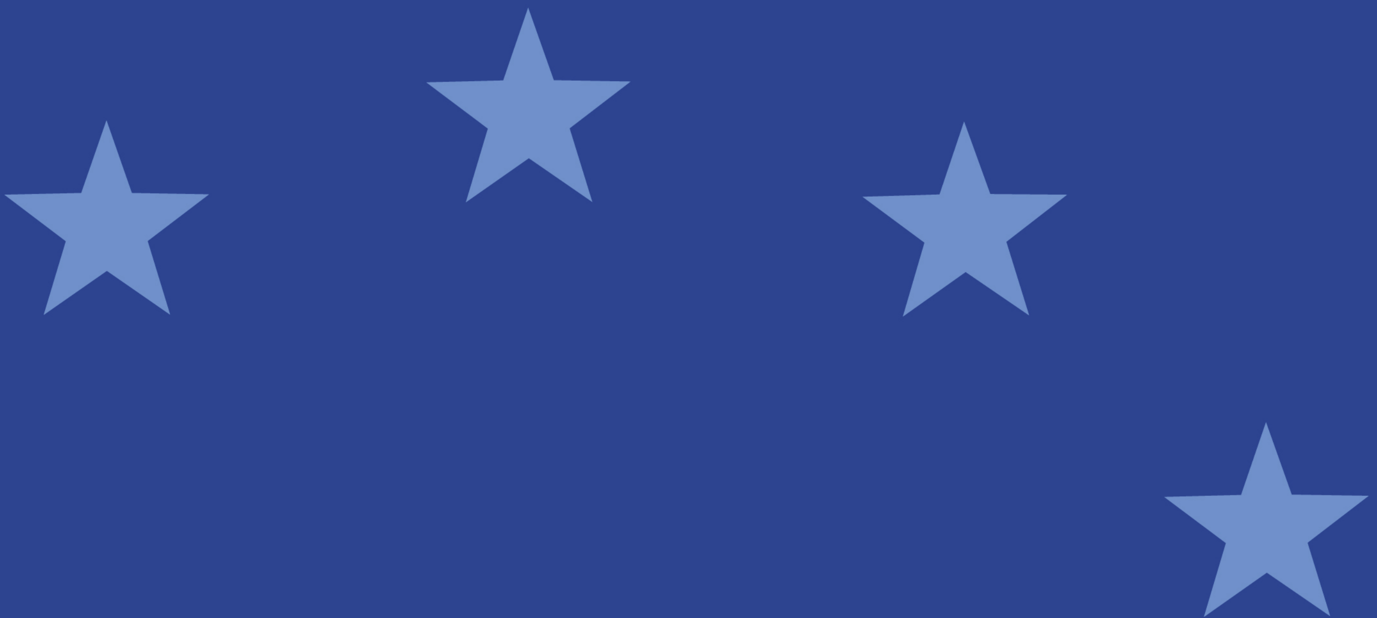
Reply form for the ESMA MiFID II/MiFIR Consultation Paper



22 May 2014

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>
The Nordic Securities Association (NSA) believes that the definition of investment advice needs to be clarified. However, such a clarification should focus on the type of recommendation (general vs. personal) and not in the channels used to provide them.

We agree that investment advice can be provided by using internet and e-mail, provided that it is a personal recommendation according to the MiFID definition.
<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>
Paragraph 3 point (iv) states that the compliance function has a responsibility to "oversee the operations of the complaints-handling process". At the same time paragraph 8 in the analysis states that the compliance function should take a risk-based approach when establishing its monitoring program. ESMA states in Section 2.4 paragraph 7 of the draft technical advice that complaints-handling should be analysed by the compliance function. At the same time in Section 2.3 paragraph 4 of the draft technical advice, ESMA states that compliance program should be established from a risk-based approach. Therefore, ESMA

should not point out activities that should be part of the compliance program – This should be left for a risk-based assessment by the individual firm.

Paragraph 5 point (ii) states that the compliance officer must be appointed and replaced by the management body. It should be clarified that this requirement only applies to the responsible compliance officer and not all compliance staff.
<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>
Mostly, yes. However, paragraph 2 on the draft technical advice requires the investment firms to publish the *details* of the process to be followed. A general level should suffice as in other disclosure requirements relating to compliance. Updating even the smallest changes would increase administrative burden unnecessarily. The clients do not benefit from the details either.

Also the requirement in paragraph 2 on the draft technical advice on the clients' right to complain without expenses is unreasonable. The process itself should not, of course, cost anything for the client, but it would be unreasonable if the investment firm needed to reimburse the client for e.g. postal or telephone costs, especially if the complaint has not been made *bona fide*. The administrative costs would any many cases exceed the reimbursements.

Paragraph 7 on the draft technical advice is too broad ("should analyse complaints and complaints-handling data to ensure that they identify and address any issues"). The Joint Committee Guidelines state that "Competent authorities should ensure that firms analyse, on an on-going basis, complaints-handling data, to ensure that they identify and address any recurring or *systemic problems and potential legal and operational risks*". This should be sufficient.
<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>
One additional record that Level requires under investment advice are suitability reports.
<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>
The requirement on periodic statements to clients lefts unclear what exactly needs to be recorded.

It is difficult to assess the additional cost. The additional cost will be quite severe depending on the interpretation of paragraph 3 and the requirement to keep data in an "electronic format". If the data must be in a database allowing online search, the cost incurred will be disproportionate
<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>
Monitoring all transactions is a disproportionate requirement. The NSA would ask ESMA to consider, if it would be a sufficient requirement for the investment firms to monitor transactions as a part of compliance function without a requirement to monitor all of them.
<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>
We believe that the requirement to monitor records including telephone conversations laid down in paragraph 7 should take a risk based approach in line with the draft technical advice set out in section 2.3 "Compliance Function". Firms do monitor the suitability and effectiveness of internal rules and procedures, but the suggested provisions need to be proportionate and not require monitoring all conversations, but make ad-hoc checks. See also reply to Q8.

Data protection issues need to be taken into consideration while ESMA gives technical advice to the Commission on monitoring the records.
<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>

Investment firms should be allowed to merge the minutes or notes from face-to -face conversations and the suitability statement, cf. section 2.17 par 2, item i-iii) as the content could be coinciding. Merging the information when possible would likely also increase the accessibility of the information from a client perspective.

Information on "initiator" should not be recorded as it is seldom clear who the actual initiator is - but often a combined effort that initiates the meeting. Also the investment firm's obligations in regard to advice are independent of who initiated the meeting.
<ESMA_QUESTION_10>

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

<ESMA_QUESTION_11>
According to MiFID II article 16(7) "written minutes or notes" refer only to face-to-face conversations. As Level I does not require signing, it should be sufficient that the investment firms assess which actions are appropriate
<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>
According to article 16 in MiFID II records, including recordings of telephone conversations, should be provided to clients upon their request. It should be stated on Level II that recordings of telephone conversations could be alternatively provided as transcripts, in order to prevent that conversations in the background – not intended for the client in question – are provided on the tape.

According to paragraph 7 in the analysis, some internal calls could be subject to the recording requirement. It should be clarified that the requirement to provide clients with recordings on request only applies to telephone conversation in which the client participates. Consequently, internal calls should not be provided to clients on request. Internal calls would not relate to the client relationship and could include business secrets, such as information of procedures, control functions and other surveillance mechanisms. Information might also be subject to the firm's secrecy obligations, e.g. information on other clients. The NSA also deems that the requirement may, in practice, lead to obligatory recording of all internal calls, which would be disproportionate.
<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>
In order to avoid unnecessary costs, ESMA should clarify in Level II measures that the client needs to specify what telephone recordings he or she wishes to obtain, under article 16(7) of MiFID II. Investment firms need to be able to require clients to provide any additional information necessary in order for the investment firm to comply with its obligation to identify and then provide clients with the requested records.
<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 believe that the distributor's obligations should only apply to distribution of products on the primary market and not the secondary market. As the manufacturer will have the positive duty to review investment products (prior to any further issue or re-launch, if it becomes aware of any event that could materially affect the potential risk to investors, and at regular intervals to investigate whether the products function as intended) and also has a duty to provide adequate information to the distributor, it should be deemed sufficient from an investor protection angle that the distributor makes necessary adjustments to its processes based on the information from the manufacturer. The NSA is very concerned about the scope of the rules regarding product governance and identification of a target market. Many of the requirements in ESMA's proposal are not suitable for e.g. government bonds or shares issued by non-MiFID firms. Furthermore, there is no need to expand the rules to investment services provided by the firm, as suggested by item 16 in the draft technical advice.

The terms "offer" and "market" in the draft technical advice should be defined. It should be clarified that only distributors that have an agreement or close relationship with the manufacturer are within the scope of the proposed regime. When trading in the secondary market the MiFID rules regarding appropriateness and suitability apply together with the requirement of giving information on the product and related risks. This should prevent misselling.

According to paragraph 22 the compliance function should be involved in the development and review of the product governance arrangements. It is, however, important that the compliance function remains independent and that decisions are taken independently form the influence of the business. Consequently, the compliance function should not "be involved" but should monitor the suitability and efficiency of the established procedures.
<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>
No, we do not believe that it is appropriate or proportionate to make these requirements available to non-MiFID firms (e.g. State Treasuries, listed companies and fund managers). What will be the consequences if such companies do not want to enter into such agreement? In our opinion, financial instruments are only "manufactured" by the investment firm if they are issued by the firm (own shares) or packaged by the firm (structured products).

