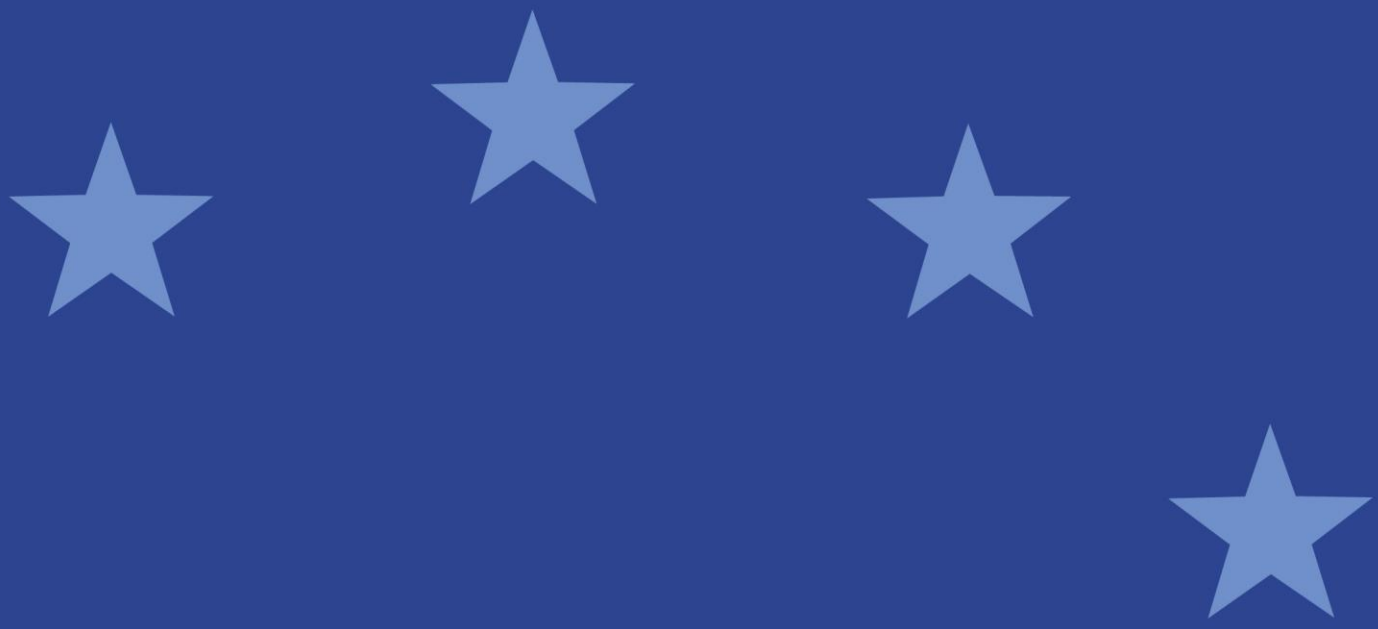
esma European Securities and Markets Authority

Reply form for the ESMA MiFID II/MiFIR Consultation Paper



22 May 2014

European Securities and
Markets Authority

Date: 22 May 2014

Responding to this paper

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

Instructions

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

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

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

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

Responses are most helpful:

i. if they respond to the question stated;

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

iii. describe any alternatives that ESMA should consider

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

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

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

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

Publication of responses

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

Data protection

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

1. Overview

2. Investor protection

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

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

<ESMA_QUESTION_1>

Better Finance, the European Federation of Financial Services Users, thanks ESMA for this consultation paper on the possible content of the delegated acts required by several provisions of MiFID II (the new Markets in Financial Instruments Directive) and MiFIR (the Markets in Financial Instruments Regulation), which have been both approved by the European Parliament on 15 April 2014 and by the European Council on 13 May 2014.

This is a very important consultation for individual investors and other financial services users. However, the size (311 pages) of the consultation, the exceptionally high number of questions (243) raised by ESMA, and the short deadline do not make it a very retail user friendly consultation. We will only be able to reply to selected questions we believe are the most crucial for retail investors and financial services users.

Also, we could find no place in the reply form to make these general comments. We therefore include them at the beginning of the reply section to Question 1:

In general, there are two main problems which need to be addressed:

1.- The sale and distribution of unsuitable, inappropriate or toxic products to retail investors and pension funds etc (this requires robust regulation to tackle conflicts of interest in the distribution chain, robust product intervention and governance standards to ensure products are designed properly and sold to the right investors; and

2.- Serious market inefficiencies – that is, high charges and underperformance by fund and insurance managers (this requires tackling conflicts of interest to improve competition and to align the interests of clients and fund managers so that clients do not end up paying for fund and/or insurance manager underperformance).

<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>

Yes. However, Better Finance considers that it is necessary to go further, and specify under what circumstances 'generic advice' provided via web channels may or may not constitute investment advice under MiFID. Furthermore, it should also be made clear to consumers buying a product in this way whether they have received regulated advice or not, and what are the practical consequences in terms of protection and redress.

<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>

We agree. We consider the compliance function as one of the key factors to improve the business culture to become compliant with the duty to act honestly, fairly and professionally in accordance with the best interest of its clients. In this regard, the expansion of the compliance requirements proposed draft technical advice proposed by ESMA is needed to put the compliance function in a position to efficiently fulfil its duty.

<ESMA_QUESTION_3>

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

<ESMA_QUESTION_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_4>

2.4. Complaints-handling

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

<ESMA_QUESTION_5>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_5>

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

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

<ESMA_QUESTION_6>

We consider that the remuneration policies of persons involved in the provision of services to clients should also be included in the minimum list if a minimum record keeping obligation does not exist under local law.

<ESMA_QUESTION_6>

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

<ESMA_QUESTION_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_7>

2.6. Recording of telephone conversations and electronic communications

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

<ESMA_QUESTION_8>

In its analysis, at the point 11 (page 35), ESMA points that *"recording rules do not generally apply to the service of investment advice"*. This is in contradiction with the general duty to keep records *"of all services, activities and transactions undertaken by it which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive (…) and in particular to ascertain that the investment firm has complied with all obligations including those with respect to clients or potential clients and to the integrity of the market"*. The approach neglecting the recording of investment advice gives us the feeling ESMA is focusing more on the integrity of the market than the obligation vis-à-vis clients or potential clients. We demand a correct recording of all services, investment advice included, as provided by Article 16.6.

