subject to transaction reporting but by amending the current transaction report, for example, by simply adding two more data fields to be filled in by investment firms or trading venue:

- *End of chain (EOC):* this field should be filled in by an Investment Firm/Trading Venue where it faces an entity that is currently reported as Buyer/Seller but that acts as agent on behalf of a third party without being an investment firm;
- *Decision Maker of Non-Investment Firm*: If the EOC-Field is completed with a value, the field "Decision Maker of Non-Investment Firm" shall be completed with a chiffre provided by the Buyer / Seller with respect to the applicable decision maker. The use of chiffres, instead of the LEI or National-ID, allows to keep business secrets when this information is provided by the management companies to investment firms (brokers) or trading venues.

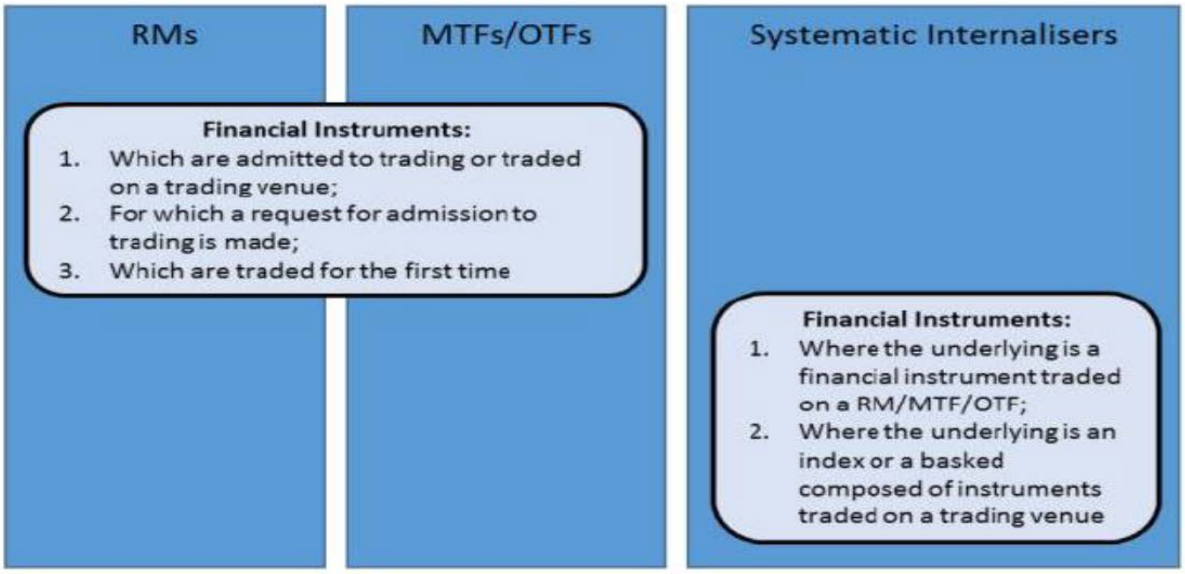
This alternative approach would avoid dual side reporting and an enormous amount of data that regulators would need to store but could hardly be in a position to cross-reference, resulting in high costs without any clear benefit. It means also less burden to management companies. The burden put on investment firms/trading venue by populating two more data fields is low and can be implemented much faster than a full implementation of Article 26 MiFIR by management companies. This alternative would also mean that management companies must not stop their provision of discretionary portfolio mandate for economic reasons.

3. On the request of information on off-venue transactions

ESMA states in the consultation paper that "*information about transactions executed by these firms off venue will not at all be available to NCAs*". The proposal of expanding the firms subject to transaction reporting has therefore the following merit: *"(iii) it provides NCAs with the relevant information needed to conduct their monitoring of the trading activity of these firms that is 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".

The transaction reporting obligation covers the three categories of instruments indicated in Article 26(2) in points (a) to (c) and it shall apply to transactions in such financial instruments irrespective of whether or not such transactions are carried out on the trading venue, as summarized by ESMA in the following figure (Figure 1, para. 32 of the CP).



In our understanding ESMA is looking for the trading activity on financial instruments admitted to trading, or traded on a trading venue or for which a request for admission was made, where the transaction on that financial instrument is not executed on a trading venue, SI or organised trading platform outside of the Union (MIC code 'XOFF').

However, most of transactions are taking place on trading venue. Indeed, the share trading obligation ('STO') requires that EU investment firms only trade shares on eligible execution venues. While, information on derivatives are available under the EMIR regime. If additional information on derivatives are really necessary, it would be possible to further consider developing the EMIR reporting requirements to include those data fields to make EMIR reports sufficient for transaction reporting purposes, rather than extending the transaction reporting regime to management companies (see also our answer to Q29 and Q30).

Therefore, we wonder if a collection of such information for the residual categories of instruments subject to the reporting obligation is commensurate to the scope and it will comply, again, with the principle of proportionality.

Q4. While the arrangements referred in this section are exclusively between the national supervisors and do not have a direct impact on the market, do you have any views on the outlined proposal?

We agree to change the reference to respond to NCA's supervisory need.

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.

We strongly support ESMA extending reference data reporting, transaction reporting, and transparency to include derivatives traded with an SI.

Including derivatives traded with an SI will (a) level the playing field between SIs and trading venues, (b) establish a more comprehensive post-trade transparency regime that will deliver meaningful benefits to end-clients and support the implementation of a post-trade.

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.
Yes, we agree that all SIs should be covered, including voluntary SIs. This is particularly important in 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.

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.
We support Option 1 that will address the current deficiencies and meaningfully increase transparency in derivatives for market participants.

Q27: Do you agree with this approach? If not, please clarify your concerns and propose alternative solutions
We support this approach that reduce the burden of investment firms (or will reduce those of management companies providing MiFID service, in case ESMA envisages to impose additional reporting) in case of transmission of orders. We support also that this obligation would only apply when the receiving investment firm would not be transmitting the received orders to another investment firm.

Q29: Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.
If further alignment of MiFIR and EMIR is really necessary, it would be possible to further consider developing EMIR reporting requirements to include those data fields that are necessary to make EMIR reports sufficient for transaction reporting purposes.

Q30: Do you foresee any challenges with the outlined approach? If yes, please explain and provide alternative proposals.
If further alignment of MiFIR and EMIR is really necessary, it would be possible to further consider developing EMIR reporting requirements to include those data fields that are necessary to make EMIR reports sufficient for transaction reporting purposes.

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?
We support the current level of granularity applied to ISINs.