esma European Securities and Markets Authority

Reply form for the ESMA MiFID II/MiFIR Consultation Paper

22 May 2014

European Securities and Markets Authority

Date: 22 May 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA MiFID II/MiFIR Consultation Paper, published on the ESMA website (here).

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type <ESMA_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **1 August 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.

1. Overview

2. Investor protection

2.1. Exemption from the applicability of MiFID for persons providing an investment service in an incidental manner

Q1: Do you agree with the proposed cumulative conditions to be fulfilled in order for an investment service to be deemed to be provided in an incidental manner?

<ESMA_QUESTION_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_1>

2.2. Investment advice and the use of distribution channels

Q2: Do you agree that it is appropriate to clarify that the use of distribution channels does not exclude the possibility that investment advice is provided to investors?

<ESMA_QUESTION_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_2>

2.3. Compliance function

Q3: Do you agree that the existing compliance requirements included in Article 6 of the MiFID Implementing Directive should be expanded?

<ESMA_QUESTION_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_3>

Q4: Are there any other areas of the Level 2 requirements concerning the compliance function that you consider should be updated, improved or revised?

<ESMA_QUESTION_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_4>

2.4. Complaints-handling

Q5: Do you already have in place arrangements that comply with the requirements set out in the draft technical advice set out above?

<ESMA_QUESTION_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_5>

2.5. Record-keeping (other than recording of telephone conversations or other electronic communications)

Q6: Do you consider that additional records should be mentioned in the minimum list proposed in the table in the draft technical advice above? Please list any additional records that could be added to the minimum list for the purposes of MiFID II, MiFIR, MAD or MAR.

<ESMA_QUESTION_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_6>

Q7: What, if any, additional costs and/or benefits do you envisage arising from the proposed approach? Please quantify and provide details.

<ESMA_QUESTION_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_7>

2.6. Recording of telephone conversations and electronic communications

Q8: What additional measure(s) could firms implement to reduce the risk of non-compliance with the rules in relation to telephone recording and electronic communications?

<ESMA_QUESTION_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_8>

Q9: Do you agree that firms should periodically monitor records to ensure compliance with the recording requirement and wider regulatory requirements?

<ESMA_QUESTION_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_9>

Q10: Should any additional items of information be included as a minimum in meeting minutes or notes where relevant face-to-face conversations take place with clients?

<ESMA_QUESTION_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_10>

Q11: Should clients be required to sign these minutes or notes?

<ESMA_QUESTION_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_11>

Q12: Do you agree with the proposals for storage and retention set out in the above draft technical advice?

<ESMA_QUESTION_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_12>

Q13: More generally, what additional costs, impacts and/or benefits do you envisage as a result of the requirements set out in the entire draft technical advice above?

<ESMA_QUESTION_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_13>

2.7. Product governance

Q14: Should the proposed distributor requirements apply in the case of distribution of products (e.g. shares and bonds as well as over-the-counter (OTC) products) available on the primary market or should they also apply to distribution of products on the secondary market (e.g. freely tradable shares and bonds)? Please state the reason for your answer.

<ESMA_QUESTION_14>
We see no reason to distinguish if the distribution services under MiFID of investment advice, reception and transmission of orders and dealing on own account are involved. However where secondary market trading is used only as a means to execute client orders, such as shares or ETFs, the secondary market should be understood as trading venue within the meaning of MiFID II Art. 4(1)(24) for executing orders resulting from distribution services under MiFID, not as distribution service of its own.
<ESMA_QUESTION_14>

Q15: When products are manufactured by non-MiFID firms or third country firms and public information is not available, should there be a requirement for a written agreement under which the manufacturer must provide all relevant product information to the distributor?

<ESMA_QUESTION_15>
There should be no mandatory requirement for a written agreement. However in our view a distributor in the context of this question can only be considered as such if there is a distribution agreement between such distributor and the product manufacturer.

UCITS and AIF disclosures should be considered as reliable and adequate standard allowing the distributor to fulfil its own requirements when distributing a product manufactured by a non-MiFID firm. UCITS requirements should be mentioned as equivalent to Prospectus and Transparency Directives (cf. point 26 of the Draft Technical Advice). As a result, a UCITS or an AIF management company would not be required to provide any further information over and above the prospectus and KIID and any AIFMD Article 23 disclosure obligations.

We agree that a written agreement may be useful to ensure on-going provision of adequate information from the manufacturer to the distributor but this requirement should be limited to situations where (i) the product/product manufacturer is not regulated by UCITS, AIFM, Prospectus or Transparency Directive and (ii) the information is not publicly available or not of reliable and adequate standard.

It should also be made clear that the manufacturing of UCITS and AIFs is not subject to the product governance standards under MiFID based on the general exception of these products under MiFID II Article 2(1)(i).

It should be left to the product manufacturer and the distributor to determine how they wish to document the provision of information.
<ESMA_QUESTION_15>

Q16: Do you think it would be useful to require distributors to periodically inform the manufacturer about their experience with the product? If yes, in what circumstances and what specific information could be provided by the distributor?

<ESMA_QUESTION_16>
ESMA implies that there is a link of responsibility on the part of a manufacturer to check that the distributor is complying with its own regulatory obligations. It is important to keep the respective responsibilities of the two investment firms clear and separate, as each investment firm is responsible on their own for any promotional material it has produced. In addition manufacturers are not normally in the position to be able to assess whether individual sales made by the distributor are consistent with target market analysis without redoing the suitability analysis conducted by the distributor. Rather it is for the distributor to put in place suitable governance to review internal suitability decisions.

However periodic information about the practical experience with the distribution of a product could be useful for the product manufacturer.

It could be useful for the manufacturer to receive the following information on an ad-hoc or upon request basis: (i) any difficulties to sell a product to the target market defined by the manufacturer which may be caused by an inadequacy of product to the needs of the target market, (ii) any difficulty to understand the features of a product and how this product meets the needs of the target market, (iii) any event impacting the sales channel of a specific product or to a specific target market.
<ESMA_QUESTION_16>

Q17: What appropriate action do you think manufacturers can take if they become aware that products are not sold as envisaged (e.g. if the product is being widely sold to clients outside of the product's target market)?

<ESMA_QUESTION_17>
The provision of investment advice and the selling of products in accordance with the 'suitability' and 'appropriateness' requirements is the responsibility of the distributor and not the product manufacturer. Distributors are able to perform their own assessment of products to consider whether they meet the investment objectives and risk appetite of their clients.

To this end a product manufacturer should only identify in general terms the target market for each product and the distributor may take this into account when advising the investor.

We refer to our answer to Q16 and the importance that product manufacturers are not considered responsible for any actions taken by distributors in their course of business.
<ESMA_QUESTION_17>

Q18: What appropriate action do you think distributors can take, if they become aware of any event that could materially affect the potential risk to the identified target market (e.g. if the distributor has mis-judged the target market for a specific product)?

<ESMA_QUESTION_18>
The distributor or financial intermediary should first inform the clients of potential inadequacy and propose alternative solutions, at no cost to the client(s) if the distributor has not been compliant. If a distribution agreement exists between the product manufacturer and the distributor this agreement should contractually require the manufacturer to be notified of error made by the distributor. However the product manufacturer cannot be responsible for the actions of the distributor or financial intermediary.

As stated in our response to Q16, the manufacturer will not normally have access to the suitability analysis performed by the distributor or an overview of the client's entire portfolio. Therefore the manufacturer would not be in a position to determine whether products have been sold to the wrong target market. The investment that the manufacturer is aware of may also be a small part of a larger investment portfolio which, together, meets the client's risk profile and objective.
<ESMA_QUESTION_18>

Q19: Do you consider that there is sufficient clarity regarding the requirements of investment firms when acting as manufacturers, distributors or both? If not, please provide details of how such requirements should interact with each other.

<ESMA_QUESTION_19>
No, clarity is not sufficient at this stage. The manufacturer is responsible to design products in compliance with the requirements of the legislation applicable to the products, such as UCITS and AIFs. Therefore collective investment schemes are explicitly exempted from MiFID and this point should be clearer in the ESMA technical advice. The distributor's responsibility is to identify the clients which fall within the defined target market for each product. In particular: Footnote 34 should be further clarified and point 27.iii of the Draft Technical Advice should be removed.
<ESMA_QUESTION_19>

Q20: Are there any other product governance requirements not mentioned in this paper that you consider important and should be considered? If yes, please set out these additional requirements.

<ESMA_QUESTION_20>
It should be clarified that manufacturers of UCITS and AIFs, that are not MiFID firms, are not subject to the product governance obligations due to the exemption in Article 2. It should also be confirmed that there is a clear separation between manufacturers and distributors, as explained in the previous answers.
<ESMA_QUESTION_20>

Q21: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements, either as distributors or manufacturers?

<ESMA_QUESTION_21>
While UCITS and AIFs are not subject to the new product governance obligations additional costs may be incurred in providing 'all relevant information' on products to distributors.
<ESMA_QUESTION_21>

2.8. Safeguarding of client assets

Q22: Do you agree with the proposal for investment firms to establish and maintain a client assets oversight function?

<ESMA_QUESTION_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_22>

Q23: What would be the cost implications of establishing and maintaining a function with specific responsibility for matters relating to the firm's compliance with its obligations regarding the safeguarding of client instruments and funds?

<ESMA_QUESTION_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_23>

Q24: Do you think that the examples in this chapter constitute an inappropriate use of TTCA? If not, why not? Are there any other examples of inappropriate use of or features of inappropriate use of TTCA?

<ESMA_QUESTION_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_24>

Q25: Do you agree with the proposal to clarify that the use of TTCA is not a freely available option for avoiding the protections required under MiFID? Do you agree with the proposal to place high-level requirements on firms to consider the appropriateness of TTCA? Should risk disclosures be required in this area? Please explain your answer. If not, why not?

<ESMA_QUESTION_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_25>

Q26: Do you agree with the proposal to require a reasonable link between the client's obligation and the financial instruments or funds subject to TTCA?

<ESMA_QUESTION_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_26>

Q27: Do you already make any assessment of the suitability of TTCAs? If not, would you need to change any processes to meet such a requirement, and if so, what would be the cost implications of doing so?