In our view, it is important to inform clients that services and conversations are recorded. Equally important is to inform them, at the same moment, that during 5 years, a copy of the records will be provided when they ask for it.

Finally we are also worried about the use of private devices in this context. This should not be allowed in the sense of reducing the risk of non-compliance.

<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 agree

<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>
.<ESMA_QUESTION_10>

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

<ESMA_QUESTION_11>

No, clients should not be required to sign any minutes or notes when that signature states that the content of that minutes or notes is correct are has been fully understood by the client. Instead, the draft technical advice should require (1) investment firms to hand out minutes or notes to the client and (2) client to sign the receipt of that minutes or notes.
It is important that firms and advisers do not pressurise clients into signing forms that absolve advisers of liability

<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>

Yes, we agree. Moreover, the draft technical advice should require firms to inform clients (1) that services and conversations are recorded, (2) the way the recording is done and (3) that a copy of the records will be provided on request for a period of at least five years.

<ESMA_QUESTION_12>

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

<ESMA_QUESTION_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_13>

2.7. Product governance

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

<ESMA_QUESTION_14>

We answer with a very strong Yes to this question as distributors could (and sometimes should) offer/promote secondary market products as well as "primary" market. It is very important that the product governance requirements apply as well to freely tradable shares and bonds, even if obviously some of the requirements listed by ESMA are relevant only for retail packaged products (so called "primary market" although there is almost never any "secondary" market for those) and should then be excluded:

- Shares and bonds are among the main markets for long-term retail investors;
- Shares and bonds are most often not promoted or "advised" to individual investors as – contrary to "packaged" products" they do not allow distributors to charge hefty annual asset-based commissions (the same applies of course to low cost index ETFs which have the dual nature of funds and securities as they are listed and traded on regulated markets).

Also, the recent misselling or market abuse cases such as those of Government bonds (individual Greek bondholders in 2011 who were excluded from the debt restructuring negotiations), bank shares (Natixis in France in 2007 for example) or of bank preferred shares (Bankia in Spain in 2012) where retail investors in the "primary" market lost almost everything in the ensuing "secondary" market. Also, the additional incentives provided by CRD IV and Basel III for banks to issue and sell large amounts of new equity or equity-like instruments such as CoCos demonstrate that there can be risks of massive individual investor detriment in the sale and distribution of securities - including once they are listed on secondary markets - as much as in the case of "packaged" products.

This is all the more important as the industry and issuer lobbies have succeeded to exclude shares and bonds from the scope of the recently adopted PRIIPs Regulation, which means that the product information (summary prospectuses) on shares and bonds will remain unformatted, not allowing comparison with other investment products and written in a very unclear and legalistic way.

All products that are actively distributed to consumers should fulfill the proposed distributor requirements. While products available on primary markets are subject to greater risk concerning conflicts of interest induced by commissions and other third party payments, distribution via secondary markets should be treated equally with respect to product governance rules.

A non-level regulatory field creates incentives to sell products via secondary markets instead of by ways of primary emission. In effect, this (1) undermines consumer protection standards and (2) hampers firm refinancing operations.

<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>

It seems necessary to set out such a requirement. As the distributing firm is selling the product to consumers, it is responsible that information is correct, complete and accurately communicated. The distributor can be held liable for any form of misinformation.

It moreover appears necessary to precisely define the circumstances an agreement becomes obligatory in view of a lack of public information.

<ESMA_QUESTION_15>

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

<ESMA_QUESTION_16>

No, we do not see any use in such a requirement. The proposal rests on the naive view that the distributor has an own interest in setting high investor protection standards. In our view, the information communicated under such a requirements would not focus on client's problems but on problems concerning the sale of particular products.

<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>

In case manufacturers become aware that products are not sold as envisaged they should be on duty to inform the NCA. The NCA is responsible to ensure that distributers sell and advice their products in a suitable and appropriate way. Distributers that violate these obligations need to be sanctioned. If distributers miss-sell continuously, they must get an occupational/professional ban.
Also, it is important that there is a nominated senior person in charge of product governance so that regulators can enforce against breaches of product governance rules.

<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>

It is not clear to us on what criteria and categories the identification of target markets is based. We doubt whether a reasonable categorization is principally possible. However, if the distributor is responsible for a misjudgement, the client should be offered to reverse the agreement without being charged any costs, fees or monetary disadvantages.
Also, product manufacturers should 'stress test' products with relevant groups of investors before launching onto market.

<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>
TYPE YOUR TEXT HERE
<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 lacks clarity on the question how to deal with situations in which products are not sold as envisaged. From our perspective, the duly informed NCA must makes sure that the product is either taken back by the distributor without monetary disadvantage for the customer, or is exchanged for a suitable product without the customer being charged additional costs or fees, or is kept by the customer when he or she is fully aware of the risk-return profile and explicitly explains wishing to keep the product.

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_21>

2.8. Safeguarding of client assets

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

<ESMA_QUESTION_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_22>

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

<ESMA_QUESTION_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_23>

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

<ESMA_QUESTION_24>

a) Sub-depository practices

When examining general terms provided by investment firms or banks, it is generally mentioned that the assets may be kept by depositors, sub-depositors, eventually in non EU countries, including jurisdictions where the segregation of clients' assets cannot be guaranteed ..; and that the firm cannot be responsible for any damageable consequence, except intentional or gross fault on its part.

b) Securities lending

Some investment firm proposes as default that the clients' assets may be lent to third parties.

Regarding sub-depositories, we agree that some assets necessitate sub-depositary or sub-depositary in jurisdiction where the segregation of clients' assets is not guaranteed. But

1° the information given through the general terms must be in line with the MiFID provisions

2° it must be clear if the clients' assets remain protected by an investment protection scheme when a default, affecting their assets, occurs somewhere in the sub-depositary chain. Telling the client maybe their right could be affected is not satisfactory.