The investment firm should be allowed to market and sell the financial instrument without an agreement as it would otherwise limit liquidity. Further it would limit the number of financial instruments an adviser could take into consideration when providing investment services.
<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>
The NSA does not think it would be useful to specifically require distributors to periodically inform the manufacturer about their experience with the product. This information flow will happen through the normal course of business as both parties have an interest in exchanging this information. It is important that the responsibility for the actual distribution of products lies with the distributor, unless otherwise agreed upon. A legal requirement is also deemed to be burdensome for both the distributor and the manufacturer.
<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>
What is appropriate action in a specific case would depend on a range of different circumstances such as the business relationship between the parties, contractual agreement (if any) and also national civil law. Should not be a matter for Level II. See also reply to Q 18.
<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>
See answer to Q17.

ESMA should take care not to impose obligations on distributors on Level II which are not supported by Level I or which blurs the division of responsibilities between manufacturers and distributors. In fact, according to Level I the responsibility of *identifying* an appropriate target market group for a specific product lies with the manufacturer who shall also provide information on the target market group to the distributor (articles 16(3) and 24(2) of MiFID II). The distributor shall understand the target market of each financial instrument it distributes (article 16(3) (6) of MiFID II), take this target market into account when offering or recommending products to clients (article 24(2)(2) of MiFID II) and, of course, perform a suitability test (article 25(2) of MiFID II) if providing advice. The distributor is under an obligation to ensure that distributors only recommend or actively offer financial instruments when this is in the interest of the client.

What could be appropriate action if a distributor discovers events that could affect the risk of the target market group can differ depending on the circumstances in the specific case, including the business relationship between the parties and national law. This is not to be a matter for Level II measures. For instance, as regards the example in the Q18, a distributor could "misjudge" a target market due to the manufacturer not having provided good information or itself not to have read or understood the information received. Notably, even if events occur that would "change the potential risk of the identified target market group" this could never entail a legal obligation or right of the distributor to change the target market group. However, it may follow from the other obligations mentioned above that the distributor then is prevented from actively offering the product as it is not in the client's

need or the product is no longer suitable. But, as mentioned above, detailed rules on this are not warranted on Level II.
<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>
When looking at the retail segment, containing a large amount of clients with vastly deviating needs and characteristics, the current proposal may present difficult challenges. Incorporating a too detailed level of granularity to identify a target market and ensure that the products are only marketed and sold within the identified group could potentially render general consumer marketing impossible.

As such, the assessment is separated from the suitability and appropriateness provisions but with a high degree of granularity in defining the target market, the result would almost be similar to having to do an additional suitability test before even approaching the client. The requirements hit both the manufacturing side and the distribution side.

We request ESMA to further clarify the scope of the level of granularity, and aim to secure the possibility of a high degree of generality when defining the target market group for products which may be suitable for a wide variety of clients, for example regular UCITS funds.

In the context of a company group, the requirements apply to each separate entity depending on the activities undertaken, i.e. manufacturing or distributing a product. In order to maintain an effective product governance process and to use an organisation's resources efficiently for the ultimate benefit of the client, the rules suggested by ESMA should open up for the possibility to have the same governance process within a company group. Even if the manufacturing entity and the distributing entity are separate legal entities within the group, they are still entities with close links to one another and the possibility for a closer collaboration and common process could produce a more holistic picture and capture potential issues in the product structure at an earlier stage than if the assessments need to be made separately. ESMA opens up, on page 43 of the Consultation Paper in draft technical advice paragraph 9, a possibility that when the manufacturer and the distributor are within the same legal entity, the same should apply within the same group.

In addition, we assume ESMAs proposal should not exclude that a manufacturer is able to collaborate and e.g. unite the assessments of the target market also with external distributors.

The NSA deems unreasonable to require identification also of ”clients whose needs are not compatible...” (paragraph 7 of draft technical advice advice) as defining the target market implicates that the product is note compatible with any other group of investors .

Finally, we note that NCAs according to article 69(2) of MiFID II may prohibit products if the firm has not complied with art 16(3) of MiFID II. This makes it even more important that the rules are clear and reasonable.
<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>
The draft technical advice takes the view that a target market would be defined as a group of investors. However, a target market could also be defined as a purpose e.g. mitigating the risk in a portfolio while increasing the expected return. Consequently, it should be clarified that a target market could be both a group of investors and a specific use (i.e. the target market definition should not be too narrow as this would preclude investors from access to investment products). See also answers to Q17-19.
<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>
The proposed requirements are very cumbersome and would incur a lot of administrative costs. Also, managing operational risks, including compliance risks, caused by the proposed rules would be very costly. The draft technical advice is especially difficult in an intra-group product governance (see Q17), where different rules apply to the manufacturer and the distributor.
<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>
Safeguarding of client assets is already a core task of the compliance function. Therefore we do not support establishment of a separate function for number of reasons.

The MiFID II Article 16 stipulates that an investment firm should "make adequate arrangements to safeguard client rights". The text does not mandate an establishment of an entirely new function.

In the first place establishment of a new function would add regulatory burden and personnel costs for smaller firms and also bigger investment firms and banks that operate in the less complex regulatory environment. For instance in the Nordic countries the client asset protection regime is already robust and based on strong segregation arrangements. Taken into account the nature, scale and complexity requirement of a separate officer would be clearly disproportionate. On the other requiring only bigger firms to have this functionality might create un-level playing field.

We perceive that this issue is in general already adequately handled by other departments of the investment firms, including compliance. It is very good, though, that point 2 in the draft technical advice allows investment firms to decide arrangements with regards to proportionality. Otherwise the requirement to appoint a single officer would be too broad and costly. However, safeguarding of client assets in the proposed manner might prove difficult in third countries. Further, a possible improvement of point 2 would be to replace "the

compliance officer" with "the relevant compliance officer(-s) (or the compliance function)" to take into account that several persons may be involved, not least as back-up. Furthermore, is should be noted that MiFID I implementing directive 2006/73/EC article 20 already requires yearly report by external auditors firms arrangements in this respect.

The NSA emphasizes that legal concepts, such as "client instruments" and "funds" should be clearly defined. Consistency should be carefully cross-checked and reference should be made to MiFID level I directive and other relevant EU laws (these might include Financial Collateral Directive, Regulation on Central Securities Depositaries, draft Securities Financing Transaction Regulation etc.). Creation of new ambiguous definitions on level II should be avoided.
<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>
Depending on the outcome of the consultation and the forthcoming technical standards, there will certainly be cost implications and administrative burden.
<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>
In principle we agree that in these cases TTCA might not typically be an appropriate method for the parties. However, it is our firm view that MiFID II level II regulation is not an appropriate legislative act to regulate this highly important issue. After the financial crisis the importance of financial collateral has grown tremendously. From the point of view of financial stability it is crucial that legal provisions regulating financial collateral arrangement are clear, unambiguous and provide the highest level of legal certainty. The aspect of predictability has been the key principle of European civil (or proprietary) law systems for centuries.

The Directive 2002/47/EU on Financial Collateral Arrangements (FCD) provides a modern and predictable EU-wide regime for the provision of securities and cash as collateral under both security interest and title transfer structures. FCD simplifies the use of financial collateral through the limitation of administrative burden to guarantee smooth provision of cross-border collateral that is prerequisite for well-functioning internal market. In case there is the need to review these core principles, this should be reviewed in the context of the FCD. Other relevant venue for the review is the Commission proposal on Regulation on reporting and transparency of securities financing transactions (COM(2014)40 final, SFTR). The MiFID level II regulation should not impose substantial rules on proprietary aspects of provision of collateral as this might compromise the legal certainty provided in FCD and forthcoming SFTR (and perhaps the future EU Securities Law Legislation). In case there is a need to regulate we recommend a general clause at high level based on existing requirements to act in the best interest of client.

In practice collateral transactions are often complex and the outcome is decided by many aspects in the negotiations. The exposure of the client towards the investment firm can be quite different from time to time. This means that the client's liability sometimes can be low and another time high. TTCA can therefore be an efficient way to manage the risk and also

be favourable for the client as it enables the client in an efficient way to use his securities for credit. Inappropriate legislation in this area could restrict the possibilities for clients. In some cases there could be legal reasons to avoid taking collateral through more traditional forms of collateral, such as pledge.
<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>
No, this matter should in our view be governed by the principle of freedom of contract. Please refer to our reply on 24 as well.

The question of appropriateness is something that the firms can handle themselves on commercial grounds. It should be noted that article 16(10) of MiFID II already prohibits TTCA for retail clients. It is not correct to assume that TTCA is used to circumvent MiFID. Furthermore this kind of substantial restriction should not be introduced at this level of the legislative process but on level 1. Finally, we see no need for risk disclosures in this area taking into account that the parties concerned are not within the retail category.

A separate concern that affects both retail and non-retail clients, is the consequences of a TTCA restriction on the use of funds as collateral. Cash as collateral is covered by article 2(1) (b) in the Financial Collateral Directive. We assume that the possibility to pledge an account would still remain, but transfers of cash as collateral would unfortunately no longer be an option. In the interest of keeping necessary flexibility, we recommend that the scope of the TTCA restriction should not be extended to non-retail clients.

Furthermore, we take note that the Commission has recently published a proposal for on SFTR which includes conditions for the use of rehypothecation in article 15. According to the Commissions questions and answers the rules in article 15 covers TTCA. Among the conditions is a requirement to inform the client (counterparty) in writing of the risks with TTCA. To avoid overlapping legislation no risk disclosure should be required in MiFID II level II regulation.
<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>
Please see our answer on Q25.
<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>
Already at the moment TTCA is only used when it is deemed suitable. However, the formal approach suggested would create unnecessary burden associated with additional costs. We advise against it. In the Nordic market TTCA is in fact not so common for other means of collateral than for cash. The dominant method for providing securities as collateral is the traditional pledge, in which the ownership remains with the pledgor.