<ESMA_QUESTION_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_27>

Q28: Are any further measures needed to ensure that the transactions envisaged under Article 19 of the MiFID Implementing Directive remain possible in light of the ban on concluding TTCAs with retail clients in Article 16(10) of MiFID II?

<ESMA_QUESTION_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_28>

Q29: Do you agree with the proposal to require firms to adopt specific arrangements to take appropriate collateral, monitor and maintain its appropriateness in respect of securities financing transactions?

<ESMA_QUESTION_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_29>

Q30: Is it suitable to place collateral, monitoring and maintaining measures on firms in respect of retail clients only, or should these be extended to all classes of client?

<ESMA_QUESTION_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_30>

Q31: Do you already take collateral against securities financing transactions and monitor its appropriateness on an on-going basis? If not, what would be the cost of developing and maintaining such arrangements?

<ESMA_QUESTION_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_31>

Q32: Do you agree that investment firms should evidence the express prior consent of non-retail clients to the use of their financial instruments as they are currently required to do so for retail clients clearly, in writing or in a legally equivalent alternative means, and affirmatively executed by the client? Are there any cost implications?

<ESMA_QUESTION_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_32>

Q33: Do you anticipate any additional costs in order to comply with the requirements proposed in relation to securities financing transactions and collateralisation? If yes, please provide details.

<ESMA_QUESTION_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_33>

Q34: Do you think that it is proportionate to require investment firms to consider diversification of client funds as part of the due diligence requirements when depositing client funds? If not, why? What other measures could achieve a similar objective?

<ESMA_QUESTION_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_34>

Q35: Are there any cost implications to investment firms when considering diversification as part of due diligence requirements?

<ESMA_QUESTION_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_35>

Q36: Where an investment firm deposits client funds at a third party that is within its own group, should an intra-group deposit limit be imposed? If yes, would imposing an intra-group deposit limit of 20% in respect of client funds be proportionate? If not, what other percentage could be proportionate? What other measures could achieve similar objectives? What is the rationale for this percentage?

<ESMA_QUESTION_36>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_36>

Q37: Are there any situations that would justify exempting an investment firm from such a rule restricting intra-group deposits in respect of client funds, for example, when other safeguards are in place?

<ESMA_QUESTION_37>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_37>

Q38: Do you place any client funds in a credit institution within your group? If so, what proportion of the total?

<ESMA_QUESTION_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_38>

Q39: What would be the cost implications for investment firms of diversifying holdings away from a group credit institution?

<ESMA_QUESTION_39>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_39>

Q40: What would be the impact of restricting investment firms in respect of the proportion of funds they could deposit at affiliated credit institutions? Could there be any unintended consequences?

<ESMA_QUESTION_40>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_40>

Q41: What would be the cost implications to credit institutions if investment firms were limited in respect of depositing client funds at credit institutions in the same group?

<ESMA_QUESTION_41>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_41>

Q42: Do you agree with the proposal to prevent firms from agreeing to liens that allow a third party to recover costs from client assets that do not relate to those clients, except where this is required in a particular jurisdiction?

<ESMA_QUESTION_42>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_42>

Q43: Do you agree with the proposal to specify specific risk warnings where firms are obliged to agree to wide-ranging liens exposing their clients to the risk?

<ESMA_QUESTION_43>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_43>

Q44: What would be the one off costs of reviewing third party agreements in the light of an explicit prohibition of such liens, and the on-going costs in respect of risk warnings to clients?

<ESMA_QUESTION_44>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_44>

Q45: Should firms be obliged to record the presence of security interests or other encumbrances over client assets in their own books and records? Are there any reasons why firms might not be able to meet such a requirement? Are there any cost implications of recording these?

<ESMA_QUESTION_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_45>

Q46: Should the option of 'other equivalent measures' for segregation of client financial instruments only be available in third country jurisdictions where market practice or legal requirements make this necessary?

<ESMA_QUESTION_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_46>

Q47: Should firms be required to develop additional systems to mitigate the risks of 'other equivalent measures' and require specific risk disclosures to clients where a firm must rely on such 'other equivalent measures', where not already covered by the Article 32(4) of the MiFID Implementing Directive?

<ESMA_QUESTION_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_47>

Q48: What would be the on-going costs of making disclosures to clients when relying on 'other equivalent measures'?

<ESMA_QUESTION_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_48>

Q49: Should investment firms be required to maintain systems and controls to prevent shortfalls in client accounts and to prevent the use of one client's financial instruments to settle the transactions of another client, including:

<ESMA_QUESTION_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_49>

Q50: Do you already have measures in place that address the proposals in this chapter? What would be the one-off and on-going cost implications of developing systems and controls to address these proposals?

<ESMA_QUESTION_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_50>

Q51: Do you agree that requiring firms to hold necessary information in an easily accessible way would reduce uncertainty regarding ownership and delays in returning client financial instruments and funds in the event of an insolvency?

<ESMA_QUESTION_51>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_51>

Q52: Do you think the information detailed in the draft technical advice section of this chapter is suitable for including in such a requirement?

<ESMA_QUESTION_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_52>

Q53: Do you already maintain the information listed in a way that would be easily accessible on request by a competent person, either before or after insolvency? What would be the cost of maintaining such information in a way that is easily accessible to an insolvency practitioner in the event of firm failure?

<ESMA_QUESTION_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_53>

2.9. Conflicts of interest

Q54: Should investment firms be required to assess and periodically review - at least annually - the conflicts of interest policy established, taking all appropriate measures to address any deficiencies? Please also state the reason for your answer.

<ESMA_QUESTION_54>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_54>

Q55: Do you consider that additional situations to those identified in Article 21 of the MiFID Implementing Directive should be mentioned in the measures implementing MiFID II? Please explain your rationale for any additional suggestions.

<ESMA_QUESTION_55>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_55>

Q56: Do you consider that the distinction between investment research and marketing communications drawn in Article 24 of the MiFID Implementing Directive is sufficient and sufficiently clear? If not, please suggest any improvements to the existing framework and the rationale for your proposals.

<ESMA_QUESTION_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_56>

Q57: Do you consider that the additional organisational requirements listed in Article 25 of the MiFID Implementing Directive and addressed to firms producing and disseminating investment research are sufficient to properly regulate the specificities of these activities and to protect the objectivity and independence of financial analysts and of the investment research they produce? If not, please suggest any improvements to the existing framework and the rationale for your proposals.

<ESMA_QUESTION_57>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_57>

2.10. Underwriting and placing – conflicts of interest and provision of information to clients

Q58: Are there additional details or requirements you believe should be included?

<ESMA_QUESTION_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_58>

Q59: Do you consider that investment firms should be required to discuss with the issuer client any hedging strategies they plan to undertake with respect to the offering, including how these strategies may impact the issuer client's interest? If not, please provide your views on possible alternative arrangements. In addition to stabilisation, what other trading strategies might the firm take in connection with the offering that would impact the issuer?

<ESMA_QUESTION_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_59>

Q60: Have you already put in place organisational arrangements that comply with these requirements?

<ESMA_QUESTION_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_60>

Q61: How would you need to change your processes to meet the requirements?

<ESMA_QUESTION_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_61>

Q62: What costs would you incur in order to meet these requirements?

<ESMA_QUESTION_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_62>

2.11. Remuneration

Q63: Do you agree with the definition of the scope of the requirements as proposed? If not, why not?

<ESMA_QUESTION_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_63>

Q64: Do you agree with the proposal with respect to variable remuneration and similar incentives? If not, why not?

<ESMA_QUESTION_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_64>

2.12. Fair, clear and not misleading information

Q65: Do you agree that the information to retail clients should be up-to-date, consistently presented in the same language, and in the same font size in order to be fair, clear and not misleading?

<ESMA_QUESTION_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_65>

Q66: Do you agree that the information about future performance should be provided under different performance scenarios in order to illustrate the potential functioning of financial instruments?

<ESMA_QUESTION_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_66>

Q67: Do you agree that the information to professional clients should comply with the proposed conditions in order to be fair, clear and not misleading? Do you consider that the information to professional clients should meet any of the other conditions proposed for retail clients?

<ESMA_QUESTION_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_67>

2.13. Information to clients about investment advice and financial instruments

Q68: Do you agree with the objective of the above proposals to clarify the distinction between independent and non-independent advice for investors?

<ESMA_QUESTION_68>
In principle, ALFI agrees with the objective of the above proposals to clarify the distinction between independent and non-independent advice for investors.

We have doubts about the information which is proposed to be given to the investor will demonstrate independence, in particular disclosing "the total number of financial instruments and providers analysed per each type of instrument …" does not, in our opinion, ensure independence nor inform investors. In our view, the key information an investor requires is whether the advice/adviser is independent or not, i.e. are they a 'financial intermediary' selling only the products of a particular manufacturer and whether the advice was suitable/appropriate. By way of an example, the requirements mentioned in Point 4 would be difficult to achieve when independent advice is being given in relation to Investment Funds without guidance on what proportion of the many thousands available in the market would need to have been considered in order to determine that the advice given is independent.

Moreover an adviser may provide independent advice for a particular area of the market (for example ethical investments), but provide non-independent advice for the rest of the product range offered.
<ESMA_QUESTION_68>

Q69: Do you agree with the proposal to further specify information provided to clients about financial instruments and their risks?

<ESMA_QUESTION_69>
In ALFI's view disclosures as foreseen by the UCITS, AIFMD or in equivalent regulations like PRIIPS should be sufficient and do not ask for an additional layer of transparency. Imposing another layer of disclosure for UCITS would cause confusion in the mind of investors. As under MiFID 1, the principle should be to rely on existing specific regulations that already provide a high degree of protection for investors. Therefore it should be clarified that those products covered by UCITS, AIFMD and, in due course, by PRIIPS meet this obligation.

ALFI is of the opinion that the same disclosure requirements should not be applicable in case of professional clients.
<ESMA_QUESTION_69>

Q70: Do you consider that, in addition to the information requirements suggested in this CP (including information on investment advice, financial instruments, costs and charges and safeguarding of client assets), further improvements to the information requirements in other areas should be proposed? If yes, please specify, by making reference to existing requirements in the MiFID Implementing directive.