Regarding securities lending, it is foreseen that the client must consent to it in order to allow the firm to use clients' assets. First of all, securities lending should not be proposed to clients if it is not suitable when taking their investor profile. Secondly, a real consent is

only possible when the client is properly informed in a comprehensible language about the key aspects related to the securities lending, including:
1° can the user of the securities use them against the interest of the client (e.g. using them to go short against the securities lent)?
2° how are the remuneration and costs paid by the lender distributed between the investment firm and the client?
3° what are, concretely, the risks supported by the client and the protection that no more apply (e.g. investor protection scheme)?

<ESMA_QUESTION_24>

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

<ESMA_QUESTION_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_25>

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

<ESMA_QUESTION_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_26>

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

<ESMA_QUESTION_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_27>

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

<ESMA_QUESTION_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_28>

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

<ESMA_QUESTION_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_29>

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

<ESMA_QUESTION_30>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_30>

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

<ESMA_QUESTION_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_31>

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

<ESMA_QUESTION_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_32>

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

<ESMA_QUESTION_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_33>

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

<ESMA_QUESTION_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_34>

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

<ESMA_QUESTION_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_35>

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

<ESMA_QUESTION_36>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_36>

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

<ESMA_QUESTION_37>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_37>

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

<ESMA_QUESTION_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_38>

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

<ESMA_QUESTION_39>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_39>

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

<ESMA_QUESTION_40>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_40>

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

<ESMA_QUESTION_41>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_41>

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

<ESMA_QUESTION_42>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_42>

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

<ESMA_QUESTION_43>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_43>

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

<ESMA_QUESTION_44>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_44>

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

<ESMA_QUESTION_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_45>

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

<ESMA_QUESTION_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_46>

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

<ESMA_QUESTION_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_47>

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

<ESMA_QUESTION_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_48>

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

<ESMA_QUESTION_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_49>

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

<ESMA_QUESTION_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_50>

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

<ESMA_QUESTION_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_51>

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

<ESMA_QUESTION_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_52>

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

<ESMA_QUESTION_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_53>

2.9. Conflicts of interest

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

<ESMA_QUESTION_54>

Yes, firms should be obliged to perform a periodical review of their conflict of interest (CoI) policies. However, before the adequacy of CoI policies can be assessed, firms need to review the types of CoI present (not solely materialized). Moreover, the review should not be understood as a purely internal process of the firm but should be supplemented by independent external reviewers in a sense that the firm's internal compliance review is crosschecked by externals (e.g. the NCA). Auditors paid by the firm are only considered as independent when the contractual relation accounts for CoI with respect to the auditor.

<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>

Article 21 of the MiFID Implementing Directive does not take sufficient account of the ban of commission for independent financial advice established by MiFID2. The draft technical advice should clearly state that all kind of inducements lead to conflicts of interest. Therefore Art. 21 (e) of the MiFID Implementing Directive should be amended in including standard commissions and fees into the list of conflicts of interests categories.

Moreover, conflicts of interest arising from monetary and non-monetary inducements are by far the most relevant with respect to harming retail clients. Article 21 of the MiFID Implementing Directive should therefore be amended in emphasizing that conflicts of interests resulting from inducements are qualitatively different from others. In particular, point (e) should be dealt with separately and with clear reference to retail clients. In our view, the points (a) – (d) are more relevant with respect to professional clients and market structure.
Also, 'professional' clients such as pension fund trustees are often just as vulnerable as 'retail' clients.

<ESMA_QUESTION_55>

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

<ESMA_QUESTION_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_56>

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

<ESMA_QUESTION_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_57>

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

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

<ESMA_QUESTION_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_58>

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

<ESMA_QUESTION_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_59>

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

<ESMA_QUESTION_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_60>

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

<ESMA_QUESTION_61>
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<ESMA_QUESTION_61>

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

<ESMA_QUESTION_62>
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<ESMA_QUESTION_62>

2.11. Remuneration

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

<ESMA_QUESTION_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_63>

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

<ESMA_QUESTION_64>

Better Finance does not agree with the request that variable remuneration should principally be based on criteria reflecting compliance with the applicable regulations, the fair treatment of clients and the quality of services provided to clients, see no. 6 of the TA. We would prefer a predominant link to commercial criteria (which ESMA considers that they should be partly based on) as these can be better measured as the criteria named by ESMA. Their compliance should on the one hand be a matter of course anyway and on the other hand can be easily influenced by the firm ("never trust statistics that you did not fake yourself").

Variable remuneration of salaried financial advisors is a key element when reducing conflicts of interest at the point of sale. Ideally commercial targets should have not more than a minor impact on the remuneration, but this is of course a challenge in many salaried sales networks for which the economics rely mostly on in-house product sales, and where "advisors" are hardly distinguishable from sales people. Supervisors should pay attention that the formal description of criteria for variable remuneration can be more window dressing than a real change in practices based on sales targets. Remuneration

must be as independent as possible from the volume of sales. Any connection creates disincentives that lead distributors not to act in the client's best interest
The proposed technical advice doesn't mention the criteria for performance assessment of the staff as a source of conflict of interest to be taken in account. Even when there is no direct link with the remuneration, the performance assessment may have an important impact on the career of an employee in the firm. He could lose his job after several negative evaluations. Recital 77 and article 20(10) address specifically the performance assessment as a source of conflict of interest. Organizing competition or publishing comparisons based on sales amount achieved by sales people, even if it is not officially linked to the remuneration or the performance assessment, is detrimental for the consumers' interest.
We suggest ESMA to address those types of strong sources of conflict of interest, even if the commission's request doesn't mention them.

<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>

No. These requirements listed by ESMA as 2.ii to 2.iv are necessary but are not the most important ones and are certainly not sufficient to ensure fair, clear and not misleading information.

Better Finance is surprised that ESMA does not consult stakeholders on its first and more important proposed requirement 2.i (page 93) :
" *Information addressed to or likely to be received by retail clients or potential retail clients:*

i. *shall always give a fair and prominent indication of any relevant risks and shall not reference any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks*".

Actually, this is one of the most important and ongoing failures in the enforcement of the fair, clear and not misleading provisions of MiFID, and should be expressly identified by ESMA in its analysis preceding its proposed advice.

