Consultation response

DACSI 15-1034

From : DACSI

Subject : **Reply to the ESMA Consultation on MiFID II / MiFIR – Regulatory and Implementing Technical Standards**
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What follows is the final text of DACSI's response to ESMA's Consultation Papers "MiFID II / MiFIR" (DACSI 14-2378 en DACSI 14-2379).

DACSI responded to Questions with regard to market data reporting and post-trade issues only (chapters 8 and 9).

Chapter 8 - Market data reporting

Q213 Which of the formats specified in paragraph 2 would pose you the most substantial implementation challenge from technical and compliance point of view for transaction and/or reference data reporting? Please explain.

The following formats would pose substantial implementation challenge: FpML, TREM, IFX, FIX and XBRL. These formats are soundly developed and fit for their purpose, but they would introduce unnecessary complexities when used for reporting by intermediaries about individual transactions: current transaction processing is intensively using ISO standards and is in a process of migrating to ISO 20022. The addition of messages for MiFID II transaction reporting purposes would be muss less complex within ISO 20022 than when another format would be introduced.

In DACSI's view ISO 20022 would be the most appropriate standard.

Overall we believe that ISO 20022 offers the best potential for cost-effective and future-proof implementation. It has a strong methodology and model for defining and structuring financial data, and an open governance process that ensures a level playing field for standardisers and users. It also offers expert international scrutiny of submitted content. ISO 20022 is now being implemented in a growing number of markets, which results in increasing opportunities for automation and interoperability.
We believe ISO 20022 brings the following benefits:

- it is the standard used for messaging by strategic initiatives such as the Single Euro Payments Area (SEPA), in the ECB's Target 2 Securities initiative, the upcoming migrations of Target 2 and EBA EURO1/STEP1;
- it enables higher levels of automation and interoperability across payments and securities, reducing overall industry costs and lowering barriers to entry; basing MiFID II /MiFIR Transaction reporting and Reference data on ISO 20022 will enable us to reuse our investment in supporting the standard;
- it can easily cater for future additional/new regulatory reporting functionalities including changes to MiFID II /MiFIR reporting components;
- it is an open standard which can be freely implemented, with an open governance process and no single entity that controls it; it has an established process for maintenance and evolution;
- it is being adopted globally in the financial industry: Central banks and market infrastructures across the world are increasingly using the standard, with around 70 payments and securities clearing and settlement systems implementing ISO 20022;
- ISO 20022 standards have been developed across many financial business processes including retail and wholesale payments, foreign exchange, clearing, collateral management, settlement, asset reconciliation and transaction reporting.

Q214 Do you anticipate any difficulties with the proposed definition for a transaction and execution?

DACSI agrees with the proposed definition for an **execution**.

However, DACSI wants to comment on the definition for a **transaction**.
The MiFID/MiFIR principle is that an investment firm receives an order from a client and will execute this order; the result of order execution is a transaction, which is reportable for the underlying reportable financial instrument (transaction based).
An essentially different situation is that of a client instruction that is not an order; although this will lead to a position movement, this will not result in an execution and hence not in a transaction.
DACSI wants a clear confirmation from ESMA that instructions resulting in a **position movement only** are not in the definition of a transaction and **not in scope** of the MiFID/MiFIR reporting requirements.
Evidently, instructions not given by clients but for example directly by issuers (i.e. all corporate events) should not be in the scope of the definition for a transaction.

Q215 In your view, is there any other outcome or activity that should be excluded from the definition of transaction or execution? Please justify.

DACSI wants to exclude in addition of the proposal (RTS32) in art 3 (3):

- all **corporate events** announced by the Issuer/Company.
- all **(internal) transfers** that do not qualify as a transaction, but are rather a settlement instructions.

DACSI also recommends ESMA to delete in art 3 (j) criteria (iv): if the criteria (i-iii) are met, criteria (iv) is not relevant.

Q216 Do you foresee any difficulties with the suggested approach? Please justify.

DACSI is of the opinion that the description of the reporting requirement (RTS 32) related to the transmission of an order is **vague and inefficient**.

The process described in art 4.1 b(iii) and art 4.2 is not clear: it seems that the receiving firm has to send a transaction report to the CA if the relevant details specified in 4.1 (a) are passed and that a new transaction report has to be submitted by the receiving firm if the information in art 2 (a-d) is provided.
Could ESMA **please explain** this process? DACSI prefers one transaction report to be submitted to the CA by the receiving firm with all relevant information.

With regard to the process in art 4.3 (a): we assume that the transaction report with the missing information should be submitted to the third party and/or client by the transmitting firm.
With regard to the process in art 4.3 (b): we assume that the transaction report should be submitted to the transmitting firm by the receiving firm.
Could ESMA **please confirm** that these assumptions are correct?