<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>
Yes, the NSA notes that securities lending arrangements should remain available for retail clients.
<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>
No, collateral requirements for SFT transactions should not be placed in this framework at all. Legislative framework for financial services and their users is growing rapidly and a true risk of unclear, diversified legislation exists. In the long run it will become impossible to follow the proposed rules if they are split into different regulatory pieces regardless of the fact that a basis framework exists or is currently being drafted elsewhere (such as SFTR for SFTs). A coherent framework should be created and hence the collateral requirements for SFTs if any will need to be discussed within the newly proposed SFT regulation.

This will ensure a better understanding of the instruments in question, a tailored collateral framework for SFT – transactions and a proper consultation with the users of these SFT – instruments. The process should follow same kind of processes as in the EMIR – regulation: collateral requirements for derivatives transactions are quite rightly discussed in the derivatives framework: EMIR.

The explanatory memorandum of the SFTR proposal recognizes the benefits of SFTs as they provide additional market liquidity, facilitate funding of market participants, support price discovery of tradable assets and enable monetary financing operations of central banks. The main measure in SFT is to improve transparency regarding the SFT market through reporting. In general we support the measures in SFT and are of the opinion that the positive impact of these transactions should not be disregarded and we are afraid that forthcoming level 2 legislation in MiFID II can have a negative impact for investment firms' clients, in particular SMEs because of inappropriate restrictions on financing for those firms.
<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>
We do not see any need for extending the scope to non-retail clients.

An obligation on the investment firms regarding non-retail would change the basic relationship between the counterparties. A non-retail client should be responsible for monitoring its own exposure. Furthermore, standard master agreements provide adequate legal certainty.
<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>
Yes, the obligations of a borrowing client are typically secured. Creating systems for handling collateral from the banks in these cases would generate significant costs, but is not likely to add much value for the client.
<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>
No, we see no need for such a requirement in this legislation. In fact, the right of use is already generally detailed in written agreements. See also Financial Collateral Directive and SFTR.
<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>
Yes, there would be costs and additional administrative burden.
<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>
We agree that firms could be required to consider diversification as part of the due diligence. However, proportionality should be the key issue and no specific percentage should be set. It should be left to investment firms' consideration and due diligence on how to ensure the safeguarding of client assets whether depositing them intra-group or with a third party.

Furthermore we recommend the ESMA to make it clear that credit institutions are not subject to the diversification obligation and intra-group deposit limits.

In case the diversification regime would be applicable to credit institutions as well we would entail that there are more new risks involved than there are benefits from avoiding situations like Lehman. If a major client order needs to be settled on a very late stage on a trading day, it might be that assets needed for settlement cannot be gathered within the required settlement period and vice versa, if an investment firm becomes in possession of a big amount of client assets very late on a banking day, it may not have enough time to diversify them, or, diversification would become operationally more prone to errors. If this was multiplied with several actors doing this at the same time in a very short timeframe, it could potentially lead to Lehman-like situations regularly. Also, in the smallest European markets, too broad requirement for diversification might lead funds to be deposited in some of the weakest banks, if not enough top tier banks existed.
<ESMA_QUESTION_34>

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

<ESMA_QUESTION_35>
Yes. Operating client payments and settlement will become very difficult if the funds cannot be deposited within a same group.
<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>
Please see Q34. Proportionality should be the key issue and no specific percentage should be set. It should be left in the investment firms' consideration and due diligence on how to ensure the safeguarding of client assets whether depositing them intra-group or with a third party. Especially disproportionate situation would arise, if an investment firm acting as an asset management company within the banking group would be only able to deposit certain limited amount to a deposit account within that group.

We recommend increased transparency as an alternative regulatory approach.
<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>
Yes, in principle we do. However, we anticipate considerable efforts and costs as regards existing agreements (review and renegotiations etc). Certain flexibility and transitional period is strongly recommended. Especially it should be noted that custody chains are often multi-tiered and this adds complexity to renegotiate terms and conditions. If requirements vis-à-vis third countries are set on too stringent level this might restrict European investors' access to emerging and more exotic markets. Furthermore, we would like to stress that the validity of the agreements as such should not be put into question as legal certainty is crucial.
<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>
No. We consider MiFID I provisions as sufficiently strong.
<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>
There would be significant costs and administrative burden. This would include legal and advisory costs to review each jurisdiction concerned. The question is also dependent on the custody structure and length of the custody chain.
<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>
There would be significant costs and administrative burdens.
<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>
No, since we assume that "equivalent measures" really are equivalent.
<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>
No, that should not be necessary assuming that "equivalent measures" really are equivalent.
<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>
Costs would be high and application cumbersome for especially smaller firms.
<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>
Referring to our answer on Q 24 there is a clear risk inconsistent or overlapping regulation. For example measures to prevent settlement failures are regulated in Article 6 (2) of CSDR. Those measures will be set out in detail in regulatory technical standards according to article 6.5. Therefore we see no need for stricter requirements on MiFID II level II.
<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>
There are systems in place. We are doubtful that this should be legislated in this context. In our opinion CSDR is the right place to discuss systems and controls.

Furthermore as far as we know and based on discussions with Nordic supervisory authorities, there have not been market failures in Nordic markets.
<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>
Yes, but we also deem that current level of client asset protection is already robust in Nordic countries.
<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>
In our opinion, a better way is to have only the main principles stated in legislation, thus avoiding detailed legislation which could be outdated.
<ESMA_QUESTION_52>

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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>
To our knowledge banks and investment firms have information in this regard.
<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>
Information to be included is too detailed (paragraph 3 of draft technical advice). The NSA does not believe that retail clients will read or understand all this information. Moreover, we agree with ESMA that the type of client should be taken into account. There should not be an obligation to use a durable medium when providing information to professional clients or eligible counterparties. The same media as in other communication with professional clients and eligible counterparties must be acceptable.
<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>
No. The NSA thinks that many of the situations described by ESMA in this section are very theoretical. Some situations are handled by Chinese Walls or other organizational measures so there is no need for more rules. Other situations described seem to be based on US trading environment and are not relevant for EU firms. For example, in the US, the investment firms assume, before the transaction is made public, the underwriting risk and therefore the investment firm has an incentive to underprice the offer in order to reduce the underwriting risk. But in Europe the parties agree on the price for assuming the underwriting risk after book-building, after knowing how many shares that can be sold at different price-thresholds, and therefore the investment firm has not the same incentive to underprice the offer.

There is, therefore, a need for more detailed analysis by ESMA before introducing new and costly requirements. Also, it is important that the rules on Level II are not so detailed that it no longer is possible to take issuing clients' needs and requests into account.

Proposed regime does not either take into account that the clients to underwriting and placement services are professionals that furthermore are assisted by lawyers and other advisors. The suggested information regime will not have added value to these clients.

If ESMA still considers the proposed regime the requirement in paragraph 3 point(i) to explain to the issuer client about the various financing alternatives available should depend on the relationship with the client (whether it is an ongoing relationship, a new client etc.) and the service required by the client (comprehensive advice or "execution" of an issue). The NSA therefore suggests that "where relevant" is included in the text.
<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>
Absolutely not. Stability measures have nothing to do with hedging. See Regulation No 2273/2003/EC of 22 December 2003 implementing Directive 2003/6/EC of European Parliament and Council as regards exemptions for buy-back programs and stabilization of financial instruments.
<ESMA_QUESTION_59>

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

<ESMA_QUESTION_60>
Yes. Conflicts of interests are currently handled by e.g. Chinese Walls and insider lists, conflicts of interest policy, conflict clearance committee, general fiduciary duty to keep client

informed and personal account dealing rules. The organizational requirements should be proportionate to the nature, size and the diversity of the investment firm's business.
<ESMA_QUESTION_60>

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

<ESMA_QUESTION_61>
Changes need to be done regarding policies and procedures related to e.g.
• Allocation / pricing policy
• Extended record-keeping
• Information exchange on underwriting fees between retail and corporate finance
• Front-loaded processes to be able to provide detailed information upon entering into the engagement.
<ESMA_QUESTION_61>

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

<ESMA_QUESTION_62>
ESMA suggests that the investment firms need to explain to the issuer client "the various financing alternatives available, and an indication of the level of transaction fees associated with each". There are information barriers in place between corporate finance and debt capital markets. Exchange of client proprietary information is evaluated on a case by case basis. To provide the suggested information on financing alternative may require the exchange of information between corporate finance and debt capital markets, which in turn may require special information barrier considerations. The suggested practice will lead to increased administrative costs as well as increased costs for evaluation financing alternatives. This will, in turn, lead to increased fees for the clients.

The suggested rule should be amended, in the NSA's view, so that investment firms could give the information to the customers upon their request. The rules should at least not be applicable for professional clients.

ESMA suggests that the investment firm needs to explain to the issuer client "the timing and process the investment firm will take in respect to how the investment firm will reach its corporate finance advice in respect to pricing the offer". If this means to provide a general description of the process applied by investment firm in general, it is acceptable, although the added value for the client may be limited. If, on the other hand, the investment firms would be required to provide a tailor-made description on a case-by case basis before accepting a mandate, this would lead to unreasonable increased administrative costs. In addition, it is often not possible to provide transaction-specific details before the engagement. The investment firms do normally not have such information until they are close to the actual pricing.

ESMA suggests that details of targeted investors are provided. It will be very burdensome and in certain cases even impossible to provide such details before accepting a mandate. To develop a detailed strategy in relation to which investors will be targeted is part of the engagement and takes time to develop.

The new record-keeping requirements would lead to increased administrative costs and be very burdensome to comply with. There is no need to have more far-reaching requirements with respect to underwriting activities.