First, the counterparty of "benefits" information is not only "risks" information. The counterparty to the "benefits" terms is much broader than risks; it is about inconvenients, drawbacks and weaknesses of the product besides its benefits. We strongly recommend to ESMA to use a more appropriate term, or – at the very least – what the term "risks" should cover. For example, what about a retail "index" fund that will never - even remotely - track its relevant index because of too high fees ? Is this major drawback of

such an investment product included in the "risks" that must be disclosed, and disclosed in a "fair and prominent manner"? The answer is of course yes if investor and consumer protection mean anything.

Second, ample evidence unfortunately show that such "risks" are almost never indicated besides the "benefits" of any investment product in particular in the marketing and promotional documents, and a fortiori not in a "*fair and prominent*" manner. This has even been recognised by certain NCAs. And this despite the already quite clear provision of the MiFID I implementation Directive: "*It shall be accurate and in particular shall not emphasize any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks*". This provision having not been enforced for the last seven years since the MiFID I came to force, we are quite skeptical that merely switching from the verb "emphasize" benefits to the verb "reference" those will change anything to this gross, very widespread and repeated violation of EU Law. Sanctions must be proposed by ESMA for any such violation.

<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>

No.
The use of different future performance scenarios is very misleading unless it is probability weighted: only the most probable scenarios should be disclosed instead of the typical and very misleading ESMA-proposed "positive" and "negative" ones.
It is really important that fund managers and distributors state in clear terms that there is no correlation between past performance and future performance.

<ESMA_QUESTION_66>

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

<ESMA_QUESTION_67>
As pointed out earlier, n many cases professional clients are just as vulnerable as 'retail' clients.

<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>

Not fully. One critical characteristic of independent advice is a complete ban of commission. In a second step, firms providing independent advice must offer a sufficiently broad range of products, and from different and unrelated providers. Firstly, the draft technical advice needs to take this dual criterion into account, clearly stating that a ban of commission is the basis for independent advice. Secondly, the draft technical advice should define clear-cut criteria to identify a sufficiently broad range of products that includes the quality of products offered. A broad range of product must not result on client's being offered the best possible advice. Finally, the draft technical advice should require firms to fully disclose the criteria they employ to identify the best-advice products.

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_69>

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

<ESMA_QUESTION_70>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_71>

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

<ESMA_QUESTION_72>
TYPE YOUR TEXT HERE
<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>

Yes but we would recommend further clarification on the term "continuing relationship" at Level 3, especially with regard to the example of "continuing advisory relationship" (no.32, p. 105). For instance, would advisory services provided once every quarter of a year be considered as a continuing relationship? Especially for long-term investing retail clients this is not an unlikely behaviour and should therefore be considered falling under the term "continuing relationship".

Also, the draft technical advice should make sure that investment firms are required to fully disclose any costs, fees as well as monetary and non-monetary inducements that are paid at AND post-point of sale to the client on an annual basis. This disclosure needs to be performed at group level and should aggregate payments to investment firms connected via holding structures. It is moreover of particular importance that monetary or non-monetary inducements are fully disclosed to the client in a disaggregated manner if the client wishes so; explicitly going beyond the total reduction in yield or payments.

<ESMA_QUESTION_73>

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

<ESMA_QUESTION_74>

We partially agree, especially as the disclosure goes further than what is currently required e.g. under the UCITS regime (transaction costs) and therefore adds to it from the investor's point of view. We are supportive of creating a level playing field when it comes to disclosure of costs and charges and therefore support ESMA's advice to the Commission to further consider this issue in the UCITS/PRIIPs context. From the investor's point of view, however, it is important a level playing field is created on the basis of MiFID II disclosure and not on the insufficient current disclosure level.

In addition to the costs and charges listed in the Annex, the draft technical advice should address the case of fixed-price transaction. Thus far, disclosure of inducements is restricted to commission-based transactions. However, fixed-price transactions provide investment firms with an equal possibility to create sales disincentive by financing distributional channels via product margins. Firms thus face incentives to sell product via fixed-price transactions to circumvent the direct flow of commissions. With respect to the newly created ban of commission for independent financial advice, the "fixed-price transaction loophole" threatens the intended impact of MiFID2 on distributional channels. The draft technical advice should explicitly list product margins at fixed-price transaction to the disclosure list.

<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>

No, we do not agree. Better Finance considers that the provision of information on costs on a generic basis – even if it is consistent with the current UCITS/PRIIPS information – is not sufficient to meet an investor's needs and should only be provided in case personalised information would not be available. As ESMA rightly points out, cost disclosure together with risk disclosure is an important element to improve the ability of investors to assess the products that are offered to them. The provision of costs on a generic basis, even if on a representative basis, may undermine the aim of improving transparency in this respect. The personalised ex-post disclosure is not sufficient as the investment decision in a financial instrument with too high costs then has already been taken. Therefore we consider ESMA should clearly state that all cost/charges information should be provided in a personalised way and provide for an exemption only in cases such information is not available.

Generic information on costs and charges is not sufficient to enable the client to understand the impact on a product's potential return AND to compare the reduction in yield or payment to those of other products (a fundamental prerequisite for the functioning of market forces). Instead, all costs and charges (at and post-point of sale) need to be disclosed in a disaggregated manner.

<ESMA_QUESTION_75>

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

<ESMA_QUESTION_76>

The most important point is to establish a level regulatory playing field with respect to cost transparency (i.e. between commission-based and fix-price transactions, i.e. between commissions and margins). Clients need to understand that the costs of distribution channels are part of their products and either take the form of commissions directly paid to the distributor by a third party or the form of a margin.
Moreover, disaggregated cost disclosure needs to be extended to post-point of sale costs even though the client and the firm have no ongoing relationship.

<ESMA_QUESTION_76>

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

<ESMA_QUESTION_77>

We would understand that ESMAs consideration that Member States may allow information to be provided in a standardised format (only with regard to the formal appearance, i.e. layout) also relates to the illustrative information. From our point of view, such

a standardised illustration of costs and charges would support investors to compare their effects on performance with that of other financial instruments.

The cumulative effect of costs and charges on the return is one of the most important criteria for consumers to estimate the effectiveness and appropriateness of a financial product. To create a clear picture of the cost/charges effect consumers must get information of the potential return at the end of the period of investments before and after costs in Euro and Cent (delta of the maturity payment in Euro and Cent). Any information of the reduction in yield expressed in percent is useless for consumers. Consumers must get understandable and clear information in Euro and Cent about the difference of the payout at a potential end of investment period in one sum.