<ESMA_QUESTION_70>
Reference is made to the response to Question 69 above.
<ESMA_QUESTION_70>

2.14. Information to clients on costs and charges

Q71: Do you agree with the proposal to fully apply requirements on information to clients on costs and charges to professional clients and eligible counterparties and to allow these clients to opt-out from the application of these requirements in certain circumstances?

<ESMA_QUESTION_71>
We do not agree with this proposal. Article 33 of the Implementing Directive applies to retail client only, this principle should be retained and professional clients can chose to opt-in.

Although increased transparency of costs is of key importance, in most cases relationships between professional clients/ eligible counterparties and professionals submitted to the MiFID II rules are different from relationships between professionals and retail clients.

Professional clients/eligible counterparties will individually negotiate advice and portfolio management services so they have other ways of being informed both in advance and permanently on financial instrument/investment services and to request the information they need. There is therefore no need to introduce an automatic procedure. Under MiFID professional clients have the right to request to be treated as retail clients and to receive this information if they wish.

Consequently, the solution should not be an opt-out but rather an opt-in, which already exists in MiFID; the information obligations should only be fulfilled on explicit request for professional clients/eligible counterparties.
<ESMA_QUESTION_71>

Q72: Do you agree with the scope of the point of sale information requirements?

<ESMA_QUESTION_72>
Generally yes, since it is desirable that a level-playing field is established across the financial industry. There remain various questions however:

The proposed rules diverge with the PRIIPs rules as regards post-sale requirements and may therefore result in contradictory obligations.

As to the terms "recommended or marketed" used in point 4 of the draft technical advice: ESMA argues that these should be understood in the broadest manner and even include general recommendations and the promotion of certain financial instruments. We question whether it is appropriate that the elements normally used to further define an investment service are discussed under the topic of costs and charges.

Furthermore, we wonder what the added value will be of interpreting these terms in such a broad sense. In our view the definition of investment service is not at its right place in the consultation (Point 18, page 102) and should be put as a generic definition elsewhere in the document. ALFI is also of the opinion that there can be marketing in the sense of Point 18 only if distribution agreements are concluded between the product manufacturer and the distributors.

We cannot agree with point 3.ii. of the draft advice as this seems to suggest that a full point of sale disclosure is applicable in cases where the distributor has the obligation to provide a KIID. If a KIID is provided this should be considered adequate disclosure and requesting additional disclosures, at a product level, would create an unlevel playing field.

Point 4 of the draft advice relates in our view to execution-only services and this should be clarified.

In relation to the ”standardized format”, we would ask that ESMA clarifies by which medium does this information have to be provided: email, normal mail, other?

Clarity is required on what is meant by a "full point" of sale disclosure?

As Article 24(4) of the Directive only discusses “aggregated information”, we do not understand why ESMA operated a differentiation by introducing the term “full point of sale disclosure”. The proposed differentiation in the draft technical advice under point 3. and 4. is therefore not understandable.
<ESMA_QUESTION_72>

Q73: Do you agree that post-sale information should be provided where the investment firm has established a continuing relationship with the client?

<ESMA_QUESTION_73>
A “continuing relationship” should only be deemed to exist where the investment firm has entered into an agreement with the client to provide certain services on an on-going basis. The provision of an ‘execution only’ service can never be considered as establishing a continuing relationship, even where trade executions may be on a frequent basis.

Certainly, such an approach makes sense in order to keep the investor sufficiently informed. However, we cannot agree with the intention to apply such an obligation to any investment service such as, in particular, investment advice or, as an ancillary service, investment research. These are as such one-off activities and if the investment advice is, in the end, not followed by the client, this obligation will have generated needless costs for the investment firm. The reasoning is similar for investment research, the behaviour of the client cannot be guaranteed and the research may prove useless. As a result, post-sale information should not be mandatory for these services.

As a general rule, ALFI would suggest that the criteria for defining whether a continued relationship exists should be the licence under which the adviser operates, based on the categories of the MiFID (mandate evidenced by a contract or one-off investment advice).
<ESMA_QUESTION_73>

Q74: Do you agree with the proposed costs and charges to be disclosed to clients, as listed in the Annex to this chapter? If not please state your reasons, including describing any other cost or charges that should be included.

<ESMA_QUESTION_74>
We do not agree. Disclosure requirements for charges under the UCITS directive, in the KIID and in future under the PRIIPs KID, are sufficient to allow the investor to understand and compare the costs of funds. Portfolio transaction costs are included in the NAV of the fund and it is difficult to see how these could be disclosed in an understandable and succinct manner to retail investors.

We would stress MiFID rules in this regard should be aligned to PRIIPs and rules applicable to investment funds.

As already required by MiFID I we support that any additional costs at point of sale be disclosed by the investment firm to the investor.
<ESMA_QUESTION_74>

Q75: Do you agree that the point of sale information on costs and charges could be provided on a generic basis? If not, please explain your response.

<ESMA_QUESTION_75>
Yes. However the ESMA advice should make it clear that UCITS KIID and in future PRIIPs KID requirements must be considered sufficient in terms of product costs information and no additional information from the product manufacturer is needed. Any additional point of sale information is the responsibility of the distributor/financial intermediary.
<ESMA_QUESTION_75>

Q76: Do you have any other comments on the methodology for calculating the point of sale figures?

<ESMA_QUESTION_76>
The disclosure and point of sale figures are the responsibility of the investment firm selling the product. From a fund perspective however, product charges disclosed in the KIID are adequate for the firm to comply with these requirements.

The MiFID regime does not provide a limitation of liability in terms of the cost disclosure similar to the one existing under the UCITS Directive or to be applicable under the PRIIPs Regulation. We would therefore be concerned that the provision of assumptions and estimations may bear a significant liability risk for the distributors of financial instruments under the relevant civil law.
<ESMA_QUESTION_76>

Q77: Do you have any comments on the requirements around illustrating the cumulative effect of costs and charges?

<ESMA_QUESTION_77>
We would be concerned that the provision of illustrative effects of costs and charges may be misleading to investors.

For this type of information to be meaningful, it would have to include a number of assumptions in order to be able to calculate a monetary illustration. Among others it would have to include examples of potential investment return which could lead to the expectation of a specific return to the investor. By way of example we would refer to the Endowment Policy issues in the UK a few years ago.

Estimates of transaction costs may also prove to be inaccurate as actual figures will be dependent on market conditions. Other aspects such as the specific tax situation of each investor would have an impact on the accuracy of any illustration. We do not believe that the product manufacturer is in a position to provide this information.
<ESMA_QUESTION_77>

Q78: What costs would you incur in order to meet these requirements?

<ESMA_QUESTION_78>
Until more specific requirements are adopted it will be impossible to give accurate figures.
<ESMA_QUESTION_78>

2.15. The legitimacy of inducements to be paid to/by a third person

Q79: Do you agree with the proposed exhaustive list of minor non-monetary benefits that are acceptable? Should any other benefits be included on the list? If so, please explain.

<ESMA_QUESTION_79>
With regard to the structure of ESMA's proposals, we do not believe that an exhaustive list of minor non-monetary benefits (limited to three headings at that) delivers the desired policy. Such a list both fails to implement the inducements rules set out at Level 1 by imposing an artificial 'exhaustive' restriction, and effectively rules out both ESMA's and each National Competent Authority's ability to add to or change the list to reflect future changes in industry practice, stripping the policy of appropriate flexibility.

Instead, we would suggest that only a non-exhaustive list will both meet the requirements of Level 1 and appropriately 'future-proof' MiFID II policy against industry change.

With regard to the scope of ESMA's proposals, we have more serious misgivings. In particular, we object to ESMA's decision to bring a portfolio manager's use of dealer commission to supply investment research ("IR") to its clients ("broker commission for IR") within scope of MiFID II's inducement rules.

Our objection here falls under four main headings.

In terms of procedure the capture of broker commission for IR does not seem to have been the intention of the Level 1 co-legislators in the first instance - or, at the very least was not properly debated by the co-legislators and is not being properly subjected to consultation by ESMA.

A ban on broker commission for IR is not called out as a key element to be considered under the inducement rules anywhere in MiFID II Recitals. Indeed - to the contrary - Recital 74 singles out for attention "fees, commission or any monetary and non-monetary benefits from third parties, and *particularly from issuers or product providers* [*emphasis* added]". Recital 74 clearly places an inducement ban solely in the context of product distribution to portfolio managers (i.e. discretionary wealth managers), and remains silent on the possibility of a ban on broker commission for IR for portfolio managers (i.e. institutional money managers).

ESMA's appointment of a consultancy to undertake an impact analysis of the proposal as part of their Level 2 work is further self-evidence that there was no such consideration by the co-legislators at Level 1 – or, if there was, that it was not based on any impact assessment.

Likewise, ESMA's advice that the Commission should retro-fit the UCITS and AIFMD Directives in order to align them with ESMA's proposals under MiFID II (CP, 2.15.16) illustrates a substantial lack of consideration at Level 1 at best, but probably again signals the fact that the co-legislators did not at the time consider a ban on broker commission for IR. We strongly object that a proposal of this magnitude, cutting across no less than three key European Directives at Level 1 should be introduced by ESMA at Level 2.

We would suggest instead that ESMA refer the entire broker commission for IR issue for MiFID firms, UCITS management companies and AIF management to the Commission for more timely assessment and consideration with proper impact assessment and industry consultation.

In terms of policy – and in the context of the proper consideration at Commission level that we recommend above - we would then suggest that the Commission consider broker commission for IR (as above) not as an inducement (between a broker and a portfolio manager) but rather as a potential conflict of interest (between a portfolio manager and its clients).

When properly understood in the context of Commission Sharing Arrangements ("CSA" - see below) the availability of broker commission for IR to a portfolio manager does not induce the portfolio manager to choose one broker over another. This is in direct contrast to the availability of product commission to a distributor that may induce distributors to prejudice commission-paying products over non-commission-paying products when advising clients or deciding on the make-up of a discretionary portfolio. Again, it is this latter scenario that Recital 74 clearly envisages under Article 24 of MiFID II when it states that policy should lean against inducements flowing "particularly from issuers or product providers".

