

Ref: European Commission Public consultation on the review of the MiFID II/MiFIR regulatory framework

Link to consultation: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12167-Review-of-the-regulatory-framework-for-investment-firms-and-market-operators-MiFID-2-1-/public-consultation>

Link to paper:

https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-mifid-2-mifir-review-consultation-document_en.pdf

BETTER FINANCE Response

Summary

General comment	The review of the MiFID II framework is timely and should be coordinated with the other ongoing actions and policy areas, i.e. PRIIPs and the work done in the Forum on the Future of the Capital Markets Union. In addition, to ensure a level playing field, the European Commission should also adopt a coordinated approach concerning the insurance market, in particular insurance-based investment products.
Trade transparency	The MiFID2 review must undo the severe damages generated by the SI/OTC regimes and bring back equity trading in the EU on “lit” markets, at the very least “retail” trading.
Advice and inducements	BETTER FINANCE supports a complete ban on inducements; as a distant second best asks to establish a level playing field for closed architecture distribution, for independent advice and for execution only investments. The EU authorities must also at least ensure a level playing field with insurance-based investment products (IBIPs).
Qualified investors	BETTER FINANCE supports a better access for qualified non-professional investors to exchange-traded stocks, bonds and ETFs.
SME research	BETTER FINANCE supports the development of SME research databases, supervised by ESMA, which should be publicly available and receive the necessary support in order to stimulate research for SMEs.
Toxic products	BETTER FINANCE supports the development of a definition for toxic products, and for clarifying ESMA intervention powers on such toxic products.
Robo-advice and digitalisation	FinTech and automated investment platforms have the potential to increase transparency and cost efficiency in financial services, increase competition and financial inclusion

About BETTER FINANCE

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

BETTER FINANCE acts as an independent financial expertise and advocacy centre to the direct benefit of European financial services users. Since the BETTER FINANCE constituency includes individual and small shareholders, fund and retail investors, savers, pension fund participants, life insurance policy holders, borrowers, and other stakeholders who are independent from the financial industry, it has the best interests of all European citizens at heart. As such its activities are supported by the European Union since 2012.

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Instructions on how to read this paper: this document contains BETTER FINANCE’s stylised response to the European Commission’s Public Consultation but it is not the actual response form submitted.¹ **Note:** due to the online platform, the official response does not contain references to academic and other publications, which we have included in this version.

Background information

The **Markets in Financial Instruments Directive (MiFID)** is one of the most important pieces of EU legislation for capital markets and savings & investment services in the European Union. Resembling to a general code for securities and financial instruments markets (although falling short of one), it sets minimum requirements for the establishment and functioning of securities exchanges, the operation and conduct of business rules of investment firms, as well as the basic investor protection rules. As it is a minimum harmonisation Directive, the majority of rules (despite the overall MiFID-framework size of 1.7 million paragraphs) are left at the discretion of Member States.

The most important investor protection rules regard:

- the rule on the provision of *fair, clear, and not misleading* information to investors;
- the rules on the provision of *independent* and *non-independent advice*, including a prohibition of inducements for the latter;
- the definition of *complex* products.
- the distinction between *professional* and “*retail*” clients;

Financial regulation in the EU has a long history, with the first harmonised rules on the provision of investment services dating back to 1993. The 1993 Directive was replaced, in 2004, by the first MiFID – larger in scope and updated to reflect market developments. That Directive, as well, was replaced in 2014 by the second MiFID (hereinafter “MiFID II”), which entered into force on the 1st of January 2018.

This year, the European Commission is reviewing the effectiveness of the MiFID II provisions, with a view of proposing improvements in the upcoming years. This public consultation seeks the views of stakeholders on how well the MiFID II rules have worked so far, whether these achieved their purpose, and whether there is a need for improvements.

General comment

Six years after the adoption of MiFID II, this review process is timely and, by coincidence, taking place during an unprecedented crisis that affects capital markets and investment services in the EU and worldwide (COVID-19 pandemic). Therefore, BETTER FINANCE welcomes this consultation and the postponement of the response deadline, in order to accommodate the unusual working circumstances and reflect recent developments.

On overall, MiFID II has brought significant improvements to the functioning of securities markets in the EU, marking its role as an important harmonisation instrument. However, while some inefficiencies have not been captured by the 2014 provisions (such as the rules on the management of conflicts of interests in the distribution – the “inducements”, the growing domination of dark capital market venues, the failure to improve the transparency and liquidity of bond markets, etc; see below), some have been overtaken by the fast development of market practices, such as *robo-advice*, or the revamped objectives to create a Capital Markets Union

¹ The European Commission uses an online platform (EU Survey) to collect answers to this consultation.

(CMU), the need to increase retail investor investments into capital markets, or to restore trust in the sector and (re)develop an equity culture in Europe.

From the outset, we ask the European Commission to coordinate the work on the review of this Directive with the extensive work done by the CMU unit in the same Directorate-General with the High Level Forum on the Future of Capital Markets Union (HLF CMU). It would be a waste to have such an extensive brainstorming work done in the HLF CMU and not reflected immediately in the parallel work on MiFID. Moreover, we take this opportunity to call on the European Commission and the co-legislators to ensure that EU financial regulation is approached holistically, ensuring consistency between the varying sectoral or more specific legislation (MiFID II, IDD, PRIIPs, UCITS) and the Sustainable Finance issue.