As the investment period could be very different this information should offered in table form and cumulated form year to year. Or alternatively in standardized periods of time like 1, 5 and 10 years. The cumulative cost effect should be shown on standardized investment sums, like 1.000 or 10.000 Euro. As costs depend on the performance of financial products, there is the need for a fictive performance. This fictive performance could be 5 percent yearly performance. As margins have the same effect as costs, margins also need to consider showing the cost effect (difference between fair value and price).

<ESMA_QUESTION_77>

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

<ESMA_QUESTION_78>

We support the improvements proposed by ESMA in its draft technical advice, in particular regarding the disclosure of inducements.

<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>

A full information on inducements is needed to put the retail investor in a position to know how much remuneration is generated from his investment and to be able to make an informed choice between independent he has to pay upfront and non-independent advice.

<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>
TYPE YOUR TEXT HERE
<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>

"the conditions under which payments and non-monetary benefits, paid to or provided by investment firms providing all other investment or ancillary services, are not deemed to meet the requirement of enhancing the quality of the relevant service to the client"

1. This quality enhancement requirement is already in MIFID 1 but has not been enforced by supervisors (European and national ones) to our knowledge. There is another – as important – requirement in MIFID 2 (and also in MIFID 1): that any inducement "*does not impair compliance with the firm's duty to act honestly, fairly and professionally in accordance with the best interest of its clients*." (Article 24(9) of MiFID II). We wonder why this equally un-enforced requirement is not part of the mandate from the EC. We recommend that ESMA issues guidelines on this requirement as well in order to avoid the further non implementation of EU Law in this respect.

2. The "Technical Advice" (TA) proposed by ESMA on the conditions to meet this requirement of "quality enhancement" (para. 10, page 124) seems extremely obscure, and not clear and will not be understood by most individual investors[1], item 10 (i) in particular.
   We would strongly advise ESMA to rewrite this paragraph in plain English and practical terms both for retail distributors' and their clients' sake.

[1] *10. ESMA advises the Commission to introduce a non-exhaustive list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met. A fee, commission or non-monetary benefit may not generally be regarded as designed to enhance the quality of the relevant service to the client if:*
i. it is used to pay or provide goods or services that are essential for the recipient firm in its ordinary course of business;
ii. it does not provide for an additional or higher quality service above the regulatory requirements provided to the end user client;
iii. it directly benefits the recipient firm, its shareholders or employees without tangible benefit or value to its end user client; or
iv. in relation to an on-going inducement, it is not related to the provision of an on-going service to an end user client.

We are also concerned over item 11 and its relation to item 10 as we consider item 11 as an "escape clause" which is likely to undermine the aim of item 10. As regards the term "higher quality service" we would welcome further clarification at Level 3 For example we would not consider elaborately designed product information as enhancing service quality for the investor but are concerned that the term may be understood that way.

3. This TA proposed by ESMA is also quite worrisome as it would still **de facto exempt the already dominant big bank networks from all "inducements" rules to the detriment of the already much smaller multi- provider networks which are independent of the big banks**. We are concerned that if it is implemented stricto sensu it may well create an even worse distribution model in Continental Europe compared to the existing one which is already largely dominated by commercial banks and other large salaried or captive networks:
   - The large and dominant salaried networks of integrated financial institutions (banks and also insurers) are already largely dominating continental European distribution. In addition they are mostly distributing only in-house products ("closed architecture").
   - Stricter standards for allowing "inducements" as proposed by ESMA will apply only to the small "open architecture" segment of the retail market and therefore discriminate it vis-à-vis the larger and dominant salaried networks. With the reduction of the already small "open architecture" models (individual investors being given the choice between different and unrelated providers of investment products including from independent asset managers);
   - ESMA proposals would further benefit of the dominant "closed architecture" models where individual investors are offered only in-house products. All evidence available (including from Lipper and from Better Finance) prove that on average these closed architecture distributors sell lower performing products than the open architecture ones. It has been - and will be - quite easy for closed architecture players to continue to operate and prosper without having to disclose "inducements" as they are defined by MIFID 1 and MIFID 2. Indeed, as these players control both the manufacturing and the distribution units, they can for example compensate the affiliated distributors through salaries or other compensation schemes that are not in the scope of MiFID "inducements".
   - Also, this may give rise to sales without any financial advice (whether "independent" or "dependent") to EU citizens as selling without advice is a clear and easy way to avoid most of MIFID's investor protection regulations which are not targeting selling but only "advice".
   - Finally, this is also very detrimental to the mid and small size asset management firms that are independent from big retail distribution networks: these often innovative and performing asset managers can only distribute through open architecture networks in continental Europe. Hitting the latter will therefore likely also hurt the former, again to the sole benefit of the large networks, not to the benefit of investors.
   - Charging fees or honoraria to the client instead of receiving a commission from providers will be very detrimental tax wise for savers and consumers as –

contrary to inducements – those fees will be subject to VAT and will not be deductible from investment income for consumers (at least in France).

We are of course aware of the recent actual banning of inducements in the UK (the "RDR") and this year in the Netherlands. Better Finance does not believe that an EU-wide inducements ban is the most effective solution, since although they are indeed a potential source of conflicts of interests, this ban would be made at the expense of individual investors and consumers.

Indeed, the narrow MiFID definition of "inducements" de facto exempts the major and dominant retail distribution networks in continental Europe. Indeed, in particular, the very large and dominant "*bancassurance*" salaried networks are not subject to such requirements as they mostly sell only intra-group products through salaried employees, and the "inducement" is extracted from the asset management or from the insurance units in ways that avoid totally the MiFID definition of "inducements". The conflict of interests risk is nevertheless there and even more acute than in the much smaller "open architecture" distribution segment that ESMA proposals are likely to eliminate altogether. At the very least ESMA should ensure a level playing field between the large "closed architecture" distribution networks and the much smaller "open architecture" ones, which, on average, deliver a better performance to individual investors.