Q217 Do you agree with ESMA's proposed approach to simplify transaction reporting? Please provide details of your reasons.

DACSI does **not agree** that the reporting will be simplified by the proposed amendments, because the content of the fields will be changed. The amendments would introduce more fields to be completed, which means there will be more variables, and hence the possibility of mistakes would increase.

We recommend continuing the use the existing report, while including additional columns for the additional information (thereby continuing to use client and counterparty instead of buyer and seller).

In addition, DACSI recommends that ESMA will follow **one standard for data fields** regardless whether it is for EMIR, SFTR and/or MiFID/R reporting requirements, which is not the case in ESMAs proposal.

Q218 We invite your comments on the proposed fields and population of the fields. Please provide specific references to the fields which you are discussing in your response.

For DACSI it is **unacceptable** that all entities that are subject to the MiFID reporting requirements have to populate additional information to ESMA and have to make additional (operating and implementing) costs for a need which ESMA should solve and not the financial industry.
ESMA should have in place a global solution how to gather (reference) data from non EEA-trading venues instead of shifting this problem onto the industry.

Q219 Do you agree with the proposed approach to flag trading capacities?

DACSI wants to highlight a **special issue** for the Dutch market related to the so called "**lastgeving**" model, a mandate construction in which the Dutch Investment Firm is not acting as an agent or a principal but directly constitutes a contract between his client and a counterparty. In this hybrid model an investment firm acts as agent versus the client, but for the same transaction acts as a principal for the counterpart of the trade.
As a consequence, the MiFiD 2 rules are not clear with regard to the capacity flag that has to be filled in for these transactions for the Dutch Investment Firm, because Matched Principal is not part of the current practice in the "lastgeving" model.

We request **guidance** from ESMA on this crucial point for the Dutch market.

Q220 Do you foresee any problem with identifying the specific waiver(s) under which the trade took place in a transaction report? If so, please provide details.

Yes, DACSI foresees problems with the **LEI**, which needs to be used as client identifier of a legal entity. There is no global system yet and therefore not all entities will have a LEI or a legal obligation to obtain one. In addition, there is always a **period between requesting** a LEI **and receiving** one. Is the legal entity not allowed to trade if it does not have a LEI (yet)? If so, this may impact the liquidity (and volatility) in trading. Under EMIR we experienced already that the (high) initial and annual costs of a LEI are a material burden for the smaller clients to ask for a LEI. Therefore, it is very important that the **costs of a LEI** are reasonable for smaller clients and **not restricting** them unnecessarily.
DACSI requests ESMA to provide **guidance** on what an investment firm has to do if a legal entity does not have a (active) LEI in case a client will send an order for execution.

DACSI is also concerned that in relation to **data privacy** legislation (especially in third countries), it may constitute reporting data in breach with the applicable legislation. This is also relevant with respect to the trader ID.

With regard to par. 139 on page 589, we question what needs to be reported when **multiple waivers** are applicable to a (composed) transaction. Would it be necessary to include all waivers or only one of the applicable waivers?

With regard to par. 154 on page 592, we anticipate problems in using the **short selling flag**. How would it work if transactions are entered into from different parts of the business to which even Chinese Walls may exist? It may not be

possible to know whether a certain transaction at that moment is a short selling transaction. Also, different systems will be used, under MiFID II it will be an intra-day report (and thus use of flag) and under the SSR it is an end-of-day report. It could be that at the moment of a transaction intra-day it is a short sale, but which is 'remedied' by another transaction later that day.
In addition, we do not think these data will provide the CAs with the information they are looking for. We expect the CA's to be interested in the intention of the trader to do a short sale; even if a different part of the same investment firm coincidentally has a long position at the same time. And the SSR reporting already exists and does provide the relevant information.

Q221 Do you agree with ESMA's approach for deciding whether financial instruments based on baskets or indices are reportable?

DACSI is in favour of a standard method for baskets and indices.

Q222 Do you agree with the proposed standards for identifying these instruments in the transaction reports?

DACSI recommends that the format for an Index and a basket should be the same.

Q223 Do you foresee any difficulties applying the criteria to determine whether a branch is responsible for the specified activity? If so, do you have any alternative proposals?

With regard to par. 171 on page 595, DACSI foresees that it will be difficult to determine which entity will have the **closest relationship** with the client, without any guidance on how to assess the relationship. Could ESMA give guidance what will be the exact criteria that entities should take into account with that determination?

In addition, the relationship with the client can change **over time**, by way that another entity can use a different branch or another group entity than initially.