ESMA suggests that the investment firm should consider whether it is appropriate to refrain from acting in a situation where proceeds from the offer will be used to repay loans to the

investment firm (paragraph 14 of the draft technical advice). With the current wording, there is a risk that this could be considered as a default that investment firms must refrain from acting when proceeds are used for repayment of loans. It should thus be clarified that an investment firm would only have to refrain from acting if its participation would be contrary to the interests of the client and it is unlikely that this could be adequately managed by conflict of interest management mechanisms – e.g. disclosure or separate deal teams (see IOSCO's "Market Intermediary Management of Conflicts that arise in Securities Offerings" from November 2007).

ESMA stipulates a mandatory exchange of information between part of the bank arranging the offer and the lending side of the bank (paragraph 16 of the draft technical advice). The NSA deems that in certain cases the client may wish that no exchange of information takes place.
<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>
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<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>
It is of great importance that too excessive requirements are not put on investment firms and that the information requirements are proportionately calibrated both in relation to how disclosures are made (generic vs. personalized information) and to the extension of the disclosure requirements to non-retail clients.

Too much information could generate an information overload for the clients, and thus undermine the purpose of the expanded requirements. In order not to introduce overly costly requirements on investment firms, there needs to be room for the investment firms to use standardised models for how to calculate the costs incurred by the clients and a possibility to generalise the information at the point of sale disclosure, These should not only

concern the costs related to the financial instruments but also the costs related to the investment and/or ancillary services. Even in the situation with several client segments, as pointed out by ESMA, it should be sufficient with generic information on the costs for the various segments as long as the adviser points out to the client the service level applicable to that particular client and the costs connected thereto.

In regards to the extension of requirements to disclose information to non-retail clients on costs and charges, we believe that ESMA has approached the information disclosure regime in a disproportionate way by suggesting that non-retail clients should only be able to opt out from the application of the detailed information disclosure requirements.

To include, as a general rule, all non-retail clients under the same information disclosure requirements as retail clients seems excessive and disproportionate. By being professional clients and eligible counterparties these parties have sufficient knowledge and expertise to appreciate the risks concerning their investments and be able to decide the level of detail they require.

The proposed regime would serve a better purpose if it was turned around so that non-retail clients could request to be covered by the applicability of said requirements (opt-in). This would still give clients the freedom of choice but at the same time also secure that clients are not forced to receive a lot of information they are not using. It would also save investment firms from spending unnecessary resources for work that the clients may not want. The NSA thinks that the proposed new regime blurs the classification of non-professional and professional clients.

In any case, it seems excessive to not be able to opt out from the application of the requirements in regards to investment advice or portfolio management services or when a product embeds a derivative. The last-mentioned could severely limit the clients' possibilities to opt out from the applicability of the requirements as many of the regular UCITS funds utilise derivatives for hedging purposes. ESMA should also clarify what exactly is meant by "embed a derivative".

Requirement of being up-to-date should not cover an indefinite period of time. Such requirement would not be fit-for-purpose for old products, whose marketing has ceased.

The NSA deems unnecessary to regulate the font size. As all information should be fair, clear and misleading and no requirements on details like font size should be needed. There is also overlapping regulations on this issue in e.g. PRIIPS.

We agree that information should be up-to-date and relevant to the method of communication but some time lag is inevitable, even for online information.
<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>
Yes, but the NSA asks ESMA to clarify that the proposed performance scenarios have to be based on a 'what if' approach and not require the use of probabilistic methods (i.e. based on probability simulations).
<ESMA_QUESTION_66>

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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>
The NSA agrees with the suggested approach since the proposed conditions for information to be fair, clear and not misleading are in line with the general principle to act honestly, fairly and professionally in accordance with the best interests of clients. The NSA deems such conditions sufficient to ensure an appropriate level of protection of the professional clients (or potential professional clients). See also the answer to Q65.
<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>
Rules on non-independent investment advice should not unreasonably hinder offering other investment services in their current form.

Information regarding broad or restricted analysis should be of a general nature, provided as a generic description of the investment firm's selection process and allowed to be provided to clients on e.g. the investment firm's web site. The proposed requirements to provide information on "own and other" financial instruments are disproportionate and would imply huge administrative costs. It should be taken into consideration that some firms offer substantial amounts of different instruments (ISINs) and that the range of products offered is dynamic.
<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>
The notion that information on financial instruments may be provided in a standardised form is acceptable, as long as this does not imply a new information disclosure requirement. Cumulative impact of other overlapping legal dossiers (DGSD, UCITS IV and PRIIPS) may cause unintended consequences. It is very important that the standard information (KID or KIID) to be issued in accordance with other regulations can be used to fulfill the MiFID II requirements.

As regards paragraph 10 (financial instrument composition), a clarification is needed regarding what is intended to be provided to clients regarding the "status of the financial instruments".
<ESMA_QUESTION_69>

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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>
The NSA believes important clarifications should be made regarding the information requirements under MiFID II.

First of all, it is extremely important to determine which information should be provided to a client in the case of legislation overlapping. There are several pieces of legislation that deals with disclosure to retail clients (MiFID II, PRIIPs, and Prospectus Directive). In some cases they may apply to the same situations and there is no conflict rule to determine which one is applicable to provide the pre-trade information to the client or if the entity should provide it following each of them (with the consequent operational and administrative cost for the entity and excess of documentation for the client). For instance, cost disclosure will also be covered under the PRIIPs' KID and it should be clearly stated in the Level II rules that if an investment firm provides the KID to a client, the MiFID II requirement on cost disclosure is already fulfilled. Clarity regarding this point would be beneficial for both clients and entities. Duplicating the disclosure requirements should absolutely be avoided.

In line with what has been stated above, it should be noted that the great quantity of information that investment firms must provide to their clients may have a detrimental effect, as clients may lose the focus about what is relevant and what is not, making this information process a mere administrative process without positive effects.

Finally, disclosure requirement included in the Level II rules should be expressly identified as a "numerus clausus" obligations. A clear definition and limit of the obligations will provide to the market and investment firms legal certainty as no new obligations may be imposed in the future based on interpretations of NCAs.

<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>
No. The NSA recalls that professional clients and eligible counterparties - due to their knowledge and experience - are sufficiently informed on the types of costs and fees commonly connected to the intended transactions and therefore in a position to ask for the relevant information.

Moreover, eligible counterparties can request - either on a general form or on a trade-by-trade basis - to be treated as retail clients, whose business with the investment firm is subject to articles 24, 25, 27, 28 and article 30(2) MiFID II).

As a consequence it should be sufficient to provide them with the appropriate amount of information about costs and fees upon the their request (opt-in), as described in article 24(4)(c) of MiFID II.

Finally, the proposed measure is disproportionate as what comes to the expense of a substantial advantage in trade with professional clients and eligible counterparties – the higher speed, at which the business can be carried out due to the greater knowledge and experience of the parties. This is also stipulated in the current rules on best execution (article 44(3) of MiFID Implementing Directive) whereas the price is playing a predominate role with regard to retail clients.
<ESMA_QUESTION_71>

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

<ESMA_QUESTION_72>
No, the NSA does not agree.

The needs of different types of clients, as well as their freedom of choice, have to be taken into account to ensure that the information disclosure rules are appropriately balanced between the client benefit and the costs incurred to uphold the regime. It is of great importance that excessive requirements are not put on investment firms and that the information requirements are proportionately calibrated both in relation to how disclosures are made (generic vs. personalised information) and to the extension of the disclosure requirements to non-retail clients.

The detailed point of sale disclosures should only apply to client relationships under an advisory or discretionary agreement, i.e. not in case of execution-only transactions. Further, the respective disclosure should not cover costs charged by third parties - Even if the client has been directed to the third party.

In this context, and in order to not introduce overly costly requirements on investment firms, there needs to be room for investment firms to use standardised models for how to calculate the costs incurred and a possibility to generalise the information at the point of sale disclosure, not only concerning the costs related to the financial instruments but also the costs related to the investment and/or ancillary services. Even with several client segments generic information on the costs for the various segments should be sufficient, as pointed out by ESMA, as long as the adviser points out to the client the service level applicable to that particular client and the costs connected thereto.

ESMA’s proposal that firms need to disclose the cumulative effect of costs on the return of a product is of the NSA’s particular concern. For example, firms do not know for how long the client will actually hold a product, which makes such estimation very difficult and unreliable. Further, when considering the suitability requirement to assess whether an alternative instrument would better meet the client’s profile, there is no corresponding requirement to show the cumulative effect of costs on return on that alternative product. The cumulative disclosure requirement would not be of value for the client as it cannot be compared with the alternative product. Neither does it make sense to incorporate cumulative disclosure requirements for an alternative product. Such an exercise would be equally unreliable with the first one and would generate additional costs borne by the client.

Concerning itemising all costs per client as stated in the Annex 2.14.1 proposed by ESMA, the NSA believes that this could add further complexity and difficulties for the investors to clearly understand the cost structure. Thus, the NSA questions whether it would add value

for clients that investment firms trace back all costs through the entire value chain. We believe that it is the total cost figure that actually matters to the clients. The NSA fears that with this proposal, ESMA creates unnecessary operational risks.
Some of the requirements regarding costs are difficult to comply with e.g. as information is not known at point of sale. Estimates and proxies should be used with care as they may provide incorrect information to clients and may be misleading and also lead to difficult questions regarding responsibility. The NSA fears that also with this proposal, ESMA creates unnecessary operational risks.
<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>
The NSA agrees with this proposal only if, additionally, the firm agrees to monitor the client's portfolio as described in article 24(4)(a)(iii) of MiFID II.