Also, banning "inducements" (as defined by MiFID) is not the option chosen for now by the European legislator for "non independent" advice in MiFID II. Lastly, the UK distribution structure was much different from the continental European one (in particular the role of "IFAs" was much more developed, and "closed architecture" commercial banks are not as dominant in the UK).

We therefore recommend to ESMA to propose to the EC standards and guidelines that:

- do not favor further consumer detriment by favoring again the big banks , i.e. the dominant "closed architecture" and on average underperforming financial distribution networks, but, on the contrary, at last ensuring MiFID provisions on the prevention of conflicts of interests in the distribution of investment products also fully apply to the dominant salaried networks in Continental Europe;
- and concentrate on ensuring the actual implementation of the MiFID I and II provisions preventing conflicts of interests in distribution by drafting much clearer and plain English easy to enforce standards and guidelines on how to enforce article 29 of MiFID II.

<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>

Better Finance would certainly benefit from getting information from ESMA on the findings of the "impact assessment" it contracted externally before drafting this TA and also of its data gathering exercise it mentions in page 11, paragraph 12 of the Consultation Paper. In particular, Better Finance would be most interested by ESMA's assessment of the impact of its proposals on the already small "open architecture" distributors.

During the MiFID 1 period, it seems there was confusion between the need - for the service provider – to pay or receive inducements in order to be able to provide the service in the existing business model and a real enhancement of the service quality due to the inducement. This is not compliant with the condition provided by the directive. There must be a real enhancement of the service quality. The existing business model cannot be a justification for inducements as long as that business model can be adapted or changed.

<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>

The evaluation of an adequate target market is crucial for investors as only out of this universe they will receive an independent investment advice. Better Finance therefore supports that ESMA specifies the requirements for advice to be considered independent. However, we consider that further clarification is required on the "sufficient range of sufficient financial instruments available on the market". For example, the technical advice in our view does not state clear enough that it should not be possible to exclude a certain type of (simple and low cost) financial instrument (e.g. shares or ETFs) completely from the target market. If this would be possible, then the suitability assessment, especially with regard to the new and very welcomed obligation for firms to assess whether a less complex product with lower costs would better meet the client's profile would be undermined from the start. In addition we consider that the diversified selection of financial instruments should be made with regard to type, issuer, and product provider (and not – as stated in the TA in 1.i. on p. 128) to type, issuer, or product provider).

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_84>

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

<ESMA_QUESTION_85>
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>

Yes but at least one requirement needs further clarification.

Better Finance believes the suitability assessment to be made whether there is an alternative instrument with lower costs[2] is crucial and we congratulate ESMA for including this requirement in its draft TA. Indeed, ample evidence shows the dramatic impact of costs on the performance – and therefore on the "suitability" - of retail investment products. It needs however to be further clarified in our view

In our view the extent of the range of products offered by the investment firm should not be an excuse for not providing this assessment. We strongly advise that this assessment be provided in the suitability report regardless of the lower cost alternative instruments being part of the investment firm's offering or not. Otherwise, this requirement will be made useless. In particular, all evidence confirmed that plain vanilla index ETFs are not currently proposed/sold to individual investors in Europe. It means that they are very unlikely to be included in the retail products range of the investment firm. If ESMA limits the scope of "alternative investments with lower costs" to that firm's product range then, the requirement becomes quite useless and ineffective to protect the investor's interests.

For example in the case of indexed products, the distributor must know that index ETFS are a low cost alternative (if he does not know, he is incompetent in that field and

[2] Draft TA 1. Ix: "when recommending a financial instrument to a client, investment firms should assess whether an alternative instrument, less complex and with lower costs, would better meet the client's profile"

therefore should not be allowed to sell/advise any indexed products) and therefore he MUST warn their clients about it.

We therefore propose the following rewriting of this requirement: "Draft TA 1. Ix: "*when recommending a financial instrument to a client, investment firms should assess whether an alternative instrument, less complex and with lower costs, would better meet the client's profile*. If such an alternative instrument is available on the market, the firm must warn the client but adding that the firm is not in a position to assess and recommend those.

<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>

Suitability assessments should also include the ex ante probability of the investment product of achieving either its stated investment objective and/or a real positive return. In other words, the performance criterion is missing in the current suitability assessment, as products which bear a high probability of either performing poorly (destroying the real value of the investment) or of not meeting its advertised objective (such as for example "over performing index xyz") are most certainly not "suitable" for retail clients.

The content of the suitability reports muss be in a way that clients are enabled to understand why advice provided has been assessed as suitable for them.
A personalized explanation of the disadvantages of the recommended course of action should be given.

<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>

We refer to our reply to Question 87 above.

It must be clear that the financial advice must complement the existing portfolio. Therefore the suitability report must explain how the given advice suits to the existing portfolio (e.g. risk diversification, fulfilling the different investment targets….). This aspect should be added.

Regarding the readiness to bear risk it must clear that any consumer has only one and overall risk attitudes but different risk attitudes to different investment targets. This aspect should be added to the suitability report.

<ESMA_QUESTION_88>

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

<ESMA_QUESTION_89>

Yes

It must be clear that the financial advice must complement the existing portfolio. Therefore the suitability report must explain how the given advice suits to the existing portfolio (e.g. risk diversification, fulfilling the different investment targets….). This aspect should be added.

Regarding the readiness to bear risk it must clear that any consumer has only one and overall risk attitudes but different risk attitudes to different investment targets. This aspect should be added to the 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>

We refer to our reply (paragraph number 2) to Question 107 on the much confused "complexity" issue.

<ESMA_QUESTION_90>

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

<ESMA_QUESTION_91>

Again, our replies to 107 and90 refer), appropriateness is at least as much related to product toxicity (as defined in our reply to Q 107).

<ESMA_QUESTION_91>

2.19. Client agreement

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

<ESMA_QUESTION_92>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_92>

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

<ESMA_QUESTION_93>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_93>

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

<ESMA_QUESTION_94>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_94>

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

<ESMA_QUESTION_95>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_95>

2.20.

2.21. 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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_96>

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

<ESMA_QUESTION_97>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_97>

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

<ESMA_QUESTION_98>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_98>

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

<ESMA_QUESTION_99>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_99>

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

<ESMA_QUESTION_100>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_100>

2.22. 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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_101>

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

<ESMA_QUESTION_102>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_102>

2.23. 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>

"*measures specifying the criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern"*

We do not agree with the criteria and factors proposed by ESMA in its draft TA, and we do not agree with their ranking.