Broker commission, on the other hand, is used to purchase IR for a portfolio manager's clients – whether they are segregated mandate, UCITS or AIF clients – without direct benefit to the portfolio manager itself and with the IR benefitting the portfolio manager's clients. Broker commission is therefore not intended to induce the portfolio manager. Instead, the risks inherent in broker commission for IR are that a portfolio manager might overpay for IR to the detriment of its clients or unfairly allocate IR between clients. This is why portfolio managers have traditionally handled broker commission for IR under the heading of conflicts of interest between investment firms and their clients under MIFID, and why we would suggest that in undertaking its work, the Commission should shift its consideration of broker commission for IR back from under Recital 74 / Article 24 of MiFID 2, where ESMA have pegged it, and return its proper consideration under Article 23.

For the Commission, this would have the added benefit of treating any conflicts inherent in broker commission for IR as a general structural issue for MiFID firms to address (under Chapter II (Operating conditions for investment firms), Section 1 (General provisions), Article 23 (Conflicts of interest)), rather than as a narrowly investor protection issue (under Chapter II (Operating conditions for investment firms), Section 2 (Provisions to ensure investor protection), Article 24 (General principles and information to clients)). In this way broker commission for IR can be controlled more broadly at the level of a MiFID firm's conduct of business obligations when procuring services for clients.

As a recognised conflict between portfolio managers and clients, broker commission for IR would then fall subject to MiFID's three key tools for managing conflicts between firms and their clients: mitigation, avoidance and disclosure. It is worth noting that these tools are themselves subject to proposed enhancements via MiFID II.

In terms of disclosure, we note that portfolio managers will already be obliged to disclose all broker commission under ESMA's proposed changes to the disclosure of costs and charge. Annex 2.14.1 clearly lists broker commissions alongside transactions tax, stamp duty and FX costs *inter alia* among the costs related to transactions initiated in the course of the provision of an investment service such as portfolio man-

agement. Notwithstanding our comments on section 2.14, this disclosure will give both retail and professional users of MiFID portfolio management service a much clearer view of the types and magnitude of broker commission for IR in play on an aggregated as well as itemised basis (upon request) and both ex-ante and ex-post.

This said, we also note ESMA's concerns that firms may over-rely on disclosure as a conflicts management tool (Section 2.9). In terms of additional mitigation, then, we would ask ESMA to note that a number of MiFID portfolio managers already have CSAs in place with brokers. A CSA is an agreement between a portfolio manager and its broker, which allows the brokerage commission to be separated, and a pre-agreed portion of that commission to be set aside to pay for IR (be it third party IR or IR provided by that broker). At the point of execution, the broker receives the execution component of the commission (to pay for brokerage services) but the research component of the commission falls into a separate account, held by the broker on behalf of the portfolio manager who, in turn, holds it on behalf of the clients who will ultimately benefit from the IR.

CSAs allow portfolio managers to accrue money for IR from broker commission in a way that not only separates it from payment for brokerage services, but also allows the portfolio manager to spend it on IR independently of the quality or quantity of the brokerage services received. In other words, CSAs allow portfolio managers to use brokers as 'accounts' for accruing money to be paid out for IR and then for paying out that money for IR. Portfolio managers can monitor the accrual of money, and can then pay it to the IR provider they choose, which is often not including the broker that the portfolio manager has used to accrue the money in the first instance. Portfolio managers can also control the amount they pay to each IR provider or for each piece of IR. Under CSA arrangements, portfolio managers retain the flexibility to only allocate research commission to the IR to which the portfolio manager attributes value, thereby incentivising IR providers to provide a high quality of IR to the portfolio manager and, indirectly, the fund. Any money not spent on IR in any given time period (e.g. over the course of a year) can be left in the broker's commission account for use on IR for clients over the next period or 're-captured' from the broker and returned to each of the portfolio manager's clients on a *pro rata* basis. Portfolio managers may also opt to switch to 'execution only' brokerage commission rates with a particular broker when a particular amount of research commission has been accrued under the CSA in line with a pre-determined IR budget.

A final (and converse) product of CSAs function of distinguishing and separating the commission to be spent on IR from the commission to be paid for brokers' execution services, is that it leaves the portfolio manager's best execution decisions unencumbered by considerations of one broker's provision of IR over another broker's. Once the two payments are severed from one another the portfolio manager is un-conflicted when it comes to choosing the best broker with which to execute transactions with, in precisely the same way that the portfolio manager is now un-conflicted when it comes to choosing the best IR to purchase and at what price. Again we note that best execution standards are themselves subject to proposed enhancements via MiFID II.

Finally, in terms of impact and unknown consequences ALFI would join a number of other voices (some raised in ESMA's Open Hearing) in expressing concern about some of the possible unintended consequences of an effective ban on broker commission for IR brought to bear on the industry in short order by 3 January 2017.

Along with others, we fear that ESMA policy will shrink the volume of IR produced and change it in its nature – skewing IR towards highly demanded large cap stock and away from less highly demanded mid- and small-cap stock; that it will create higher barriers to operation and entry for smaller managers less able to defray the fixed costs of external and internal IR; but moreover that it will make for a less effective European asset management industry, leaving EU investors with less-well-researched funds and segregated mandates than Asian and US counterparts.
<ESMA_QUESTION_79>

Q80: Do you agree with the proposed approach for the disclosure of monetary and non-monetary benefits, in relation to investment services other than portfolio management and advice on an independent basis?

<ESMA_QUESTION_80>
We consider that MiFID II Level 1 clearly distinguishes between cost and charges (Article 24 para 4) on one hand and fee, commission and non-monetary benefit on the other hand (Article 24 para 9). Each issue is regulated within a stand-alone paragraph. Regarding fee, commission and non-monetary benefit MiFID II Level 1 requires "… The existence, nature and amount of the payment or benefit referred to in the first subparagraph, or, where the amount cannot be ascertained, the method of calculating the amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service. …" (Article 24 para 9 subpara 2). Beside the precise wording there is no reference included within the paragraphs, neither in Article 24 para 9 with reference to Article 24 para 3 nor in Article 24 para 3 with reference to Article 24 para 9.

Against this background ESMA's proposal to require the investment firm to provide the clients with information of the exact amount of the inducements received not only prior to the provision of the relevant service but rather on an ex-post basis (where the investment firm was unable to ascertain on an ex-ante basis the amount of any payments or benefit and instead disclosed to the client the method of calculating the amount) and in case as long as (on-going) inducements are received at least once a year goes beyond the indication of MiFID II Level 1.

Hence, the requirement of ex post disclosure regarding the exact amount of the inducements should be deleted.

As there is no common method of calculation of the amount of non-monetary benefit we consider that the proposed approach may limit the effectiveness of the overall information communicated to investors. Disclosure by larger investment firms will naturally result in a larger amount of non-monetary benefit, while a smaller investment firm is likely to result in a smaller non-monetary benefit amount to be disclosed, pro rata the scale and level of influence would be the same.

By way of an example, if we assume that a product manufacturer provides a group training session to several distributors for a total cost of EUR 10,000. The disclosure of to assess the individual costs related to each distributor's training will be difficult to assess and impossible to provide a meaningful cost disclosure to an investor who, as a client of the distributor, has subsequently invested in the fund that was the subject of the training.

Further ALFI understands that ESMA considers that if an investment firm has satisfied its disclosure requirements through provision of a UCITS KIID or in future a PRIIPS KID, it will be considered to be compliant with this requirement. ALFI recognises that there may be requirements for further point of sale disclosure, which should be the responsibility of the distributor or financial intermediary.
<ESMA_QUESTION_80>

Q81: Do you agree with the non-exhaustive list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met? If not, please explain and provide examples of circumstances and situations where you believe the enhancement test is met. Should any other circumstances and/or situations be included in the list? If so, please explain.

<ESMA_QUESTION_81>
We do not agree at all with ESMA´s approach of a negative list. First of all, the list is not in line with Article 24 para 13 subpara 1 (d), whereby the Commission shall be empowered to adopt delegated acts including "the criteria to assess compliance of forms receiving inducements with the obligation to act honestly, fairly and professionally in accordance with the best interest of the client." Against this background the Commission is not empowered to adopt delegated acts that include criteria which may *not* generally be regarded as designed to enhance the quality of the relevant service to the client. Hence, the Commission`s

request for advice (mandate) to ESMA does not reflect the empowerment as it invites ESMA to provide technical advice on: "… the conditions under which payments and non-monetary benefits, paid to or provided by investment firms providing all other investment od ancillary services, are not deemed to meet the requirement of enhancing the quality of the relevant service to the client; …" (ESMA 2014/549, 2.15 Background/Mandate).

Secondly, the circumstances and situations ESMA is proposing would lead to a ban of provisions, as it is not possible for investment firms to do business without any payment from either the client or a third party. If third party payments however are forbidden (because they are like in No. 10. i. used to finance the services that are essential for the recipient firm in its ordinary course of business) an investment firm has to rely on client's payment which will lead to an advice on an independent basis. MiFID II Level 1 however states clearly that advice on an independent as well as on a non-independent basis are equal and shall be equally accepted. Therefore any Level 2 provision that goes beyond that clear political statement or leads de facto to a ban of provisions has to be deleted.
In detail we don't see the necessity to provide for circumstances and situations being regarded as not fulfilling the quality enhancement criteria. The quality enhancement criteria in general presumes that any advice on a non-independent basis is biased by the third party payment totally ignoring that the first and overall duty of an investment firm when providing investment advice is to recommend the most suitable financial instruments. That is the reason that the German legislator, when MiFID I came into force, made a clarification that "if the third party payment is received while providing the service of investment advice or recommendations with respect to financial instruments, and the service will be provided nonbiased despite the payment, than one could assume that the payment can be regarded as designed to enhance the quality." Hence, the negative list of circumstances and situations should be deleted completely.