However, providing post-trade information to all clients, regardless of the obligation to monitor the client's portfolio, would be disproportionate. From a civil law perspective post-trade information could give reason to cautionary obligation that would cause additional liabilities and costs for the investment firms.
<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>
Investment firms should be allowed to present the costs and charges on a generic basis especially in regard to pre-trade. Regardless of whether the situation is pre- or post-trade, some of the costs and charges can only be estimated or calculated only if there is an estimate or forecast for the return on the financial instruments. This is particularly true for actual cost measured in a certain currency. Any other solution, as proposed in the Annex 2.14.1, would add further complexity and difficulties for investors to clearly understand the cost structure. Therefore, the NSA questions whether investment firms tracing back all costs through the entire value chain would add value to the clients. The NSA believes that it is the total cost figure that actually matters to the clients. For the sake of clarity, it should be stated that these requirements do not apply to pure cost for the execution of orders. If the investment firms are to develop their own models for forecasting the returns this could lead to an unhealthy situation where the forecast of future performance is a competition parameter or factor.

Forecasting future performance would most likely be advantageous only for index models as it is difficult to put an objective value on Alpha parameter in the forecast (where Alpha is an expression used for the extra value an active manager adds (or subtracts) from the investment return).

This could lead to an active management being deselected on a "deceptive" background. Only cost actually incurred can be given on a precise level. Estimated costs and charges will always be, to some degree, incorrect.

Most of the cost elements mentioned in Annex 2.14.1 are available in different forms in prospectuses, on web-sites and in annual reports and accounts.

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Requiring an individual investment firm to retrieve this information from various sources would involve a high risk of the information being disclosed on the same product varying from one investment firm to another.
Therefore, it must be ensured that the information disclosed is based on a methodology and on cost elements defined in the common European legislative framework and produced and provided by the product manufacturer, which is also liable for the information.

Requirements on how to disclose costs on UCITS to retail investors are today regulated in the regulation on KIID for UCITS. Other types of packaged investment and insurance products will be regulated in the PRIIPs regulation.

Consequently, it is essential that the requirements on cost disclosures on MiFID II Level II are directly based on the requirements on cost disclosure in the UCITS KIID and the upcoming KID for PRIIPs.

This approach will ensure that the same cost elements form part of the information on costs and charges disclosed to the investor from both the product manufacturer and the investment firm. Furthermore it will be ensured that the investor will receive the exact same information on costs and charges regarding a certain investment product (e.g. a fund) despite where the investment product is bought from, and regardless of whether the securities are held with the investment firm or not.

The NSA is therefore of the opinion that a requirement of disclosing the transaction costs as an addition on to the requirement in KID and KIIID should await an alignment of the requirements in PRIIPs regulation and the UCITS directive.

In paragraph 41 of the analysis, ESMA seeks to illustrate by examples, how aggregated costs and charges could be disclosed. The examples seem to assume that the average client is investing in one instrument and that the funds invested are "new" funds. However, the common situation involves advising on a more diversified portfolio. Therefore, the NSA encourages ESMA to illustrate more complex examples e.g.

- examples with mixed products
- examples where the client has an existing portfolio of different products, and sells part of the existing portfolio and buys similar products, or sells part of existing portfolio and buys other products
- examples where custody fees are included
- examples with different structures of fees and types of fees.

The need for further examples clearly indicates the need co-ordination with all other rules and requirement since this issue is very complex with multiple combinations.
<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. Generic disclosure of costs and charges certainly makes sense from a consistency standpoint and should apply to costs and charges for financial instruments as well as for the investment or ancillary service provided by an investment firm.

An estimate of future or continuing actual cost will require an estimate/forecasting of future performance.

Furthermore, it should be made clear that only financial instruments where the distributor has an actual distribution agreement are included in the obligation to present pre-trade information. Should the intention be to include any financial instrument that could be traded via the investment firm, it would result in more illiquid and fewer instruments available to the investors to meet their needs. This would most likely be to the detriment of small and medium sized investment firms.
<ESMA_QUESTION_75>

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

<ESMA_QUESTION_76>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_76>

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

<ESMA_QUESTION_77>
ESMA's proposal that firms need to disclose the cumulative effect of costs on the return of a product is of a particular concern to the NSA. By way of an example, investment firms do not know for how long a client will actually hold a product, which makes such estimations very difficult to work with and unreliable. Further, when considering the suitability requirement to assess whether an alternative instrument, less complex and with lower costs, would better meet the client's profile, there is no corresponding requirement to show the cumulative effect of costs on return on that alternative product. The cumulative disclosure requirement would not add value to the client, as it cannot be compared with the alternative product to be assessed. Neither does it make sense to incorporate such a cumulative disclosure requirement for the alternative product to be assessed. Such an exercise would be equally unreliable and generate additional costs which would be borne by the client.
<ESMA_QUESTION_77>

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

<ESMA_QUESTION_78>
TYPE YOUR TEXT HERE
<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>
As already envisaged for the list of circumstances and situations to be considered by NCAs in assessing the so-called "quality enhancement test", the NSA believes that a non-exhaustive list better fits the purpose to fulfill the obligation to accept only those non-monetary benefits which can be qualified as minor due to the extreme variability of the potential cases to be assessed. Furthermore, a non-exhaustive list would be more flexible in a constantly changing financial industry and technical progress.

Furthermore, we propose that both the reasonability and the proportionality criteria should be carefully evaluated in light of the capacity of each minor non-monetary benefit to influence the recipient's behavior in any way that is detrimental to the client interests.

Concerning face-to-face meetings or conference calls with brokers, there is a need to focus on the content of the information discussed in the meetings rather than the situation that a firm has direct access to the broker. In many cases the research presented and discussed in such meetings are in fact generic research which the brokers use in meetings or calls with a large number of firms. Even though the research is then only discussed between two parties at a time, it should be considered as an acceptable non-monetary inducement as the content is in fact generic and intended for a larger audience.

Some investment firms provide a bundled service where the client can get investment advice, research and execution and other services. Normally the market has two dimensions - a liquid part (large-cap) with large volume trading and an illiquid (small- and-mid cap) with small-size volume trading. As commissions are agreed as combined trade-related basis points on size, there could be unintended consequences for the illiquid part - That small-size trading cannot uphold enough profit to continue research on a broad level of market participants, as there is a combined income effort between "high-touch" execution in tough, illiquid markets with research of the small and mid-cap equities. If the equity service is unbundled, service by service, for which the investment firms do not get paid, the services will not be provided anymore.

The illiquid shares in small and mid-cap companies will not be traded enough so the investment firms will not afford to have analysts staffed to cover these companies. There is a risk that the suggested rule will lead to less research on small- and mid-cap companies, and these companies having problems finding investors.

The NSA believes that corporate access for information purposes should also be seen as an acceptable non-monetary benefit based on the same line of argumentation as for research. Moreover, it should be noted that financial analysis and research as a non-monetary benefit is an integral part of the value addition to clients. Having access to a wide range of research helps clients make better investment decisions. Further, requiring firms to contract with external research providers for tailored research would effectively limit the scope of research providers a firm would contract with. This would lead to a lesser range of research being used by firms, a narrower base to build investment decisions on and finally to the detriment of the clients. Having only investment firms paying for financial analysis and research will have a negative impact on transparency, by firms increasing management fees to cover expenses and bundling information rather than unbundling information and being transparent towards their clients on the various services they are paying for.

The requirements related to receiving of financial analysis and research are not aligned between discretionary portfolio management as an investment service under MiFID II and collective portfolio management under UCITS and AIFMD, but creates a un-level playing field.
<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>

Yes, the NSA agrees, in principle, with the proposed approach, which we understand to be very much in line with current Level II. However, the NSA proposes to further clarify how the reference (paragraph 8 of the draft technical advice) to the costs and charges disclosure rules is interpreted. More specifically, the NSA asks ESMA to clarify whether that reference entails the disclosure of how the inducements influence the costs or overall charges paid by clients, or if it is a mere cross-reference to the relevant disclosure criteria. Disclosing the inducements before offering investment services is sufficient according Level I.

In the second case, taking into consideration the difference between the information to be disclosed (costs and charges vs. inducements), it may be clarified that only the relevant criteria may apply with the necessary adaptations, such as those dealing with the aggregation or the *ex-post* disclosure format.

Finally, NSA recommends allowing firms a certain degree of discretion on setting up their internal procedures for disclosure of monetary and non-monetary benefits provided of course that they comply with the general principles. Other solutions would be disproportionate. Further restricting the use of non-monetary inducements as means to access financial research and analysis could damage the competitiveness of European firms, as firms in other markets outside of the EU, for example in the USA, are using commissions to pay for research and analysis. Disclosing the inducements before offering investment services is sufficient according to Level I (article 24(9) of MiFID II). Consultation Paper goes beyond the Level I when there is requirement to disclose the inducements ex-post to the provision of service or on an on-going basis.
<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>
No, the NSA does not agree with ESMA's analysis on this issue.

The negative definition of quality enhancement circumstances advanced by ESMA (in particular paragraph 10 point (i) on page 124 of the Consultation Paper is of such a nature that an effective remuneration of non-independent advice through inducements becomes practically impossible. It should be kept in mind that inducements are only banned in independent advice and portfolio management. It should be kept in mind that inducements are only banned in independent advice and portfolio management, not in other investment services such as reception and transmission of orders (distribution), execution of orders (execution only) or non-independent advice.

The NSA believes that point (i) of paragraph 10 needs to be clarified so that it states more accurately which basic investment firm infrastructure cannot be based on inducements.