The fact that there are no criteria to be considered in the determination which entity will have the closest relationship, leaves the entities with a lot of discretion, but also liability. If the CAs will determine that the entities did not take the correct criteria into consideration, it can be fined.

Q224 Do you anticipate any significant difficulties related to the implementation of LEI validation?

Yes, DACSI anticipates difficulties in this respect. With regard to par. 183 on page 597: to validate the LEI, the investment firm should have **access to the global LEI system**. If that is not (yet) possible, it should be possible to assume the correctness if the LEI has been provided by the counterparty.

Please also note that we believe that this obligation of verifying the LEI should only apply to the on-boarding of a client and not to every single transaction. If the client's LEI has been **verified at the start** of a relationship, it should be allowed to rely on that LEI for all transactions.

It is DACSI's opinion that the investment firm cannot be responsible when the LEI of a legal entity is no longer active, blocked due to non-payment or other reasons, or withdrawn; it is the responsibility of the client to inform the investment firm if the status of its LEI changes.

Q225 Do you foresee any difficulties with the proposed requirements? Please elaborate.

DACSI understands that over-reporting will not be allowed as mentioned in par. 186 on page 598, but we would like to emphasise that where there is **room for interpretation** by the investment firms, this will likely lead to **discrepancies** between the reports by different investment firms. Even more so, where it seems that CAs can have different interpretations, for instance in par. 27 under ii on page 565.
Furthermore, DACSI wants to state again that the data fields and formats of the reports should be standardised and harmonised with other reporting requirements from other European rules and legislation.

Q226 Are there any cases other than the AGGREGATED scenario where the client ID information could not be submitted to the trading venue operator at the time of order submission? If yes, please elaborate.

DACSI does not understand why the client ID should be provided to the trading venue as this is already known by the CAs through the reporting obligation of the investment firm. Please note that this will mean that the **format** of the reporting would have **to be amended**, which would increase the risk of incorrect reports.

Q227 Do you agree with the proposed approach to flag liquidity provision activity?

In DACSI's view this information is **not available** for the investment firm to be included in the transaction reporting; only the trading venue has to deliver this piece of information in its report.

Q233 Do you agree with the proposed criteria for calibrating the level of accuracy required for the purpose of clock synchronisation? Please elaborate.

DACSI requests ESMA to give further guidance in case different desks within the same legal entity that may trade on different trading venues have to synchronise with each separate trading venue or do the desks have to coordinate and synchronise with the most strict reference time independently of the trading venues?

Chapter 9 - Post-trading issues

9.1 The clearing obligation

Q239 What are your views on the pre-check to be performed by trading venues for orders related to derivative transactions subject to the clearing obligation and the proposed time frame?

DACSI believes that **trading venues should not be held liable and responsible** for limits of trading firms and not whether a derivative transaction will be cleared by a CCP (the clearing obligation for derivatives are part of the EMIR rules). There are currently trading venues that undertake a pre-check as an additional service but not all trading venues are offering this service. CCPs and Clearing members are offering limit (and other) services to their clients for derivatives transactions that are mandatory cleared under the EMIR regime. The current RTS 37 proposal is too narrow and all entities in the chain (trading venue, CCP and Clearing Member) should be in the position to offer limits and (other) clearing services. The RTS should be more flexible and should allow that all entities in the clearing process could offer this service in relation to their own business model. In general, extending the role of the trading venue would create an additional and more risky step of which we do not believe it is within the mandate of the trading venue. The obligation in article 29 (1) MiFIR should be read as an obligation to ensure that the trade feed is sent to a CCP for clearing, and that the CCP and the trading venue have both clear and public rules on when a transaction in principle will be cleared.

Q240 What are your views on the categories of transactions and the proposed timeframe for submitting executed transactions to the CCP?

DACSI agrees with the proposed timeframe.

We emphasise that the **sequence** should be correct. In relation to the orders, the first order should be transacted first. It should not be possible that the information on an order is sent to the CCP, and that an order that was submitted later, after which that order is processed before the first order. Regarding the 30 minutes timeframe it should be clear that a transaction is concluded bilaterally on a trading venue; bilaterally executed trades outside a trading venue are not in scope of this proposal. For this kind of bilateral trades the timeframe should be synchronised with the EMIR requirements regarding the confirmation of the trade and the transformation of the information in case the bilateral trade will be cleared by a CCP.

DACSI recommend s that the same rules are applied to voluntarily cleared and mandatorily cleared trades.

Q241 What are your views on the proposal that the clearing member should receive the information related to the bilateral derivative contracts submitted for clearing and the timeframe?