But in line with Article 24 para 13 subpara 1 (d) ESMA´s analysis states that Commissions mandate requires further specification in the "use of payments and non-monetary benefits that meet the requirements of enhancing the quality of the relevant service to the client" (ESMA 2014/549, 2.15 No. 8. iii). Hence, we do agree with ESMA´s approach to describe positively criteria whereas a fee, commission or non-monetary benefit could be considered as fulfilling the criteria "quality enhancement" and hence, we ask ESMA to provide a positive list indicating examples of circumstances and situations regarded as designed to enhance the quality. This list should include for instance the build-up of an efficient infrastructure as this will lead to a better supply for clients with a smaller amount to invest. What will happen if these clients will be kept away from investing money just because they can't afford the payments for the advice? It is not only their retirement savings, which won't take place. Much more relevant it is the possible impact on national economies when the huge number of retails will be kept away from investing in company and government bonds.

Against this background we propose the following approach:

A payment can generally be regarded as fulfilling the criteria "designed to enhance the quality of the service", if at least one of the circumstances and situations of the following non-exhaustive list is met, especially if

- it provides for an additional or higher quality service above the regulatory requirements provided to the end user client; or

- it provides a tangible benefit or value to the recipient's end user client; or

- it provides an efficient and high-quality infrastructure for services with regard to financial instruments including the qualification of the investment firm´s employees; or

- it enables the client to receive access to a wider range of suitable financial instruments; or

- it enables the build-up of an efficient and high-quality infrastructure for services with regard to financial instruments including the qualification of the investment firm's employees; or

- it enables the client to receive the provision of non-independent advice on an on-going basis; or

- in relation to an ongoing inducement, it is related to the provision of an ongoing service to an end user client.

However, if ESMA after careful and thoughtful considerations of the aforementioned comments and proposals would not be prepared to follow the approach of a positive list indicating examples of circumstances and situations regarded as designed to enhance the quality we would ask ESMA to confirm the relationship between point 10 and 11 of the draft technical advice for the sake of clarity.

In consideration of the above and in accordance with point 11 on page 124 of the CP, ALFI understands that is it permissible to pay to investment firms monetary and non-monetary benefits for services that are provided in order to comply with regulatory requirements where this expands the range of financial instruments available to investors or where non-independent advice is being provided on an on-going basis. A distribution fee paid to a distributor should not be considered as an inducement but as a fair remuneration for services rendered to the product manufacturer.

We also understand that point 11 would, for example, allow platforms to receive payments from product manufacturers on the basis that they provide investors with access to a wider range of products.

Therefore payments fulfilling any of the positive criteria have to be considered as being designed to enhance the quality no matter of whether in addition any of the negative criteria and situations is fulfilled.

With the introduction of new regulation aimed at preventing the payment of inappropriate inducements, we are concerned by possible unintended negative impact to investors and financial markets, should distributors decide to no longer offer certain products or services to investors, as a result of these proposed new requirements.

Studies show that a very small portion of investors would be ready to pay for advice and not recognizing this could have unintended consequences by reducing retail clients' access to investment advice. Hence we believe there will be a higher risk of investors, particularly at the lower (asset) end of the spectrum, making unwise investments as they do not want to pay advisory fees and will have to choose their investments themselves.

It should be made clear in the guidance that non-independent advisers only must remain allowed to be remunerated through commission payments.
<ESMA_QUESTION_81>

Q82: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.

<ESMA_QUESTION_82>
As stated in our answer to Q81 we would be concerned at the impact of the increased costs to retail investors who wish to continue to receive investment advice. We would also anticipate increased costs in meeting the requirements of the draft technical advice.
<ESMA_QUESTION_82>

2.16. Investment advice on independent basis

Q83: Do you agree with the approach proposed in the technical advice above in order to ensure investment firm's compliance with the obligation to assess a sufficient range of financial instruments available on the market? If not, please explain your reasons and provide for alternative or additional criteria.

<ESMA_QUESTION_83>
ALFI agrees in principle with the approach adopted. However it must be underlined that the obligations mentioned are actually already covered to a large extent by existing conduct of business rules and organisational rules.

The overriding principle in advising an investor must be that the financial instrument is suitable/appropriate for the investor taking into account the investor's profile and risk appetite. There should be no assumption that a less complex product, or one not having close links to the investment firm, will better meet the requirements of the investor.
<ESMA_QUESTION_83>

Q84: What type of organisational requirements should firms have in place (e.g. degree of separation, procedures, controls) when they provide both independent and non-independent advice?

<ESMA_QUESTION_84>
Since firms already have to address suitability, they also already have a set of rules and organisational elements in place. Therefore we do not see any need for adding extra requirements.
<ESMA_QUESTION_84>

Q85: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.

<ESMA_QUESTION_85>
See above response to Question 82.
<ESMA_QUESTION_85>

2.17. Suitability

Q86: Do you agree that the existing suitability requirements included in Article 35 of the MiFID Implementing Directive should be expanded to cover points discussed in the draft technical advice of this chapter?

<ESMA_QUESTION_86>
No. Given the importance of UCITS as a major retail investment product in Europe and increasingly worldwide, it is important to understand all the potential impacts and consequences of any additional requirement in order not to close down existing distribution channels, unduly restrict the access of retail investors to innovative and efficient products.

As a general remark, ALFI supports the open-architecture model, which is well known in the investment fund industry but which, unfortunately, may be put at risk through the new inducements rules. Open architecture works in favour of the end investor by driving competition, offering more choice and easy access to the best products available. The current ESMA proposal with regard to the suitability test could potentially limit the investors' choice of the most appropriate investment fund to meet their investment requirements.

Moreover, ALFI believes that it is an overarching principle that each professional must act in the best interest of his/her clients and any suitability assessment should be made taking this principle into account. It is the distributor's responsibility to ensure that they provide the right service to the end client. The suitability test in combination with appropriate disclosure around the characteristics of the advice provided by this distributor should be the appropriate means to ensure investor protection.

We therefore believe that the draft technical advice needs to clearly set out an investment firm's and client's responsibilities and should include a proportionate approach in the context that an investment firm may not just be a discretionary investment manager providing full portfolio management services to an investor, but an investment adviser providing an investment recommendation on one single financial product or fund.

ALFI also notes several references to investment firms being required to consider "less complex and with lower costs" financial products better suited to a client's profile. We would point out that less complex products do not always entail cheaper costs (or less risk) and that a focus on cost and a less complex structure may result in an inappropriate product ultimately being considered for a client under the technical advice, where we would consider that a client's risk profile should ultimately be a key factor in the suitability assessment.
<ESMA_QUESTION_86>

Q87: Are there any other areas where MiFID Implementing Directive requirements covering the suitability assessment should be updated, improved or revised based on your experiences under MiFID since it was originally implemented?

<ESMA_QUESTION_87>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_87>

Q88: What is your view on the proposals for the content of suitability reports? Are there additional details or requirements you believe should be included, especially to ensure suitability reports are sufficiently 'personalised' to have added value for the client, drawing on any initiatives in national markets?

<ESMA_QUESTION_88>
Combined response to Question 88 and Question 89.
<ESMA_QUESTION_88>

Q89: Do you agree that periodic suitability reports would only need to cover any changes in the instruments and/or circumstances of the client rather than repeating information which is unchanged from the first suitability report?

<ESMA_QUESTION_89>
Yes, we agree that periodic suitability reports should only need to cover any changes in the instruments and/or circumstances of the client, rather than repeating information that is unchanged from the first suitability report. These reports are, of course, the responsibility of the distributor and not the product manufacturer.
<ESMA_QUESTION_89>

2.18. Appropriateness

Q90: Do you agree the existing criteria included in Article 38 of the Implementing Directive should be expanded to incorporate the above points, and that an instrument not included explicitly in Article 25(4)(a) of MiFID II would need to meet to be considered non-complex?

<ESMA_QUESTION_90>
Combined response to Question 90 and Question 91.
<ESMA_QUESTION_90>

Q91: Are there any other areas where the MiFID Implementing Directive requirements covering the appropriateness assessment and conditions for an instrument to be considered non-complex should be updated, improved or revised based on your experiences under MiFID I?

<ESMA_QUESTION_91>
We do not agree that any UCITS or AIFs should be systematically excluded from the possibility of being classified as non-complex, rather that each fund should be subject to individual assessment and then appropriately classified. This we believe is the intention of Level 1. ALFI does not see any need for further regulation of the requirements for an instrument to be non-complex nor of the rules for appropriateness assessment.

We would highlight that there are currently non-UCITS retail fund products available in a number of European markets (e.g. in Luxembourg this would be Part II funds) that, were they UCITS funds, would be considered non-complex products. The proposed technical advice would therefore exclude these products from consideration under the criteria, which we do not believe was the intention of the proposed requirements. In addition, we would also highlight that Alternative Investment Funds could also have UCITS-like investment restrictions or objectives but again would not be able to be considered as non-complex.

The ESMA approach will send the wrong message to investors and the general public that complexity, stemming from innovation in asset management, necessarily involves higher risks and *a contrario* that funds using less complex investment techniques and instruments are risk free, including potentially from an investment performance perspective. ALFI believes it is essential to make a clear distinction between the use of complex, innovative asset management techniques and strategies on the one hand and the risks that may be associated with complexity, if any, on the other hand.

Moreover AIFMD and UCITS both incorporate high levels of investor protection at the product level and in terms of their transparency requirements to investors. Hence, a general treatment of AIFs as complex products would be inappropriate. Rather such funds should still be able to be qualified as non-complex, subject to an individual assessment of the characteristics of the fund, under the MiFID II regime.

Accordingly, we urge ESMA to confirm in its final advice to the Commission that there is no presumption that AIFs are to be considered complex.

In terms of the proposed additional criteria themselves, ALFI would highlight to ESMA that under point 1. ii that explicit or implicit exit charges on a financial product do not necessarily result in the product being less liquid. ALFI therefore considers that this criterion could have detrimental effects on existing investor protection measures. For investment funds, management companies have obligations to manage liquidity risk and prevent market timing under UCITS and AIFMD requirements. Redemption fees, swing pricing/ dilution levies are all tools used by managers to ensure that existing investors in the funds are protected against any potential market timing activity or liquidity risks that might arise in an investment fund's portfolio (i.e. in situations of market stress and increased volatility).
<ESMA_QUESTION_91>

2.19. Client agreement

Q92: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement with their professional clients, at least for certain services? If yes, in which circumstances? If no, please state your reason.