1. In the proposed TA there is no definition at all of what is an "*investor protection concern*". There is also no definition of what is to be considered an investor "detriment", other than mentioning: "*including the amount of loss potentially suffered*" (TA 4. Ii (d)). We believe it is necessary to define these key notions, especially when one observes that investor concern and detriment is being mixed up and confused with quite the different notions of "complexity", "innovation", "leverage", "risk". For Better Finance, financial health product intervention (like it is the case for physical health products) should concentrate first and foremost on toxic products. For us, toxic investment products are the ones where the ex ante probability of achieving either the stated investment objective and/or a real positive return is low. Evidence and research show that the manufacturer and the distributor are most often aware of these probabilities although they are almost never disclosed to the clients.

   For example, a retail equity "index" fund that actually underperforms its index benchmark by thousands of basis points (tens of percentage points) after a only few years and is very likely therefore to deliver a negative real return over the mid and long term is certainly a toxic product that should disclose a clear warning and not be promoted as an "index" tracking fund to individuals.

2. The whole first six criteria for investor "concern" are not about likely detriment/ concern in our view, but about complexity which is a quite different issue. Aspirin is a very complex product. A car is also a very complex product. But the services they deliver to the consumer are quite clear and easy to understand, and they both - by the way – have been pre-approved by the supervisors. We have been pointing out for years this unfortunate confusion and amalgamation between investor concern/detriment and "complexity". What is important is that the investment proposal is clear and understandable (actually this is a requirement of MIFID 1 and 2). Whether the "engine below the hood" is complex or not is not the main issue for investor and consumer detriment. Toxicity is as for physical health. We would very much like ESMA to reduce this confusion by at least moving these 6 criteria to the end and bringing forward, refining and better defining the criterion cur-

rently ranked 10: "*probability, scale and nature of any detriment, including the amount of loss potentially suffered*".

3. Next to toxicity (the high probability of not achieving stated/advertised goals and/or of destroying the real value of savings), the number two criterion should be the magnitude of total charges and commissions borne by the client directly or indirectly, including disclosed and undisclosed charges, including the various layers of costs (for example in a unit-linked insurance contract). Indeed, ample evidence and research show that poor and below expectation returns are often correlated to the level of charges and costs. Part of this criterion is captured by ESMA's TA proposal in criteria i(b) (*multiple layers of costs and charges*) and iv (b) (*any hidden costs and charges*).

<ESMA_QUESTION_107>

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

<ESMA_QUESTION_108>

We refer to our reply to Question 107 above.

<ESMA_QUESTION_108>

3. Transparency

3.1. Liquid market for equity and equity-like instruments

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

<ESMA_QUESTION_109>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_109>

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

<ESMA_QUESTION_110>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_110>

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

<ESMA_QUESTION_111>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_111>

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

<ESMA_QUESTION_112>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_112>

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

<ESMA_QUESTION_113>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_113>

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

<ESMA_QUESTION_114>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_114>

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

<ESMA_QUESTION_115>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_115>

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

<ESMA_QUESTION_116>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_116>

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

<ESMA_QUESTION_117>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_117>

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

<ESMA_QUESTION_118>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_118>

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

<ESMA_QUESTION_119>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_119>

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

<ESMA_QUESTION_120>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_120>

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

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

<ESMA_QUESTION_121>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_121>

3.3. The definition of systematic internaliser

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

<ESMA_QUESTION_122>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_122>

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

<ESMA_QUESTION_123>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_123>

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

<ESMA_QUESTION_124>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_124>

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

<ESMA_QUESTION_125>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_125>

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

<ESMA_QUESTION_126>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_126>

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

<ESMA_QUESTION_127>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_127>

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

<ESMA_QUESTION_128>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_128>

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

<ESMA_QUESTION_129>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_129>

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

<ESMA_QUESTION_130>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_130>

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

<ESMA_QUESTION_131>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_131>

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

<ESMA_QUESTION_132>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_132>

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

<ESMA_QUESTION_133>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_133>

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

<ESMA_QUESTION_134>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_134>

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

<ESMA_QUESTION_135>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_135>

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

<ESMA_QUESTION_136>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_136>

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

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

<ESMA_QUESTION_137>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_137>

3.5. Exceptional market circumstances and conditions for updating quotes

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

<ESMA_QUESTION_138>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_138>

3.6. Orders considerably exceeding the norm

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

<ESMA_QUESTION_139>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_139>

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

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

<ESMA_QUESTION_140>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_140>

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

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

<ESMA_QUESTION_141>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_141>

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

<ESMA_QUESTION_142>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_142>

4. Data publication

4.1. Access to systematic internalisers' quotes

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

<ESMA_QUESTION_143>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_143>

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

<ESMA_QUESTION_144>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_144>

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

<ESMA_QUESTION_145>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_145>

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

<ESMA_QUESTION_146>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_146>

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

<ESMA_QUESTION_147>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_147>

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

<ESMA_QUESTION_148>
This is not only important; it must be an absolute requisite.
<ESMA_QUESTION_148>

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

<ESMA_QUESTION_149>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_149>

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

<ESMA_QUESTION_150>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_150>

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

<ESMA_QUESTION_151>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_151>

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

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

<ESMA_QUESTION_152>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_152>

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

<ESMA_QUESTION_153>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_153>

4.3. Reasonable commercial basis (RCB)

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

<ESMA_QUESTION_154>

ESMA should take into account the basic and fundamental needs of individual investors who did not have to pay anything to get consolidated trade data before MiFID I (2007), and do not have the resources to pay for consolidated trade data. Again, ESMA should clearly state that consolidated trade data are easily accessible and free for individual investors after about one minute.

<ESMA_QUESTION_154>

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

<ESMA_QUESTION_155>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_155>

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

<ESMA_QUESTION_156>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_156>

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

<ESMA_QUESTION_157>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_157>

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

<ESMA_QUESTION_158>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_158>

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

<ESMA_QUESTION_159>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_159>

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

<ESMA_QUESTION_160>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_160>

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

<ESMA_QUESTION_161>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_161>

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

<ESMA_QUESTION_162>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_162>

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

<ESMA_QUESTION_163>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_163>

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

<ESMA_QUESTION_164>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_164>

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

<ESMA_QUESTION_165>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_165>

Q166: If yes, in which circumstances?