While the NSA welcomes paragraph 11 of the draft technical advice on inducements, it should be explicitly clear that besides the access to a wider product range or the provision of advice on an ongoing basis, the access to and support of a distribution net should be recognised as relevant quality enhancement criterion in itself. Otherwise ESMA would ignore the characteristics of a wide-spread distribution model in Continental Europe in which the producer remunerates its distributors in exchange for the access to a distributor's client network.

Examples of circumstances and situations where the enhancement test is met should include the following:

- Access to a personal advisor having received specific additional training (such as product training which goes beyond regulatory requirements);
- Access to and support of a distribution net
- Access to a financial planner or tax advisor;
- Invitations for clients to information sessions where product types are explained or general information and analysis is shared about the general economic situation;
- Specific information materials and brochures about economic or regulatory developments that are relevant for a client (e.g. estate planning).
- Access to a platform where a client has continuous access to its portfolio in addition to regulatory reporting requirements;
- Access to simulation tools that are not directly linked to the sale of products or services (e.g. calculation of pension benefits and calculation of taxes);
- The so-called open architecture model;
- Possibility to access investment services at all in rural areas.

Concerning the part of the ESMA's questions that relates to the nature of the list (exhaustive vs. non-exhaustive) the NSA supports a **non-exhaustive** list but not the list that ESMA has proposed.

Considering the large group of clients that could be left without advice, it would mainly consist of retail clients and there is reason to believe that the de-selection of advice could pose a greater risk to the clients than the use of inducements.

Further, the structure in the Nordics is to a large extent built on distribution channels which consist of or is owned by banks and insurance companies also having in-house manufacturing. If not being able to utilize distribution fees there is a lot less incentive for these distributors to include products from external product manufacturers in their product offering. Naturally, this would lead to diminishing product diversity, fewer products for the clients to choose from and clients would only be able to invest in products issued by the specific distributor.

There is a hazard that reforms with good intentions have unintended consequences, such as decreased transparency. If inducements are banned, they might be replaced with less transparent arrangements, or including the fees in the spreads. If structures are forced to become complicated with over-regulation the costs usually increase and fall to the clients to bear.
<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>
Yes. Especially the non-exhaustive list of circumstances where the quality enhancement criteria of an inducement is not met will cause major legal uncertainty, as well as compliance and risk management costs as the investment firms cannot rely on a certain inducement meeting the criteria.
<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>
We agree with the statement regarding principle of proportionality, i.e. the requirements as of number and variety of instruments to be considered should be proportionate to the scope of the advice offered by the firm. As ESMA correctly states in paragraph 11 of the analysis, an investment firm must be able to specialize in advice regarding certain financial instruments and still be able to be independent. This is very important in order to allow different business models and also indirectly to ensure that investment firms are not forced by regulation to give advice about instruments that they have not enough knowledge about. For instance, considering the differences in equities and non-equities, it would be unreasonable not to allow an advisor to specialize in fixed income instruments.

Moreover, the NSA asks ESMA to clarify the phrase "substantial part of financial instruments available on the market". The term "substantial" is not clear and could be misunderstood. It should also be clarified which market to assess, considering that there can be restrictions as to which markets or instruments a client can buy or subscribe to. All investment firms are not big enough to have contractual agreements with such a large number of product providers in the EU. The implications of this rule could be very detrimental to the business models of small investment firms across the EU.
<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>
The NSA supports ESMA's proposal that an investment firm could offer both independent and non-independent advice, but we do not see any advantage in separating the services and advisers of the two alternatives. The reason to impose this separation is to keep the client informed, at all stages, about the type of service being provided. If the objective is to ensure that clients are not confused about the type of advice that they are receiving, this objective will be better achieved through the provision of clear information about the service, including in the contract with the client.

The obligation to provide information, prior to the provision of the service, about the differences between the two types of advice could also help the clients to decide between the alternative that best achieve their needs. For example, if the investment firm presents the clients the features, risks, conflicts of interest and costs of both types of advice, they can choose the service.

In our opinion, the decision to separate both services and advisors should be a decision of the investment firm, taken into account the business model adopted, and not a mandatory requirement.
<ESMA_QUESTION_84>

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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>
TYPE YOUR TEXT HERE
<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>
The wording in paragraph 2 point (ii) regarding suitability report is not aligned with the wording on Level I. Level I uses the phrase "preferences an objectives", while ESMA advice uses the phrase "objectives and personal circumstances". Any intended distinction should be clarified.

The NSA opposes the text in point (xi) of paragraph 1. Policy requirement is acceptable but there should be no requirement of agreement with the client.

It should be clarified why paragraph 1 point (xii) only applies to "small firms" and not to firms in general.

Furthermore, it seems unclear why suitability reports should be included in paragraph 3 if the draft technical advice). As investment firms offering investment advice are required to perform a suitability test, clients are not recommended financial instruments that incur disadvantages to the clients. Firms make specific recommendations based on what should be the most suitable investments in the context of the client's portfolio. Assessing and disclosing an alternative product when recommending a financial instrument could make it overly complex from a client's viewpoint and confuse clients. Further, it remains unclear which "alternatives" the investment firms would need to consider.

Another concern of the NSA with assessing an alternative product is the emphasis on lower costs and less complex products, as there are, for example, no additional provisions regarding the yield of the product or other material aspects of the products. Costs are not the only significant factor when recommending a financial instrument.

There is also a liability concern if an alternative product performs better than the recommended instrument. The adviser needs to disclose a lot of cost information on the recommended instrument, e.g. the cumulative effect of costs on return. This should not be a requirement for the "alternative" as it leaves the client with a different picture or information on the recommended instrument and the "alternative". There is no direct exclusion of non-retail clients, but the NSA expects that ESMA do not aim to extend the current suitability requirements that apply to non-retail clients under MiFID I.

Further, to provide information on the clients' existing investments could prove very difficult for investment firms as clients are, in general, reluctant to inform the firm about holdings they have with other investment firms.

<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>
No.
<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>
Points (i) and (ii) in paragraph 2 are sufficient. There is already a requirement to inform the client about the risks and therefore this requirement is already fulfilled. Disadvantages are covered directly in the suitability assessment.
<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>
The need and rationale behind the periodic suitability reports is questionable and should be a requirement only if the investment firm offers ongoing suitability as referred to in article 24(4)(a)(iii) of MiFID II.

Keeping records on suitability reports should be sufficient as periodic reports are only feasible if the service provider had a small and static selection of products, which rarely is the case. Normal client relationship management systems are adequate in this respect.

Periodic suitability report should only cover the changes in the instruments or circumstances. Depending of the frequency of the advice sessions, the adviser could repeat information which has remained unchanged from the first suitability report.
<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>
The NSA takes the view that the requirements in the article 38 of the Implementing Directive of MiFID should be confirmed without amendments.
<ESMA_QUESTION_90>

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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>
TYPE YOUR TEXT HERE
<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>
No, there should not be a legal requirement of a written agreement with professional clients, see answers to Q65 and Q71.
<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>
No, we do not agree. There should be no legal requirements on written agreements for investment advice in general and in particular not for "one off" advice. Written agreement for investment advice would add the administrative burden but would not be an additional benefit to the client. The statement of suitability is sufficient from investor protection´s viewpoint (article 25(6) of MiFID II).
<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>
Yes.
<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>
No, there should not be any legal requirement in the delegated acts to describe the services in the agreement. Such information could just as well be provided in another format and there is a risk that such a requirement makes the agreement too comprehensive. There would also be unnecessary overlaps with the requirements on information to clients in the article 24 of MiFID II.
<ESMA_QUESTION_95>

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2.21. 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>
No, there is no need for this. See also reply to Q65.
<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>
It appears from the paragraphs 13 and 14 in the analysis, that there should be a certain level of harmonization with article 105 in the AIFMD as regards to the quality of information given to the investors. It is important to bear in mind that the reporting obligation in article 105 of the AIFMD is designed for reporting to professional investors and not for investors who usually have outsourced the portfolio management in order not to be obliged to constantly monitor their portfolio.
<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>
The NSA does not recommend including a duty to state the estimated value of financial instruments in the cases a market price is not available. It may be very difficult to gather information for a reasonable estimate and the valuation as such can be intricate and costly. Depending on the information quality and on the valuation assumptions, stating an estimated value may be misleading for the client.

Therefore, the article 43 of the MiFID Implementing Directive should be updated to specify that the content of statements include the market value of the financial instrument, if any.
<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>

2.22. 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>
We believe that particularly for retail clients, the most practical relevant information on the summary of best execution may relate to the list of trading venues and (executing) brokers an investment firm used. EBF members therefore support the proposal of ESMA that the list of venues or entities used by an investment firm for execution must be listed in its execution or RTO/placing policy.

However, ESMA also proposes that investment firms that transmits or places orders "should include relevant information on the execution policies of the entities that they have selected to execute transactions, in each category of financial instruments". This provision may lead to an increase of information in the summary of the RTO/placing policy and it would not always be easy for the investment firm to assess what parts of the policies of the executing broker it uses may be relevant for inclusion in its own RTO/placing policy.

If the provision to include a list of brokers in its summary best execution policy remains, the EBF suggests that clients should be referred to the respective best execution policies of the brokers used by the investment firm. Only where the best execution policy of the investment firm materially deviates from that policy of its brokers used, such information should be adopted in the RTO/placing policy.
<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>
We believe that most of the information as proposed by ESMA is already included in most of the current best execution policies used in the market (for retail clients). However, more details on the best execution policy, particularly also related to the relevant information of best execution policies of the (executing) brokers the investment firm uses, as proposed by ESMA will lead to additional administrative work. Current best execution policies or summaries will need to be reviewed and modified and subsequently distributed to clients. This may lead to additional costs which may be hard to quantify in advance, as this depends on the means of distribution and possible local legal requirements which may be applicable.
<ESMA_QUESTION_102>

2.23. 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>

2.24. 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>

2.25. Product intervention

Q107: Do you agree with the criteria proposed?