<ESMA_QUESTION_92>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_92>

Q93: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement for the provision of investment advice to any client, at least where the investment firm and the client have a continuing business relationship? If not, why not?

<ESMA_QUESTION_93>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_93>

Q94: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement for the provision of custody services (safekeeping of financial instruments) to any client? If not, why not?

<ESMA_QUESTION_94>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_94>

Q95: Do you agree that investment firms should be required to describe in the client agreement any advice services, portfolio management services and custody services to be provided? If not, why not?

<ESMA_QUESTION_95>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_95>

2.20.

2.20. Reporting to clients

Q96: Do you agree that the content of reports for professional clients, both for portfolio management and execution of orders, should be aligned to the content applicable for retail clients?

<ESMA_QUESTION_96>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_96>

Q97: Should investment firms providing portfolio management or operating a retail client account that includes leveraged financial instruments or other contingent liability transactions be required to agree on a threshold with retail clients that should at least be equal to 10% (and relevant multiples) of the initial investments (or the value of the investment at the beginning of each year)?

<ESMA_QUESTION_97>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_97>

Q98: Do you agree that Article 43 of the MiFID Implementing Directive should be updated to specify that the content of statements is to include the market or estimated value of the financial instruments included in the statement with a clear indication of the fact that the absence of a market price is likely to be indicative of a lack of liquidity?

<ESMA_QUESTION_98>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_98>

Q99: Do you consider that it would be beneficial to clients to not only provide details of those financial instruments that are subject to TTCA at the point in time of the statement, but also details of those financial instruments that have been subject to TTCA during the reporting period?

<ESMA_QUESTION_99>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_99>

Q100: What other changes to the MiFID Implementing Directive in relation to reporting to clients should ESMA consider advising the Commission on?

<ESMA_QUESTION_100>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_100>

2.21. Best execution

Q101: Do you have any additional suggestions to provide clarity of the best execution obligations in MiFID II captured in this section or to further ESMA's objective of facilitating clear disclosures to clients?

<ESMA_QUESTION_101>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_101>

Q102: Do your policies and your review procedures already the details proposed in this chapter? If they do not, what would be the implementation and recurring cost of modifying them and distributing the revised policies to your existing clients? Where possible please provide examples of the costs involved.

<ESMA_QUESTION_102>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_102>

2.22. Client order-handling

Q103: Are you aware of any issues that have emerged with regard to the application of Articles 47, 48 and 49 of the MiFID Implementing Directive? If yes, please specify.

<ESMA_QUESTION_103>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_103>

2.23. Transactions executed with eligible counterparties

Q104: Do you agree with the proposal not to allow undertakings classified as professional clients on request to be recognised as eligible counterparties?

<ESMA_QUESTION_104>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_104>

Q105: For investment firms responding to this consultation, how many clients have you already classified as eligible counterparties using the following approaches under Article 50 of the MiFID Implementing Directive:

<ESMA_QUESTION_105>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_105>

Q106: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements?

<ESMA_QUESTION_106>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_106>

2.24. Product intervention

Q107: Do you agree with the criteria proposed?

<ESMA_QUESTION_107>
ALFI believes that the ESMA guidance should make clear that those financial products, such as UCITS and AIFs, which are subject to prior approval by a Member State regulator, should not be subject to product intervention at the ESMA level except in extreme circumstances of market disruption. In particular ALFI would also underline that the product intervention rules should be clarified to make clear that the passport regime set out under AIFMD and UCITS would not be subject to challenge by such powers, as this could lead to market distortion.

The current product intervention scope is very wide and requires more accurate definition as to the scope of ESMA's powers.
<ESMA_QUESTION_107>

Q108: Are there any additional criteria that you would suggest adding?

<ESMA_QUESTION_108>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_108>

3. Transparency

3.1. Liquid market for equity and equity-like instruments

Q109: Do you agree with the liquidity thresholds ESMA proposes for equities? Would you calibrate the thresholds differently? Please provide reasons for your answers.

<ESMA_QUESTION_109>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_109>

Q110: Do you agree that the free float for depositary receipts should be determined by the number of shares issued in the issuer's home market? Please provide reasons for your answer.

<ESMA_QUESTION_110>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_110>

Q111: Do you agree with the proposal to set the liquidity threshold for depositary receipts at the same level as for shares? Please provide reasons for your answer.

<ESMA_QUESTION_111>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_111>

Q112: Do you agree with the liquidity thresholds ESMA proposes for depositary receipts? Would you calibrate the thresholds differently? Please provide reasons for your answers.

<ESMA_QUESTION_112>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_112>

Q113: Do you agree that the criterion of free float could be addressed through the number of units issued for trading? If yes, what *de minimis* number of units would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.

<ESMA_QUESTION_113>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_113>

Q114: Based on your experience, do you agree with the preliminary results related to the trading patterns of ETFs? Please provide reasons for your answer.

<ESMA_QUESTION_114>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_114>

Q115: Do you agree with the liquidity thresholds ESMA proposes for ETFs? Would you calibrate the thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).

<ESMA_QUESTION_115>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_115>

Q116: Can you identify any additional instruments that could be caught by the definition of certificates under Article 2(1)(27) of MiFIR?

<ESMA_QUESTION_116>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_116>

Q117: Based on your experience, do you agree with the preliminary results related to the trading patterns of certificates? Please provide reasons for your answer.

<ESMA_QUESTION_117>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_117>

Q118: Do you agree with the liquidity thresholds ESMA proposes for certificates? Would you calibrate the thresholds differently? Please provide reasons for your answer.

<ESMA_QUESTION_118>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_118>

Q119: Do you agree that the criterion of free float could be addressed through the issuance size? If yes, what *de minimis* issuance size would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.

<ESMA_QUESTION_119>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_119>

Q120: Do you think the discretion permitted to Member States under Article 22(2) of the Commission Regulation to specify additional instruments up to a limit as being liquid should be retained under MiFID II?

<ESMA_QUESTION_120>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_120>

3.2. Delineation between bonds, structured finance products and money market instruments

Q121: Do you agree with ESMA's assessment concerning financial instruments outside the scope of the MiFIR non-equity transparency obligations?

<ESMA_QUESTION_121>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_121>

3.3. The definition of systematic internaliser

Q122: For the systematic and frequent criterion, ESMA proposes setting the percentage for the calculation between 0.25% and 0.5%. Within this range, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications.

<ESMA_QUESTION_122>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_122>

Q123: Do you support calibrating the threshold for the systematic and frequent criterion on the liquidity of the financial instrument as measured by the number of daily transactions?

<ESMA_QUESTION_123>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_123>

Q124: For the substantial criterion, ESMA proposes setting the percentage for the calculation between 15% and 25% of the total turnover in that financial instrument executed by the investment firm on own account or on behalf of clients and between 0.25% and 0.5% of the total turnover in that financial instrument in the Union. Within these ranges, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the thresholds should be set at levels outside these ranges, please specify at what levels these should be with justifications.

<ESMA_QUESTION_124>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_124>

Q125: Do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of shares traded? Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.

<ESMA_QUESTION_125>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_125>

Q126: ESMA has calibrated the initial thresholds proposed based on systematic internaliser activity in shares. Do you consider those thresholds adequate for:

<ESMA_QUESTION_126>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_126>

Q127: Do you consider a quarterly assessment of systematic internaliser activity as adequate? If not, which assessment period would you propose? Do you consider that one month provides sufficient time for investment firms to establish all the necessary arrangements in order to comply with the systematic internaliser regime?

<ESMA_QUESTION_127>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_127>

Q128: For the systematic and frequent criterion, do you agree that the thresholds should be set per asset class? Please provide reasons for your answer. If you consider the thresholds should be set at a more granular level (sub-categories) please provide further detail and justification.

<ESMA_QUESTION_128>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_128>

Q129: With regard to the 'substantial basis' criterion, do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of instruments traded. Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.

<ESMA_QUESTION_129>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_129>

Q130: Do you agree with ESMA's proposal to apply the systematic internaliser thresholds for bonds and structured finance products at an ISIN code level? If not please provide alternatives and reasons for your answer.

<ESMA_QUESTION_130>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_130>

Q131: For derivatives, do you agree that some aggregation should be established in order to properly apply the systematic internaliser definition? If yes, do you consider that the tables presented in Annex 3.6.1 of the DP could be used as a basis for applying the systematic internaliser thresholds to derivatives products? Please provide reasons, and when necessary alternatives, to your answer.

<ESMA_QUESTION_131>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_131>

Q132: Do you agree with ESMA's proposal to set a threshold for liquid derivatives? Do you consider any scenarios could arise where systematic internalisers would be required to meet pre-trade transparency requirements for liquid derivatives where the trading obligation does not apply?

<ESMA_QUESTION_132>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_132>

Q133: Do you consider a quarterly assessment by investment firms in respect of their systematic internaliser activity is adequate? If not, what assessment period would you propose?

<ESMA_QUESTION_133>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_133>

Q134: Within the ranges proposed by ESMA, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications and where possible data to support them.

<ESMA_QUESTION_134>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_134>

Q135: Do you consider that thresholds should be set as absolute numbers rather than percentages for some specific categories? Please provide reasons for your answer.

<ESMA_QUESTION_135>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_135>

Q136: What thresholds would you consider as adequate for the emission allowance market?

<ESMA_QUESTION_136>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_136>

3.4. Transactions in several securities and orders subject to conditions other than the current market price

Q137: Do you agree with the definition of portfolio trade and of orders subject to conditions other than the current market price? Please give reasons for your answer?

<ESMA_QUESTION_137>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_137>

3.5. Exceptional market circumstances and conditions for updating quotes

Q138: Do you agree with the list of exceptional circumstances? Please give reasons for your answer. Do you agree with ESMA's view on the conditions for updating the quotes? Please give reasons for your answer.