DACSI disagrees with the proposal. In our view, the clearing member **cannot 'ensure'** that its client sends the relevant information within the timeframe of the proposed article 5 (1). The clearing member is **not aware** that a bilateral transaction is entered into by its client. Because it cannot control this process, it should not be an obligation on the clearing member to ensure that other parties have to take action. Also, if another clearing member is involved in this bilateral transaction the CCP should match this trade before the clearing members could receive the information of the CCP.

With respect to the proposed article 5 (2): at the time that the clearing member receives the back-to-back trade from the CCP, the clearing member(s) currently needs to be accept this trade **manually**. Therefore, at the moment the 60 seconds are not possible.

Q242 What are your views on having a common timeframe for all categories of derivative transactions? Do you agree with the proposed timeframe?

DACSI is in favour of a standardised and harmonised global timeframe; if systems are further developed - it should be done quicker than the proposed 10 seconds.

Q243 What are your views on the proposed treatment of rejected transactions?

DACSI recommends that **only for a technical reason** (or on the initiative of the CA) an executed derivatives trade on a trading venue with a mandatory clearing obligation could be **rejected**.
It could also be the case that trading continues and that a chain of executed derivatives trades in the same derivatives class should be rejected; this will be a very complex process.
It is our opinion that ESMA should give additional guidance what to do in these cases.

For **bilateral** derivatives transactions the **clearing member** is **not aware** if a bilateral trade is rejected by the CCP as it is not involved in the process as set out in our answer to Q 241. If the CCP rejects a bilateral trade assuming that the clearing member is not informed, the CCP only informs the clients. It is the liability of the clients how to conclude the transaction i.e. to cancel the trade.

Why is the proposed article 7 restricted to trade rejections by the CCP? What **if the clearing member rejects** the trade after receiving the information from the CCP?

In relation to the proposed article 7 (4), does this mean that **re-submission** should only be possible if there are technical problems? Currently, the bilateral trades often need to be accepted by the clearing members manually. If at the end of the day the clearing member has not accepted the bilateral back-to-back trade (for whatever reason), the bilateral trade is rejected by the CCP. However, in such a case re-submission is possible the next day. DACSI would like to see more guidance from ESMA how to deal in such a situation.

9.2 Indirect clearing

Q244 Do you agree with the proposed draft RTS? Do you believe it addresses the stakeholders concerns on the lack of indirect clearing services offering?

If not, please provide detailed explanations on the reasons why a particular provision would limit such a development as well as possible alternatives.

DACSI in unsure whether the draft RTS addresses the relevant stakeholders.

We believe that the proposed solution provides a clear overview in the administration of the CCP and clearing member. This will assist an insolvency administrator.
However, we do not think this will constitute legal segregation. Based on our experience with the segregation rules under EMIR, we know that insolvency laws do not facilitate legal segregation as anticipated under EMIR in all jurisdictions. We are unsure whether a court/insolvency administrator would respect the rules in this proposed RTS, based on the fact that a recital in a regulation states that this regulation prevails over conflicting national insolvency laws.

There are **two possible models** through which indirect clearing may work in practice.

The **principal-to-principal** model, whereby:

- the indirect client enters into a derivative contract with the direct client; and
- the direct client (in its own name, rather than as agent of the indirect client) enters into an equivalent back to back contract with the clearing member.

The **guaranteed agency** model, whereby:

- the direct client (as agent of the indirect client) enters into a derivative contract with the clearing member; and
- the direct client guarantees the performance of the indirect client to the clearing member.

An important difference between the two models is that the direct client enters into two contracts in the principal-to-principal model—one facing the clearing member and one facing the indirect client—and only one under the guaranteed agency model.

Based on the models it is unclear whether the CCPs will be required to facilitate the opening of individually segregated accounts (ISAs) for indirect clients, if not, the indirect clients will not protect as obliged under the EMIR requirements. In article 3 is stated that the CCPs are not obliged to open accounts on indirect client level, but only on direct client level. This would imply that the indirect client is not protected on the CCP segregation and portability requirements of the CCP.

In addition, DACSI is in favour of carving out third country clients for indirect clearing due to legal and solvency constraints.

Q245 Do you believe that a gross omnibus account segregation, according to which the clearing member is required to record the collateral value of the assets, rather than the assets held for the benefit of indirect clients, achieves together with other requirements included in the draft RTS a protection of equivalent effect to the indirect clients as the one envisaged for client1s under EMIR?

DACSI believes that a gross omnibus account segregation, according to which the clearing member is required to record the collateral value of the assets, rather than the assets held for the benefit of indirect clients, achieves - together with other requirements included in the draft RTS - a protection to the indirect clients of equivalent effect as the one envisaged for clients under EMIR.