<ESMA_QUESTION_107>
The NSA thinks that ESMA has struck a balance between the detail and the flexibility. We understand that the financial crisis has led to more cautious regulatory approach vis-à-vis individual financial products. However, compliance function of an investment firm, suitability and appropriateness tests, as well as the proposed product governance rules should suffice to avoid dangerous products entering the markets. Thus, the responsibility of creating a product should lie within the industry and not the regulators. Regulators would oversee these processes in the course of their normal supervisory process. If irregularities are detected, appropriate enforcement action should take place. In this process product intervention powers should be used only as a measure of a very last resort.

In that sense, the NSA believes that the criteria proposed give rise to a great legal uncertainty as it mainly uses open qualitative criteria and does not establish specific guidelines, which should govern the decision of an authority. Furthermore, we believe that the main goal is how to quantify or determine the level where the appropriate NCA could estimate that it has to exercise its their product intervention power, without creating a regulatory arbitrage possibility between two or more member states. If that is not the case, competent authorities may be empowered with discretionary measures that may be prejudicial for market confidence and stability for the EU internal market. Examples of these situations are:

- Factors like "degree of complexity", "degree of innovation", or even "size or the notional", have to be clearly defined with quantitative measures rather than subjective criteria that should be taken into account by ESMA, NCA or EBA.
- Intervention criteria should not be based on permitted activities: references to client age, wealth or incomes should be deleted, as there is no restriction to sell depending on the age, wealth or incomes of clients.
- The Consultation Paper should not include criteria that investment firms do not have to consider when distributing their products. For example, "core financial objectives", that only should be considered when providing investment advice.
- Some references may be harmful for market stability and may jeopardize the free effective price formation. In particular, we consider that the following may negatively impact the basics of market functioning: (i) "the charges that do not reflect the level of service provided", as that may result in jeopardizing the freedom of price formation: if charges are too high for a product, market will opt for alternative products; or (ii) "the credit worthiness of the issuer or any guarantor", as this is a criterion that could result in the issuer/guarantor being expulsed of the market (and again, credit worthiness will already be considered in terms of pricing and conditions of the issuance).

Finally, we understand that when the intervention powers are already introduced in other legislative initiatives (benchmarks, MAR, etc.), they should not give rise to additional enforcement actions.
<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>
No.

However, we strongly agree with ESMA's reasoning (CP page 176 p. 9) that expanding the definition of what is liquid to a greater number of instruments is detrimental for the markets.

Defining illiquid instruments incorrectly as "liquid" would create a situation that would reduce liquidity, increase fragmentation and harm the price discovery process. This would in turn increase transactions costs for investors and raise capital cost for smaller and medium sized listed companies.

Hence, it is strongly advised that ESMA takes a conservative approach in defining the new thresholds for liquid shares.

There are several reasons why thresholds should only cover shares that are truly liquid.

Firstly, and again as identified already by ESMA, there will likely be a number of firms that will abstain from dealing as an SI for less liquid shares due to the SI obligations that will arise for shares deemed as liquid. This will further reduce the available liquidity and in many cases likely lead to situations where trades that would otherwise have been executed will never be done.

Secondly, the use of the Negotiated Trade Waiver (NTW) will be affected if a greater number of shares are deemed as liquid. This due to the construction of the volume caps connected to the waiver. Negotiated trades are important for a functioning market, especially for the possibility to execute larger orders in shares that are less liquid. If these shares fall under the volume cap, and limit the use of the NTW, this will have a negative impact on trading in these shares. As a result there would be less liquidity in the market and transaction cost would rise.

It should be noted that negotiated trades in all Nordic countries are fully supervised and monitored on-exchange trades. The system has been in place prior to MiFID I and based on our discussions with NCAs, the regime has functioned well. It is often described as oil for the trading system that facilitates smooth functioning of markets. The system has nothing to do with current debate on dark pools.

Thirdly, the definition of liquid shares will also have an effect on the tick size regime since liquid shares are subject to lower tick sizes that non-liquid shares. Hence, expanding the level of liquid shares, to include also shares that are not truly liquid, will lead to lower tick sizes for these shares. This will in turn negatively affect the incentive for liquidity providers to provide liquidity since the risk of providing liquidity is larger than the incentive to do so. In short, when tick sizes are reduced below a certain level, the incentive for traders to quote

is reduced causing decreasing depth in the order book. This reduction in depth will imply that investors will have to bear an increase in trading costs following the decline in depth throughout the entire order book (market impact). This will decrease investor willingness to execute orders in the order book, driving execution of large orders off the order book. This while the possibility to execute outside the order book, for example using NTW as described above, is also hampered.

In addition, having shares defined as liquid which are not actually so will give false signals to investors implying that the instrument is easy to trade when this might not be the case.

Liquid markets must reflect true liquidity and should consist of only truly liquid shares. A good measure is shares within the so-called blue chip indices in each country.

To achieve a fair number of liquid shares we propose the limits to be set as follows:

Equities	**Free Float**	**Average daily number of transactions**	**Average daily turnover**
	€ 500,000,000	500	€ 2,000,000

All thresholds must be fulfilled to qualify as a liquid share.

We believe that this would create a set of liquid shares that truly fulfil the criteria of liquidity and would not create detrimental effects on investors, issuers and the financial markets as a whole.
<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>
Yes, we agree.
<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>
Yes, we agree, but please see also response on Q110.
<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>
No, please see response on Q115.

<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>
No, please see response on Q115.
<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>
No.

It is unfortunate that ETFs are classified in the same category with standard shares. In our view ETFs are different as they are market maker products and more similar to derivatives. For instance the liquidity of ETFs is more dependent on the underlying market conditions, the underlying asset class, number and type of market participants and the spread in the products than shares
<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>
No.
<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>

No, we believe the same principles should apply in order to ensure the common financial market. It will be very difficult to keep records of liquid markets/instrument if left to the member state.
<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>
We fear that the thresholds are too low especially for smaller markets, where an investment firm in question more easily will reach the threshold. We would appreciate a more detailed justification how the ESMA has concluded these levels.

It should be clarified that the number of transactions to be considered should be OTC transactions on "own account when executing client orders" and not "on own account or on behalf of clients" in order to truly reflect the client internalization.

The set-up of quantitative thresholds for the first time should be done with due care. ESMA should be ready to review and recalibrate thresholds if too many SIs emerge and there is risk of further liquidity fragmentation. Otherwise this new regime could create additional costs for investors. We therefore suggest ESMA to review thresholds within 2 years.
<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>
Yes.
<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>
The same response as for Q122. We encourage ESMA to justify chosen levels in more concrete terms.
<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>
Yes.
<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>
Yes.
<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>
Yes.
<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>
Yes we believe that the thresholds should be set per asset class since the calculation per ISIN or at a more granular level will be too complicated and not operational. However, there should be at least a sub-category of bond size. Smaller bonds should have higher threshold percentages. Applying same thresholds for all bonds would lead to a situation, where you could be an SI in small bonds even by making transaction only infrequently as such bonds in general trade very seldom. At the same time you can make daily transactions by benchmark bonds and avoid SI regime. As regards illiquid instruments, "At least once a week" threshold is too low. If an investment firm makes a transaction by certain instrument only once in a week in average, it cannot be considered frequent and systematic.
<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>
Yes we agree for bonds. For derivatives, we find it sufficient to let the "substantial basis" criterion be based on notionals. Multiplying by price would result in very different results depending on whether the financial instrument is quoted as a price (typically in the region of 100) or as a rate (currently rates for some financial instruments are as low as 0).
<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>
Yes.
<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>
Yes.
<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>
We do not understand the figures. What are the rationale/calculations behind these? We believe the thresholds are too small and could be a challenge to meet especially for investment firms in small economies with their own currency.
<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>
Yes.
<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>

This matter will have to be investigated further. We believe the ESMA proposal lacks justification (where is the data supporting the ranges). Some of the ranges seem to be set at a very low level and thereby deeming not intended instruments to be cached by the SI role.

Assessment requirement is very problematic. It requires sophisticated IT systems that the investment firms currently don't have. Having such systems up and running takes a lot of time and is very expensive. Making these assessments requires also more personnel.

MiFIR's non-transparency regime and ESMA's related suggestion lead to decreased bond trading profits. This might lead to shutdown of fixed income trading in many investment firms as a consequence of which the liquidity of the bond market will diminish. If also costs are increased as a result of different periodical assessment requirements etc, this effect will be even stronger.

It is also unclear how the total number of the transactions in the same financial instrument in the EU is calculated and by whom. Calculating such figures is very challenging.

We are generally more in favor of using percentages based on full EU turnover, but we question from a practical perspective where the EU turnover data will come from to make this determination and if it will be available in time for go-live. This is critical to two of the four criteria. With this in mind it is difficult to comment much at all on the levels without knowing the turnover data on EU level. If would be good to see some data and justification behind the levels proposed, otherwise it all seems somewhat arbitrary, and especially concerning as these sections (of MiFID II) are covered by delegated acts where there is limited public consultation.

We feel that the proposed levels seem very low and not what we would consider substantial, i.e. a firm having just over 0.5% of the flow (traded OTC, which typical is the case in non-order driven markets) in a given instrument would be considered “substantial”? This issue is magnified further if applied to smaller markets, i.e. it could be a very long tail of firms with little over 0.5% and few with significantly greater share. In the context of pre-trade transparency SI / price discovery we question if a firm with that little flow (as described above) is really going to impact price discovery.