<ESMA_QUESTION_138>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_138>

3.6. Orders considerably exceeding the norm

Q139: Do you agree that each systematic internaliser should determine when the number and/or volume of orders sought by clients considerably exceed the norm? Please give reasons for your answer?

<ESMA_QUESTION_139>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_139>

3.7. Prices falling within a public range close to market conditions

Q140: Do you agree that any price within the bid and offer spread quoted by the systematic internaliser would fall within a public range close to market conditions? Please give reasons for your answer.

<ESMA_QUESTION_140>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_140>

3.8. Pre-trade transparency for systematic internalisers in non-equity instruments

Q141: Do you agree that the risks a systematic internaliser faces is similar to that of an liquidity provider? If not, how do they differ?

<ESMA_QUESTION_141>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_141>

Q142: Do you agree that the sizes established for liquidity providers and systematic internalisers should be identical? If not, how should they differ?

<ESMA_QUESTION_142>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_142>

4. Data publication

4.1. Access to systematic internalisers' quotes

Q143: Do you agree with the proposed definition of "regular and continuous" publication of quotes? If not, what would definition you suggest?

<ESMA_QUESTION_143>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_143>

Q144: Do you agree with the proposed definition of "normal trading hours"? Should the publication time be extended?

<ESMA_QUESTION_144>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_144>

Q145: Do you agree with the proposal regarding the means of publication of quotes?

<ESMA_QUESTION_145>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_145>

Q146: Do you agree that a systematic internaliser should identify itself when publishing its quotes through a trading venue or a data reporting service?

<ESMA_QUESTION_146>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_146>

Q147: Is there any other mean of communication that should be considered by ESMA?

<ESMA_QUESTION_147>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_147>

Q148: Do you agree with the importance of ensuring that quotes published by investment firms are consistent across all the publication arrangements?

<ESMA_QUESTION_148>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_148>

Q149: Do you agree with the compulsory use of data standards, formats and technical arrangements in development of Article 66(5) of MiFID II?

<ESMA_QUESTION_149>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_149>

Q150: Do you agree with the imposing the publication on a 'machine-readable' and 'human readable' to investment firms publishing their quotes only through their own website?

<ESMA_QUESTION_150>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_150>

Q151: Do you agree with the requirements to consider that the publication is 'easily accessible'?

<ESMA_QUESTION_151>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_151>

4.2. Publication of unexecuted client limit orders on shares traded on a venue

Q152: Do you think that publication of unexecuted orders through a data reporting service or through an investment firm's website would effectively facilitate execution?

<ESMA_QUESTION_152>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_152>

Q153: Do you agree with this proposal. If not, what would you suggest?

<ESMA_QUESTION_153>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_153>

4.3. Reasonable commercial basis (RCB)

Q154: Would these disclosure requirements be a meaningful instrument to ensure that prices are on a reasonable commercial basis?

<ESMA_QUESTION_154>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_154>

Q155: Are there any other possible requirements in the context of transparency/disclosure to ensure a reasonable price level?

<ESMA_QUESTION_155>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_155>

Q156: To what extent do you think that comprehensive transparency requirements would be enough in terms of desired regulatory intervention?

<ESMA_QUESTION_156>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_156>

Q157: What are you views on controlling charges by fixing a limit on the share of revenue that market data services can represent?

<ESMA_QUESTION_157>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_157>

Q158: Which percentage range for a revenue limit would you consider reasonable?

<ESMA_QUESTION_158>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_158>

Q159: If the definition of "*reasonable commercial basis*" is to be based on costs, do you agree that LRIC+ is the most appropriate measure? If not what measure do you think should be used?

<ESMA_QUESTION_159>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_159>

Q160: Do you agree that suppliers should be required to maintain a cost model as the basis of setting prices against LRIC+? If not how do you think the definition should be implemented?

<ESMA_QUESTION_160>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_160>

Q161: Do you believe that if there are excessive prices in any of the other markets, the same definition of "*reasonable commercial basis*" would be appropriate, or that they should be treated differently? If the latter, what definition should be used?

<ESMA_QUESTION_161>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_161>

Q162: Within the options A, B and C, do you favour one of them, a combination of A+B or A+C or A+B+C? Please explain your reasons.

<ESMA_QUESTION_162>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_162>

Q163: What are your views on the costs of the different approaches?

<ESMA_QUESTION_163>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_163>

Q164: Is there some other approach you believe would be better? Why?

<ESMA_QUESTION_164>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_164>

Q165: Do you think that the offering of a 'per-user' pricing model designed to prevent multiple charging for the same information should be mandatory?

<ESMA_QUESTION_165>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_165>

Q166: If yes, in which circumstances?

<ESMA_QUESTION_166>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_166>

5. Micro-structural issues

5.1. Algorithmic and high frequency trading (HFT)

Q167: Which would be your preferred option? Why?

<ESMA_QUESTION_167>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_167>

Q168: Can you identify any other advantages or disadvantages of the options put forward?

<ESMA_QUESTION_168>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_168>

Q169: How would you reduce the impact of the disadvantages identified in your preferred option?

<ESMA_QUESTION_169>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_169>

Q170: If you prefer Option 2, please advise ESMA whether for the calculation of the median daily lifetime of the orders of the member/participant, you would take into account only the orders sent for liquid instruments or all the activity in the trading venue.

<ESMA_QUESTION_170>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_170>

Q171: Do you agree with the above assessment? If not, please elaborate.

<ESMA_QUESTION_171>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_171>

5.2. Direct electronic access (DEA)

Q172: Do you consider it necessary to clarify the definitions of DEA, DMA and SA provided in MiFID? In what area would further clarification be required and how would you clarify that?

<ESMA_QUESTION_172>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_172>

Q173: Is there any other activity that should be covered by the term "DEA", other than DMA and SA? In particular, should AOR be considered within the DEA definition?

<ESMA_QUESTION_173>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_173>

Q174: Do you consider that electronic order transmission systems through shared connectivity arrangements should be included within the scope of DEA?

<ESMA_QUESTION_174>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_174>

Q175: Are you aware of any order transmission systems through shared arrangements which would provide an equivalent type of access as the one provided by DEA arrangements?

<ESMA_QUESTION_175>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_175>

6. Requirements applying on and to trading venues

6.1. SME Growth Markets

Q176: Do you support assessing the percentage of issuers on the basis of number of issuers only? If not, what approach would you suggest?

<ESMA_QUESTION_176>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_176>

Q177: Which of the three different options described in the draft technical advice box above for assessing whether an SME-GM meets the criterion of having at least fifty per cent of SME issuers would you prefer?

<ESMA_QUESTION_177>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_177>

Q178: Do you agree with the approach described above (in the box Error! Reference source not found.**), that only falling below the qualifying 50% threshold for a number of three consecutive years could lead to deregistration as a SME-GM or should the period be limited to two years?**

<ESMA_QUESTION_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_178>

Q179: Should an SME-GM which falls below the 50% threshold in one calendar year be required to disclose that fact to the market?

<ESMA_QUESTION_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_179>

Q180: Which of the alternatives described above on how to deal with non-equity issuers for the purposes of the "*at least 50% criterion*" do you consider the most appropriate? Please give reasons for your answer.

<ESMA_QUESTION_180>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_180>

Q181: Do you agree that an SME-GM should be able to operate under the models described above, and that the choice of model should be left to the discretion of the operator (under the supervision of its NCA)?

<ESMA_QUESTION_181>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_181>

Q182: Do you agree that an SME-GM should establish and operate a regime which its NCA has assessed to be effective in ensuring that its issuers are "appropriate"?

<ESMA_QUESTION_182>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_182>

Q183: Do you agree with the factors to which a NCA should have regard when assessing if an SME-GM's regulatory regime is effective?

<ESMA_QUESTION_183>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_183>

Q184: Do you think that there should be an appropriateness test for an SME-GM issuer's management and board in order to confirm that they fulfil the responsibilities of a publicly quoted company?

<ESMA_QUESTION_184>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_184>

Q185: Do you think that there should be an appropriateness test for an SME-GM issuer's systems and controls in order to confirm that they provide a reasonable basis for it to comply with its continuing obligations under the rules of the market?

<ESMA_QUESTION_185>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_185>

Q186: Do you agree with Error! Reference source not found.**,** Error! Reference source not found. **or** Error! Reference source not found. Error! Reference source not found.**?**

<ESMA_QUESTION_186>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_186>

Q187: Are there any other criteria that should be set for the initial and on-going admission of financial instruments of issuers to SME-GMs?

<ESMA_QUESTION_187>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_187>

Q188: Should the SME-GM regime apply a general principle that an admission document should contain sufficient information for an investor to make an informed assessment of the financial position and prospects of the issuer and the rights attaching to its securities?

<ESMA_QUESTION_188>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_188>

Q189: Do you agree that SME-GMs should be able to take either a 'top down' or a 'bottom up' approach to their admission documents where a Prospectus is not required?

<ESMA_QUESTION_189>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_189>

Q190: Do you think that MiFID II should specify the detailed disclosures, or categories of disclosure, that the rules of a SME-GM would need to require, in order for admission documents prepared in accordance with those rules to comply with Article 33(3)(c) of MiFID II? Or do you think this should be the responsibility of the individual market, under the supervision of its NCA?

<ESMA_QUESTION_190>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_190>

Q191: If you consider that detailed disclosure requirements should be set at a MiFID level, which specific disclosures would be essential to the proper information of investors? Which elements (if any) of the proportionate schedules set out in Regulation 486/2012 should be dis-applied or modified, in order for an admission document to meet the objectives of the SME-GM framework (as long as there is no public offer requiring that a Prospectus will be drafted under the rules of the Prospectus Directive)?

<ESMA_QUESTION_191>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_191>

Q192: Should the future Level 2 Regulation require an SME-GM to make arrangements for an appropriate review of an admission document, designed to ensure that the information it contains is complete?

<ESMA_QUESTION_192>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_192>

Q193: Do you agree with this initial assessment by ESMA?

<ESMA_QUESTION_193>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_193>

Q194: In your view which reports should be included in the on-going periodic financial reporting by an issuer whose financial instruments are admitted to trading on an SME-GM?