<ESMA_QUESTION_166>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_166>

5. Micro-structural issues

5.1. Algorithmic and high frequency trading (HFT)

Q167: Which would be your preferred option? Why?

<ESMA_QUESTION_167>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_167>

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

<ESMA_QUESTION_168>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_168>

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

<ESMA_QUESTION_169>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_169>

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

<ESMA_QUESTION_170>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_170>

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

<ESMA_QUESTION_171>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_171>

5.2. Direct electronic access (DEA)

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

<ESMA_QUESTION_172>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_172>

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

<ESMA_QUESTION_173>

Better Finance's position for the inclusion of AOR under the DEA definition is certainly positive and Better Finance believes that bringing AOR under the DEA definition will contribute to the higher transparency and ex-ante protection for small individual (retail) clients and traders.

<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>

Better Finance members think that automated rule-based trading system using the API connections for automated electronic order transmissions should, even through shared connectivity arrangements, be included within the scope of DEA. Suggestions for such inclusion is motivated by rapidly rising development of "black boxes" offered to the clients that allow for automated rule-based order transmissions through client´s electronic access without client´s confirmation of the order. This means a potential detriment to the clients when the orders are placed, transmitted and executed using investment firm´s DEA without prior notice from the investment firm. Most of the "black boxes" are sold on a licensed basis not as trading systems, but rather as "signal service" analytical tools. However, when such automated rule-based system allows for order placements through investment firm´s DEA without client´s confirmation of the order, it should fall under the scope of DEA.

<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>

Later development brought the possibility to connect clients´ accounts with so called PAMM systems under variety of PAMM accounts offered by investment firms and intermediaries. The PAMM system enables individual traders (clients) to accept investments from other traders or invest in other trading accounts and hold a share in them. Even if the investments and transactions within the PAMM system are automatically controlled by the intermediary (or investment firm), the client agrees on all orders placed on his individual account routed through the intermediary. In some cases, PAMM systems as well as "black boxes" do not bring the real value to the clients and only increase the amount of orders in order to increase the trading fees for the broker (investment firm).
<ESMA_QUESTION_175>

6. Requirements applying on and to trading venues

6.1. SME Growth Markets

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

<ESMA_QUESTION_176>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_176>

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

<ESMA_QUESTION_177>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_177>

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

<ESMA_QUESTION_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_178>

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

<ESMA_QUESTION_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_179>

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

<ESMA_QUESTION_180>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_180>

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

<ESMA_QUESTION_181>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_181>

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

<ESMA_QUESTION_182>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_182>

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

<ESMA_QUESTION_183>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_183>

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

<ESMA_QUESTION_184>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_184>

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

<ESMA_QUESTION_185>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_185>

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

<ESMA_QUESTION_186>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_186>

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

<ESMA_QUESTION_187>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_187>

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

<ESMA_QUESTION_188>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_188>

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

<ESMA_QUESTION_189>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_189>

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

<ESMA_QUESTION_190>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_190>

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

<ESMA_QUESTION_191>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_191>

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

<ESMA_QUESTION_192>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_192>

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

<ESMA_QUESTION_193>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_193>

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

<ESMA_QUESTION_194>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_194>

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

<ESMA_QUESTION_195>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_195>

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

<ESMA_QUESTION_196>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_196>

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

<ESMA_QUESTION_197>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_197>

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

<ESMA_QUESTION_198>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_198>

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

<ESMA_QUESTION_199>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_199>

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

<ESMA_QUESTION_200>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_200>

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

<ESMA_QUESTION_201>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_201>

6.2. Suspension and removal of financial instruments from trading

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

<ESMA_QUESTION_202>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_202>

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

<ESMA_QUESTION_203>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_203>

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

<ESMA_QUESTION_204>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_204>

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

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

<ESMA_QUESTION_205>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_205>

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

<ESMA_QUESTION_206>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_206>

6.4. Monitoring of compliance – information requirements for trading venues

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

<ESMA_QUESTION_207>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_207>

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

Q208: Do you support the approach suggested by ESMA?

<ESMA_QUESTION_208>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_208>

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

<ESMA_QUESTION_209>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_209>

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

<ESMA_QUESTION_210>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_210>

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

<ESMA_QUESTION_211>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_211>

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

<ESMA_QUESTION_212>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_212>

7. Commodity derivatives

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

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

<ESMA_QUESTION_213>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_213>

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

<ESMA_QUESTION_214>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_214>

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

<ESMA_QUESTION_215>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_215>

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

<ESMA_QUESTION_216>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_216>

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

<ESMA_QUESTION_217>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_217>

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

<ESMA_QUESTION_218>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_218>

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

<ESMA_QUESTION_219>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_219>

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

<ESMA_QUESTION_220>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_220>

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

<ESMA_QUESTION_221>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_221>

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

<ESMA_QUESTION_222>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_222>

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

<ESMA_QUESTION_223>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_223>

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

<ESMA_QUESTION_224>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_224>

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

<ESMA_QUESTION_225>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_225>

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

<ESMA_QUESTION_226>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_226>

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

<ESMA_QUESTION_227>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_227>

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

<ESMA_QUESTION_228>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_228>

7.2. Position reporting thresholds

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

<ESMA_QUESTION_229>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_229>

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

<ESMA_QUESTION_230>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_230>

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

<ESMA_QUESTION_231>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_231>

7.3. Position management powers of ESMA

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

<ESMA_QUESTION_232>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_232>

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

<ESMA_QUESTION_233>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_233>

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

<ESMA_QUESTION_234>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_234>

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

<ESMA_QUESTION_235>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_235>

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

<ESMA_QUESTION_236>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_236>

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

<ESMA_QUESTION_237>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_237>

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

<ESMA_QUESTION_238>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_238>

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

<ESMA_QUESTION_239>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_239>

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

<ESMA_QUESTION_240>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_240>

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

<ESMA_QUESTION_241>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_241>

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

<ESMA_QUESTION_242>
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>