

## Comment on the Implementation of EMIR

Reporting Requirements and Enforcement Process  
should not overstretch Resources of Non-Financials

## Introduction

Deutsches Aktieninstitut<sup>1</sup> followed the legislative procedure regarding EMIR and the measures on level two very closely. We have already expressed in several position papers our concern that EMIR should not impact negatively the strategic need of the real economy to hedge risks related to their operative business. Furthermore, processes required in order to comply with EMIR and the respective Technical Standards should not burden inappropriately non-financial companies.

This paper focuses on practical issues many non-financial companies face as the reporting start date comes closer. In particular, we would like to draw ESMA's attention to severe difficulties in the following areas:

- The starting date for reporting will be likely mid February 2014. So far an appropriate methodology how the Unique Trade Identifier (UTI) will be determined is not available. If a feasible solution is not endorsed by ESMA in due time either the starting date for reporting needs to be postponed in all, or at the very least the requirement to deliver a field entry for an UTI, until this issue is settled.
- Especially for derivative contracts not executed on an electronic platform it is practically impossible to agree on a common execution and confirmation time stamp at reasonable costs. As we do not see the intrinsic value of this information detail in general, we ask regulators to drop this duty for these derivatives.
- Non-financial companies have to comply globally with rules concerning their use of derivatives. To minimize additional costs it has to be ensured that EMIR is implemented EU-wide without national variations (better: globally). This holds true especially for the reporting requirements and the enforcement process.

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<sup>1</sup> Deutsches Aktieninstitut e.V. (DAI, [www.dai.de](http://www.dai.de)) is the association of German exchange-listed stock corporations and other companies and institutions which are engaged in the capital markets development.

## 1 Unique-Trade-Identifier (UTI)

In order to appropriately use contract details delivered to the trade repositories for regulatory purposes the Unique Trade Identifier (UTI) is important.

ESMA noted in its Final Report regarding the Draft Technical Standards that “it should be the responsibilities of the counterparties to a contract to generate a UTI which will enable aggregation and comparison of data across trade repositories.” As a result, both counterparties must agree bilaterally on an UTI taking into account the requirements of Article 4 of the respective implementing standards (unique, neutral, reliable etc.).

As ESMA has not yet endorsed an UTI market standard, especially non-financial counterparties simply do not know how to comply with their reporting duties which will start presumably mid February 2014. The biggest compliance problem will arise from trades executed via phone because these transactions do not involve a “central body” like an electronic platform which could generate an UTI for both counterparties (nevertheless, please note that in some cases the platform operator already announced to *not* provide an UTI).

In general, we are of the opinion that it should be the task of the bank counterparties to generate the UTI for their clients. Nevertheless, one should bear in mind that most non-financial companies have to report intra-group transactions. These trades do not involve an (external) bank counterparty; the UTI has to be generated by the non-financial counterparty itself and is therefore subject to the companies internal logic.

Also problematic is how to deal with “backloaded” contracts (i.e. those contracts which are concluded on or after 16 August 2012 and which are outstanding on the reporting starting date). We want to stress that the number of backloaded derivatives, for which every single trade must be assigned an UTI on the reporting start date at the latest, is expected to be significant so that enough time is needed to meet the duty.

Overall, it will take non-financial counterparties much time to implement respective processes to comply with the reporting obligations (including the determination of an UTI). **Thus, it is most crucial that ESMA endorses feasible standards in due time. Otherwise, we urge the European Commission and ESMA to postpone the starting date for reporting or to provide appropriate transition periods to deal with the implementation of the UTI. At the very least, the requirement to deliver an UTI field entry must be postponed until a solution is at hand which is feasible for the means of all non-financial counterparties.**

In order to be feasible for non-financial companies UTI standards regarding external transactions should at least meet the following requirements:

- If trades are executed on platforms the platform operator should generate the UTI.
- If an UTI is not centrally available, especially when trades are agreed bilaterally e.g. via phone, we propose the following procedure:
  - It should be the task of the financial counterparties to generate the UTI for their clients. This would be in line with our assumption, that especially smaller non-financials will delegate the reporting duty to their bank counterparties. The requirement for non-financials to generate an UTI would undermine the benefits of the delegation.
  - Especially larger companies do not intend to delegate the reporting obligation. For these companies the UTI should be generated by the bank counterparty as well. As processes differ in non-financial companies there should be several options for the bank counterparty to submit the UTI. This should be possible **a)** by phone etc. when the trade is agreed between the counterparties. Nevertheless, as this form of communication bears the risk of misunderstandings and incorrect reports (especially when it comes to a 30- or 40-digit number) most companies will refrain from it. Therefore, it should be **b)** possible for the bank counterparty to submit the UTI as part of the trade confirmation. As the confirmation deadlines (t+2 after a period of transition) deviate from the reporting deadline (t+1), the reporting of those trades which are confirmed t+2 should be allowed to be reported t+2. As an alternative, in order to comply with the obligation to report within t+1 a “Pre-UTI” generated by the non-financial counterparty could be reported by the non-financial company, which is of course a much more complex and cost-intensive solution. The “Pre-UTI” could be the ID assigned to the respective trade in the treasury management systems. However, such an individual system ID will not meet the requirements set for an UTI defined in EMIR. Therefore, it can only be an interim solution and has to be replaced after receiving the final UTI included in the bank counterparties’ confirmation. Following its submission the non-financial counterparty forwards the UTI to the trade repository which is matched subsequently with the Pre-UTI already delivered.

