# ICMA ERCC response to the ESMA Consultation Paper on the Review of RTS 22 on transaction data reporting under Art. 26 and RTS 24 on order book data to be maintained under Art. 25 of MiFIR

## 17 January 2025

***Introduction:***

ICMA welcomes the opportunity to respond to the ESMA consultation paper on the Review of RTS 22 on transaction data reporting under Art. 26 and RTS 24 on order book data to be maintained under Art. 25 of MiFIR.

We are responding to this Consultation Paper on behalf of the ICMA's **European Repo and Collateral Council** (ERCC) which was established in 1999 as the main representative body for the cross-border repo and collateral market in Europe. The ICMA ERCC currently has around 120 members, comprising the majority of firms actively involved in this market, including sell-side and buy-side institutions as well as all the major market infrastructures and other service providers. Among its many focus areas, the ERCC has been instrumental over the past years in leading the industry's successful efforts to implement SFTR Reporting in Europe, which has been coordinated through the ERCC's SFTR Task Force.

ICMA's response to this consultation is therefore focused on the SFT-related aspects of MiFIR transaction reporting and we are consequently only responding to question 24 of this consultation paper which deals with the alignment between the MiFIR reporting regime and EMIR/SFTR reporting.

**Q24 Do you agree with the proposed alignment of fields with EMIR/SFTR requirements as presented in the table above? Are there any other fields that should be aligned?**

**ICMA response:**

ICMA generally supports the objective of aligning the MiFIR transaction reporting framework with the requirements under SFTR and EMIR in terms of definitions and formats. The proposals in the ESMA consultation paper are helpful in this regard. However, we believe that the consultation paper misses out one of the most important and significant aspects in terms of aligning the different regimes, which is related to the scope and the current inconsistency in terms of reporting securities financing transactions (SFTs). More specifically, we urge ESMA to remove SFTs in their entirety from the scope of MiFIR transaction reporting, as the current partial inclusion of SFTs, specifically those concluded with EU central banks (ESCB members), is inconsistent with the remit and stated objectives of SFTR and has no meaningful benefit from a regulatory perspective.

In terms of background, Article 2(5)(a) of the Delegated Regulation (EU) 2017/590 specifies that SFTs (as defined in SFTR) do not fall under the definition of a transaction and are therefore exempt from MiFIR reporting obligations. However, counterintuitively, this exemption does not apply to SFTs concluded with EU central banks, which are brought back into scope through the penultimate paragraph of article 2(5). In our view, this approach is inconsistent and should be reconsidered for the following reasons:

- **Reporting SFTs under MiFIR is inconsistent with SFTR:** SFTR was designed as the only applicable reporting framework for SFTs. SFTR article 2(3) explicitly exempts SFTs with EU central banks from reporting. This has been a decision by EU co-legislators which pre-dated the drafting of the relevant MiFIR technical standards (RTS 22), supposedly reflecting the fact that the details of these trades are known to central banks and are therefore accessible to the relevant national authorities, where necessary. Whether or not these trades are reportable should have been a consideration under SFTR (and could potentially be reconsidered in the context of the SFTR review), but this is not a question that should have been addressed in MiFIR level 2, an entirely different reporting regime with a different purpose. A similar argument has also been put forward forcefully by the ECB in its opinion on certain aspects of the MiFIR review (CON/2022/19) published in July 2022. In section 7.4 of this opinion ("Maintaining full exemption of ESCB securities financing transactions from the supervisory reporting obligation") the ECB argues for a removal of SFTs with ESCB members from the scope of MiFIR transaction reporting on the basis that this " effective subordination of Level 1 Union legislation to Level 2 Union legislation contradicts the well-established legal principle of *lex superior derogat legi inferiori* (16), whereby implementing and delegated Union acts may not contravene secondary Union legislation."

- **The MiFIR framework is not appropriate for reporting SFTs:** SFTR was designed specifically to capture repos and other SFTs, taking into account their unique structure and features. MiFIR was not. The logic of MiFIR transaction reporting therefore raises numerous issues. ICMA developed a proposed reporting approach for SFTs under MiFIR which was submitted to ESMA in November 2019 and subsequently incorporated into our detailed ICMA Recommendations for Reporting under SFTR (see section 1.11 "How

should a repo with a member of the ESCB or the Bank of England be reported under MiFIR?"). While these recommendations avoid some of the practical problems, the resulting report remains still far from meaningful given the fundamental logical issues with the rules, which mean that SFTs simply do not fit the relevant reporting template. One practical example is the fact that MiFIR associates specific securities with particular trading venues, but this does not make sense for repo, especially triparty repo which allows for a broader set of collateral assets to be allocated to the trade that have no association with the relevant execution venue for the repo transaction, hence resulting in rejections.

While the formatting changes proposed by ESMA as part of the present CP are helpful, they cannot resolve any of the underlying logical inconsistencies, which are all further described in the related ICMA guidance. In short, MiFIR reporting does not accurately capture the fundamentals of SFTs and therefore **does not provide meaningful information to regulators**. Of course, it also only captures a small subset of the overall market. From an industry perspective, building logic to allow firms to exclude a small number of SFTs and report these under an entirely different regime has been cumbersome and costly to implement and continues to be problematic, especially given the inappropriate design of the MiFIR rules. In short, this obligation has already **caused disproportionate costs for no significant benefit** in terms of increased transparency and should therefore be revoked. Finally, we also note that the purpose of MiFIR reporting is different from SFTR reporting. Given the focus of MiFIR reporting on market supervision and abuse, it also makes little sense to include specifically SFTs with central banks under this regime, where the potential risk for market abuse is extremely low.

**In conclusion, ICMA would urge ESMA to redraft article 2(5) to consistently exclude all types of SFTs from MiFIR transaction reporting. More specifically, we suggest deleting the penultimate paragraph of article 2(5) of Regulation (EU) 2017/590.** As a result, SFTs with EU central banks would be exempt from reporting, consistent with SFTR, whereas all other SFTs (including all SFTs with third-country central banks) would be reported under EU SFTR.

We note that this would also be in line with the approach taken by the UK, where the FCA decided in February 2022 (see Handbook Notice No.96) to extend the existing exclusion in article 2(5) of the relevant technical standards to all SFTs, including those with the Bank of England and EU central banks, with the latter (SFTs with ESCB members) becoming reportable under UK SFTR instead (with effect from 1 April 2022).

We note that our proposals are in line with the proposals put forward by the International Securities Lending Association (ISLA) in their own response to Q24 of this CP in relation to securities lending transactions.

Finally, while we believe that a full exemption is clearly the preferred and most consistent solution, we would note that in case ESMA decides to leave article 2(5) unchanged and maintain the current scope of the transaction reporting obligations (i.e. including certain SFTs), this would require more specific guidance from ESMA as to how these transactions should be reported, and a fundamental overhaul of the reporting rules specifically for SFTs in order to ensure that the logic captures the fundamentals of those transactions and that the reports are meaningful.