Also, it seems very easy to meet substantial basis threshold criteria 1. For example, executing only one customer trade in a given instrument could put a firm at 50% and above the threshold, which seems to render it somewhat pointless, whereas another firm trading in the instrument many more times may not be deemed an SI in the instrument.
<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>
In order to ensure that market developments can be taken into account, percentages should be chosen.

From a general point of view we do however question whether it makes sense to be an SI in illiquid instruments.
<ESMA_QUESTION_135>

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

<ESMA_QUESTION_136>

No comments.
<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>
Yes, we agree with ESMAs justification.
<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>
Yes. The list gives relevant indications for what can be considered as exceptional market conditions and indications for when quotes can be withdrawn.
<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>
Yes, NSA agrees that each SI should determine this since it is a matter of risk for each SI in question and its ability to act as an SI.
<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>

Yes since the quotes from SI's should reflect the prevailing market conditions and therefore the SI price would be close in prices to comparable quotes for the same instrument in other trading venues.
<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>
Yes.
<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>
Yes, **IF** the size specific to the instrument reflects retail market order sizes. From a more formal perspective we consider liquidity providers being a broader term than SI, which also includes market makers.
<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>
Yes.
<ESMA_QUESTION_143>

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

<ESMA_QUESTION_144>
Yes.
<ESMA_QUESTION_144>

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

<ESMA_QUESTION_145>
Yes.
<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>
Yes.
<ESMA_QUESTION_146>

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

<ESMA_QUESTION_147>
No.
<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>
Yes.
<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>
Yes.
<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>
Yes.
<ESMA_QUESTION_150>

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

<ESMA_QUESTION_151>
Yes.
<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>
A clarification: The requirement to publish unexecuted orders only applies to shares. Reference to OTF's and MiFIR Article 9 should therefore be deleted in the text and in the draft technical advice only to apply for shares and without OTFs.

Publication of unexecuted orders could have detrimental effect on the following execution of the clients order since the publication will provide information for other market players who can misuse this to "frontrun" the order. Thereby the execution and the investor will face considerable market impact.
<ESMA_QUESTION_152>

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

<ESMA_QUESTION_153>
Please see Q152.
<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>
No, not at all.

We applaud that pricing practices of trading venues become more transparent and comparable between venues and over time. This should definitely be pursued. However, this is not at all sufficient to achieve pricing at a reasonable commercial basis.

Transparent pricing is necessary to achieve competitive pricing in markets that are competitive by nature. Price transparency allows consumers to look for the most attractive product. However, the market for financial market data is not competitive by nature. On the contrary, trading venues exercise significant market power over the sale of their market data, as there are no substitutes for their data-product (market data from LSE is not a substitute for market data from Euronext). Consequently, transparency will not solve the problem of excessive pricing.

In markets with significant market power, transparent pricing does not solve the inherent problem of anti-competitive pricing. If an investor need market data from Bolsa Madrid, it is of little or no interest what the price of market data is at London Stock Exchange. Instead, limits on charging should be pursued. While recommending limits on charging (on raw or close to raw data), we also applaud that pricing of market data should become more transparent both across venues but also within venues across time.

The content of data products is typically not comparable between trading venues, which makes price comparison very difficult. In addition, data products at the same venue tend to change over time making even comparisons at the same venue difficult. In addition, transparency should also include binding guidelines on the various venues' market data policies and audits, which increasingly can be considered as "technical trade barrier". The policies are formed and exercised in a manner which makes it close to impossible to understand and navigate within. And these policies are also contributing to increased market data costs both directly and indirectly due to the resources needed to comply. We strongly recommend a thorough "clean-up" in various rules and practices.
<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>
Please see Q154.
<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>
Please see Q154.
<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>
We do not find this option appealing. It is not clear why revenue from market data should be linked to other revenue streams that a trading venue may have – which would be the case if the revenue share was fixed. We illustrate one potential implication: If the amount of initial public offerings (IPOs) were reduced at a stock exchange, this would imply that they should consequently lower their revenue from market data sales, in order to keep the revenue share constant. This is not an efficient or desirable outcome.

In addition, the consultation document suggests that if a trading venue wanted to exceed this limit, then it would have to consult its customers and explain the reasoning behind this

change. This entails a large risk that the control-mechanism is not sufficient to keep prices in check due to the market power held by the trading venues. In fact, customers have very few options to respond to such increases in revenue, even if they were presented with an 'invalid reasoning' behind the change.

If one wants to follow a path of revenue regulation, one could instead consider introducing an absolute cap on the revenue obtainable from market data sales. The nature of such regulation is parallel to imposing a cost-based price limit for particular products, and achieves almost similar results. This type of regulatory approach is described in the report from Copenhagen Economics (July 2014).
<ESMA_QUESTION_157>

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

<ESMA_QUESTION_158>
We do not recommend this model.
<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>
Yes. As distribution of market data is an activity on its own, separable from the other activities of trading venues, the cost of such an activity can be assessed based on the LRIC approach.
<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>
No, there is a simpler solution. Initially a centralized regulator develops an LRIC cost model which is likely to be much simpler than similar such models in e.g. telecommunications or energy distribution, as described in the report from Copenhagen Economics (July 2014).

The cost of assets included in this model should be based on a bottom-up approach, consequently not relying on financial accounts of trading venues. Instead cost data can be found in the current market place or through expert interviews. The cost model can be calibrated with data from actual trading venues to ensure that any objective factors or cost-drivers are sufficiently accounted for in the model.

Once the model is in place, a limit on charging is derived, applying to the trading venues' selling of raw data. This limit can then be reviewed at predetermined periods of time to ensure that the model is still in line with actual costs.
<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>
It seems reasonable to use the same definition, if these markets are similar to the regular trading venues. However, one should consider whether such an approach leads to regulation

of the same data twice. The whole point of e.g. consolidated tape providers is that they should receive data from e.g. trading venues at regulated prices and then compete with other providers in a competitive environment.
<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>
The most important option is C, which is the most effective way to address the problem of excessive pricing. See report from Copenhagen Economics (July 2014).

Combining C+A is even more preferred. The main reason for wanting 'A' is that current pricing schemes of trading venues are immensely complex and opaque. However, we believe that option C would reduce much of this complexity thus also reducing the need for option A. Still we prefer option C+A to C alone, as increased transparency makes it simpler to analyse developments in pricing behaviour.
<ESMA_QUESTION_162>

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

<ESMA_QUESTION_163>
Imposing and enforcing a price limit is not deemed to be associated with many costs. Constructing a cost benchmark such as the LRIC will require costs, but primarily in the initial step of developing the model. Price regulation is conducted in other sectors such as telecommunications and energy distributions where the number of regulated firms are significantly higher and the underlying cost structures much more complex than is the case for the distribution of financial market data. Consequently, the administrative costs are likely to be much lower than current regulation in other sectors. See also report from Copenhagen Economics (July 2014) for more information on this.

Any costs associated with a price regulation model should also be seen in context of the vast compliance cost currently incurred by market participants due to the (increasing) complexity regarding terms and conditions related to the purchasing of market data. Rough estimates suggest that a mid-sized broker require 6-7 full time employees only to manage contracts and ensuring that the broker is in compliance with the various clauses and usages requirements required by trading venues. A regulation model – such as the one proposed by Copenhagen Economics – will alleviate these compliance costs.
<ESMA_QUESTION_163>

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

<ESMA_QUESTION_164>
We prefer the model recommended in the report by Copenhagen Economics (July 2014). However, one could also envisage a very simple model, which would achieve the same outcome, simply by:
Allowing trading venues to recuperate the cost for providing raw market data by marginally increasing fees on trade executions. In return, raw market data should be provided at no cost. As trading venues can freely determine the execution fee margin, there is no need to construct a cost-based benchmark model. This model implies that all parties to transactions implicitly pay for the cost associated with the gains to the price formation process that is associated with producing market data and supplying them to the market. In such a model, pre and post trade data would be truly public goods and there would no restrictions on their distribution etc., while trading venues would still be compensated through their execution

fees. As the market for trade execution is competitive across venues post MiFID, trading venues would not be able to increase their execution fees by more than the cost of providing market data, as they would lose market shares to other venues
<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>
With the Copenhagen Economics proposal (July 2014), this would not be necessary
<ESMA_QUESTION_165>

Q166: If yes, in which circumstances?

<ESMA_QUESTION_166>
Since terminal netting is connected with substantial procedures it will only be relevant if it covers all instruments.
<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>
Option 1, however amending "ii." from "the participant/member" to "the user" is both clear and operational. We believe that option 2 is too detailed and difficult to understand.
<ESMA_QUESTION_167>

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

<ESMA_QUESTION_168>
No.
<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>
Yes. It is crucial that ordinary clients (private and institutional) are not subject to the DEA definition and therefore obliged to comply with MiFID, Article 2 (1) (d) including a requirement to becoming licensed. This would harm the well-functioning access for those

types of clients we have in the Nordics. It is, as we have understood it, also not the intention of the rules, cf. ESMA DP page 236 (draft technical advice).The intention of the rules is to capture firms and persons typically qualifying as HFT firms try that to circumvent the rules by becoming a DEA member instead of a direct member of a trading venue.

However, we are concerned with the way the exemption is formulated and linked to technology in the draft advice: We therefore propose that it is clarified that DEA is categorized by the user being an HFT-trader with HFT-trading as defined in option 1 at page 233.

We acknowledge that this scope might lead to a requirement for guidelines for other kind of access, but much more limited in scale (guidelines must be proportionate and reflect the nature of the business these are covering).

In addition we refer to Q185 in the DP.
<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>
No, please see Q172.
<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>
No, please see response to Q172.
<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>
No.
<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 above), 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 i, ii or iii below?

<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 23) 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 6 iii and iv, 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>

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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>

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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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_245>