<ESMA_QUESTION_194>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_194>

Q195: How and by which means should SME-GMs ensure that the reporting obligations are fulfilled by the issuers?

<ESMA_QUESTION_195>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_195>

Q196: Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph Error! Reference source not found.**) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?**

<ESMA_QUESTION_196>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_196>

Q197: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements/additional relief to those envisaged by MAR?

<ESMA_QUESTION_197>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_197>

Q198: What is your view on the possible requirements for the dissemination and storage of information?

<ESMA_QUESTION_198>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_198>

Q199: How and by which means should trading venues ensure that the dissemination and storage requirements are fulfilled by the issuers and which of the options described above do you prefer?

<ESMA_QUESTION_199>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_199>

Q200: How long should the information be stored from your point of view? Do you agree with the proposed period of 5 years or would you prefer a different one (e.g., 3 years)?

<ESMA_QUESTION_200>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_200>

Q201: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements to those presented in MAR?

<ESMA_QUESTION_201>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_201>

6.2. Suspension and removal of financial instruments from trading

Q202: Do you agree that an approach based on a non-exhaustive list of examples provides an appropriate balance between facilitating a consistent application of the exception, while allowing appropriate judgements to be made on a case by case basis?

<ESMA_QUESTION_202>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_202>

Q203: Do you agree that NCAs would also need to consider the criteria described in paragraph Error! Reference source not found. Error! Reference source not found. **and** Error! Reference source not found.**, when making an assessment of relevant costs or risks?**

<ESMA_QUESTION_203>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_203>

Q204: Which specific circumstances would you include in the list? Do you agree with the proposed examples?

<ESMA_QUESTION_204>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_204>

6.3. Substantial importance of a trading venue in a host Member State

Q205: Do you consider that the criteria established by Article 16 of MiFID Implementing Regulation remain appropriate for regulated markets?

<ESMA_QUESTION_205>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_205>

Q206: Do you agree with the additional criteria for establishing the substantial importance in the cases of MTFs and OTFs?

<ESMA_QUESTION_206>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_206>

6.4. Monitoring of compliance – information requirements for trading venues

Q207: Which circumstances would you include in this list? Do you agree with the circumstances described in the draft technical advice? What other circumstances do you think should be included in the list?

<ESMA_QUESTION_207>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_207>

6.5. Monitoring of compliance with the rules of the trading venue - determining circumstances that trigger the requirement to inform about conduct that may indicate abusive behaviour

Q208: Do you support the approach suggested by ESMA?

<ESMA_QUESTION_208>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_208>

Q209: Is there any limitation to the ability of the operator of several trading venues to identify a potentially abusive conduct affecting related financial instruments?

<ESMA_QUESTION_209>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_209>

Q210: What can be the implications for trading venues to make use of all information publicly available to complement their internal analysis of the potential abusive conduct to report such as managers' dealings or major shareholders' notifications)? Are there other public sources of information that could be useful for this purpose?

<ESMA_QUESTION_210>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_210>

Q211: Do you agree that the signals listed in the Annex contained in the draft advice constitute appropriate indicators to be considered by operators of trading venues? Do you see other signals that could be relevant to include in the list?

<ESMA_QUESTION_211>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_211>

Q212: Do you consider that front running should be considered in relation to the duty for operators of trading venues to report possible abusive conduct? If so, what could be the possible signal(s) to include in the list?

<ESMA_QUESTION_212>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_212>

7. Commodity derivatives

7.1. Financial instruments definition - specifying Section C 6, 7 and 10 of Annex I of MiFID II

Q213: Do you agree with ESMA's approach on specifying contracts that "must" be physically settled and contracts that "can" be physically settled?

<ESMA_QUESTION_213>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_213>

Q214: Which oil products in your view should be caught by the definition of C6 energy derivatives contracts and therefore be within the scope of the exemption? Please give reasons for your view stating, in particular, any practical repercussions of including or excluding products from the scope.

<ESMA_QUESTION_214>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_214>

Q215: Do you agree with ESMA's approach on specifying contracts that must be physically settled?

<ESMA_QUESTION_215>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_215>

Q216: How do operational netting arrangements in power and gas markets work in practice? Please describe such arrangements in detail. In particular, please describe the type and timing of the actions taken by the various parties in the process, and the discretion over those actions that the parties have.

<ESMA_QUESTION_216>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_216>

Q217: Please provide concrete examples of contracts that must be physically settled for power, natural gas, coal and oil. Please describe the contracts in detail and identify on which platforms they are traded at the moment.

<ESMA_QUESTION_217>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_217>

Q218: How do you understand and how would you describe the concepts of "force majeure" and "other bona fide inability to settle" in this context?

<ESMA_QUESTION_218>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_218>

Q219: Do you agree that Article 38 of Regulation (EC) No 1287/2006 has worked well in practice and elements of it should be preserved? If not, which elements in your view require amendments?

<ESMA_QUESTION_219>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_219>

Q220: Do you agree that the definition of spot contract in paragraph 2 of Article 38 of Regulation (EC) 1287/2006 is still valid and should become part of the future implementing measures for MiFID II? If not, what changes would you propose?

<ESMA_QUESTION_220>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_220>

Q221: Do you agree that the definition of a contract for commercial purposes in paragraph 4 of Article 38 of Regulation (EC) 1287/2006 is still valid and should become part of the future implementing measures for MiFID II? If not, what changes would you propose? What other contracts, in your view, should be listed among those to be considered for commercial purposes?

<ESMA_QUESTION_221>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_221>

Q222: Do you agree that the future Delegated Act should not refer to clearing as a condition for determining whether an instrument qualifies as a commodity derivative under Section C 7 of Annex I?

<ESMA_QUESTION_222>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_222>

Q223: Do you agree that standardisation of a contract as expressed in Article 38(1) Letter c of Regulation (EC) No 1287/2006 remains an important indicator for classifying financial instruments and therefore should be maintained?

<ESMA_QUESTION_223>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_223>

Q224: Do you agree with the proposal to maintain the alternatives for trading contracts in Article 38(1)(a) of Regulation (EC) No 1287/2006 taking into account the emergence of the OTF as a MiFID trading venue in the future Delegated Act?

<ESMA_QUESTION_224>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_224>

Q225: Do you agree that the existing provision in Article 38(3) of Regulation (EC) No 1287/2006 for determining whether derivative contracts within the scope of Section C(10) of Annex I should be classified as financial instruments should be updated as necessary but overall be maintained? If not, which elements in your view require amendments?

<ESMA_QUESTION_225>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_225>

Q226: Do you agree that the list of contracts in Article 39 of Regulation (EC) No 1287/2006 should be maintained? If not, which type of contracts should be added or which ones should be deleted?

<ESMA_QUESTION_226>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_226>

Q227: What is your view with regard to adding as an additional type of derivative contract those relating to actuarial statistics?

<ESMA_QUESTION_227>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_227>

Q228: What do you understand by the terms "reason of default or other termination event" and how does this differ from "except in the case of force majeure, default or other bona fide inability to perform"?

<ESMA_QUESTION_228>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_228>

7.2. Position reporting thresholds

Q229: Do you agree with the proposed threshold for the number of position holders? If not, please state your preferred thresholds and the reason why.

<ESMA_QUESTION_229>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_229>

Q230: Do you agree with the proposed minimum threshold level for the open interest criteria for the publication of reports? If not, please state your preferred alternative for the definition of this threshold and explain the reasons why this would be more appropriate.

<ESMA_QUESTION_230>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_230>

Q231: Do you agree with the proposed timeframes for publication once activity on a trading venue either reaches or no longer reaches the two thresholds?

<ESMA_QUESTION_231>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_231>

7.3. Position management powers of ESMA

Q232: Do you agree that the listed factors and criteria allow ESMA to determine the existence of a threat to the stability of the (whole or part of the) financial system in the EU?

<ESMA_QUESTION_232>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_232>

Q233: What other factors and criteria should be taken into account?

<ESMA_QUESTION_233>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_233>

Q234: Do you agree with ESMA's definition of a market fulfilling its economic function?

<ESMA_QUESTION_234>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_234>

Q235: Do you agree that the listed factors and criteria allow ESMA to adequately determine the existence of a threat to the orderly functioning and integrity of financial markets or commodity derivative market so as to justify position management intervention by ESMA?

<ESMA_QUESTION_235>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_235>

Q236: What other factors and criteria should be taken into account?

<ESMA_QUESTION_236>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_236>

Q237: Do you consider that the above factors sufficiently take account of "the degree to which positions are used to hedge positions in physical commodities or commodity contracts and the degree to which prices in underlying markets are set by reference to the prices of commodity derivatives"? If not, what further factors would you propose?

<ESMA_QUESTION_237>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_237>

Q238: Do you agree that the listed factors and criteria allow ESMA to determine the appropriate reduction of a position or exposure entered into via a derivative?

<ESMA_QUESTION_238>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_238>

Q239: What other factors and criteria should be taken into account?

<ESMA_QUESTION_239>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_239>

Q240: Do you agree that some factors are more important than others in determining what an "appropriate reduction of a position" is within a given market? If yes, which are the most important factors for ESMA to consider?

<ESMA_QUESTION_240>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_240>

Q241: Do you agree that the listed factors and criteria allow ESMA to adequately determine the situations where a risk of regulatory arbitrage could arise from the exercise of position management powers by ESMA?

<ESMA_QUESTION_241>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_241>

Q242: What other criteria and factors should be taken into account?

<ESMA_QUESTION_242>
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<ESMA_QUESTION_242>

Q243: If regulatory arbitrage may arise from inconsistent approaches to interrelated markets, what is the best way of identifying such links and correlations?

<ESMA_QUESTION_243>
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<ESMA_QUESTION_243>

8. Portfolio compression

Q244: What are your views on the proposed approach for legal documentation and portfolio compression criteria?

<ESMA_QUESTION_244>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_244>

Q245: What are your views on the approach proposed by ESMA with regard to information to be published by the compression service provider related to the volume of transactions and the timing when they were concluded?

<ESMA_QUESTION_245>
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<ESMA_QUESTION_245>