Last but not least, ESMA should acknowledge the equivalence between the EU UTI and the U.S. Unique Swap Identifier (USI). Therefore, it should be possible to use the USI instead of the UTI.

## 2 Time Stamp as Part of the Reporting Requirements

Counterparties are required to report the execution (field 19) and the confirmation time stamp (field 26). Regarding these obligations the following problems are arising:

- *Execution time stamp:* It is possible that both counterparties report a common execution time stamp for trades which are executed on electronic platforms as the platform provider can make such a time stamp available. However, this is not possible for trades bilaterally agreed via phone, e-mail etc. which are recorded in the systems of the respective counterparties at different times. Both time stamps will hardly ever be matching. To refer to the time stamp attributed in the treasury management systems would hence make no sense. Therefore, both counterparties would have to agree on phone on an identical time stamp, which will be very burdensome as it is not in line with processes implemented so far. It is also very prone to recording errors. The important information about a trade is the day it is entered into, and not the exact time.
- *Confirmation time stamp:* It is common confirmation practice among non-financial companies to exchange confirmation forms. Each counterparty reconciles the documents regarding the agreed trade details after receipt. As the confirmation documents are not sent out at the same time, it is impossible to agree on a common time stamp without additional coordination efforts. This additional administrative burden would clearly be not reasonable. It further does, as the execution time stamp referred to above, not add meaningful information to the data delivered.
- Additional efforts are also necessary for backloaded contracts where the execution and the confirmation date are in the past. To agree on both for backloaded contracts is bearing even less significance for data quality, and as it is impossible to agree on the correct time retrospectively, any data given would be arbitrary.

In general, we are of the opinion that the indication of an execution and confirmation time stamp is very burdensome for non-financial companies. In addition, we do not see the benefit of this information for supervisory authorities, especially the declaration of seconds and minutes.

Therefore, the requirement for an *execution time stamp* should be abolished for trades not executed on electronic platforms. For those derivatives the day of execution should be sufficient.

For the *confirmation time stamp* an agreement on one and the same confirmation time is not possible. Therefore, counterparties should not be required to agree on a common confirmation time stamp.

### 3 EU-wide Coherence of Reporting Requirements and Enforcement Processes

To avoid frictions reporting requirements have to be implemented coherently across the EU. This means that national supervisory authorities should not have leeway to adjust the reporting requirements and the reporting template. Otherwise the administrative burden to take these specifics into account would be unreasonable high. This has to be seen against the background that many companies will be reporting centrally on account of their European subsidiaries. **Therefore, a coherent EU-wide reporting regime should be the overwhelming goal. Furthermore, coherence with other reporting regimes, e.g. with the U.S. rules, should be ensured or at least aimed at.**

In addition to that, more guidance would be helpful regarding how to comply with the reporting requirements. **ESMA should provide market participants with an example, especially for standard transactions (e.g. for FX-forwards, FX-non-deliverable-forwards, FX-swaps, IR fix for floating-swaps, cross-currency-swaps), how the data should be filled in correctly.**

EU-wide coherence is also necessary regarding the enforcement regime. In Germany it is – besides the national supervisory authority – up to the external auditor to monitor non-financial companies' compliance with different EMIR obligations. So far it remains unclear how compliance with EMIR will be verified in other EU member states. As many affiliates of a non-financial group are domiciled outside Germany in other EU member states it is uncertain so far which process these companies will have to comply with or will be subject to.

In order to avoid cross-border frictions and to keep the administrative burden as low as possible it is important to implement a coherent enforcement regime across the EU. **To achieve this goal we propose the implementation of a “home country principle”.** As the administrative processes concerning the compliance with EMIR are centralised on group level the enforcement process should be restricted to the group entity which is responsible for these processes. In most cases this task is executed via a specific legal entity or via the holding company of the group. This entity should be the one determining which process is relevant for the group as a whole.

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