Albeit “painful” for national Governments and supervisory authorities, the European Commission should consider transforming this Directive also into a **Regulation** (still, minimum harmonisation, but a great step ahead). This would reduce the divergences of national capital markets regimes and, by consequence, would reduce the compliance costs, regulatory burden and legal uncertainty. More regulation does not mean better regulation. The provisions of MiFID, read in conjunction with the Level 2 measures and the Markets in Financial Instruments Regulation, must be streamlined and aggregated into a single code, which is currently available only for the banking sector (the so-called **Single Rulebook**).

An EU Single Market for investment services is extremely difficult to achieve without a single rulebook. The CMU would greatly benefit of a level playing field, thus removing barriers to cross-border distribution of services and products, and ensure that investors have the same, high, standard of protection across the EU.

Therefore, the European Commission should map all investor protection rules and adopt a harmonised approach to ensure a high standard of investor protection. This means the MIFID Review must already foresee a consistent and urgent review of IDD to ensure consistency with conduct of business rules for insurance-based investment products (IBIPs).

Last, the European Commission must consider a manner to integrate incentive legislation for the establishment and development of Employee Share Ownership plans as the single, most powerful tool to develop EU citizens’ involvement in European capital markets.

PART 1: AREAS IDENTIFIED AS PRIORITY FOR REVIEW

Section 1. General questions on the overall functioning of the regulatory framework

Question 1. To what extent are you satisfied with your overall experience with the implementation of the MiFID II/MiFIR framework?

- 1 - Very unsatisfied
- 2 - Unsatisfied
- 3 - Neutral
- 4 - Satisfied
- 5 - Very satisfied
- Don't know / no opinion / not relevant

Question 1.1 Please explain your answer to question 1 and specify in which areas would you consider the opportunity (or need) for improvements:

Following a BETTER FINANCE survey on the implementation of MiFID II, member organisations and individual investors highlighted a general low degree of satisfaction with the new investor protection rules. In terms of areas where respondents saw room for improvement, clarity and intelligibility of information, cost and risk transparency ranked among the top three. Other areas included product performance transparency, the amount of information received, and the quality of advice.

The first MiFID aimed to tackle certain obstacles hampering the development of the single market for investment services, such as the fairness of investment advice for retail investors, the transparency and fairness of information disclosed to non-professional investors, or trading transparency in the EU. However, due to several reasons – such as misplacing the regulatory focus – the MiFID and MiFID II provisions did not fully achieve their purpose but, on the contrary, in several cases it heavily backfired. In particular:

- **Dark equity trading is now dominant** over the much more transparent regulated, lit”, retail investor-friendly regulated capital markets, especially for blue chips (“free rider” behaviour leaving the price formation and less liquid SME equity primary and secondary trading mostly to regulated markets): this is very damaging for EU citizens as direct or would-be direct individual investors;
- **Secondary bond markets have made no progress in transparency, liquidity and retail-investor friendliness** since the 2008 financial crisis which exposed vividly these weaknesses: the first quarter 2020 exposed the very same issues -despite unprecedented liquidity infusion by central banks - with several bond markets de facto shutting down in late February. Moreover, sovereign and corporate bond trading can be less and less considered as a “market” given the increasing control over prices, trading and more and more ownership by central banks.
- **“Inducements” rules have failed again as MiFID I’s**: a lot of independent evidence shows misselling has continued unabated, and “independent advice” has not taken off mainly due to barriers to access commission-free investment products (“clean share” classes) and massive ongoing regulatory arbitrage towards the promotion of IBIPs, where inducements are also allowed for portfolio management and where there is no provision for “independent advice”, Biased advice is the prevalent rule except in the UK and in the Netherlands where inducements have been banned. The situation is even worse for

personal pension products, many of which wrap MiFID-regulated instruments such as UCITS and AIF funds. The new **Product intervention powers of ESMA have yet to be tested for the mainstream retail investment products** such as UCITS and AIFs and listed equities and bonds, where evidence shows too many cases of toxic investment products.

Moreover, certain other MiFID frameworks have not been fit for purpose, such as the general regime for “retail” clients, coupled with the suitability rules in investment advice, basically precluding European citizens from accessing transferable securities directly, such as shares and bonds.

Question 2. Please specify to what extent you agree with the statements below regarding the overall experience with the implementation of the MiFID II /MiFIR framework?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The EU intervention has been successful in achieving or progressing towards its MiFID II /MiFIR objectives (fair, transparent, efficient and integrated markets).	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The different components of the framework operate well together to achieve the MiFID II/MiFIR objectives.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The MiFID II/MiFIR objectives correspond with the needs and problems in EU financial markets.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The MiFID II/MiFIR has provided EU added value.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 2.1 Please provide qualitative elements to explain your answers to question 2:

First see our reply to question 1.1. Also, in our view, one important provision of MiFID II (although, among the least enforced) is the rule that information provided for “retail” clients must be fair, clear, and not misleading. In addition, the implementing details of Art. 44 of the MiFID II Delegated Act (Regulation 2017/565) contain important rules on how prominent warnings should be, how risks and “downside” details of investment products should be presented.

As mentioned in the response for question 1.1., we also believe that the new provisions on conflicts of interest and independent and “non-independent” (sic) advice, have proven a total failure.

Last, the rules on performance cost disclosures have also been fit for purpose and clear, so as to establish a fair and transparent communication of performances and costs to “retail” clients, but they have been nullified by the inconsistent unclear, unfair and highly misleading performance and cost disclosure requirements of the Key Information Document (KID) of the PRIIPs Regulation. We refer to BETTER FINANCE papers on the PRIIPs KID, detailing the several violations of major MiFID II requirements by the PRIIPs level II rules.

Question 3. Do you see impediments to the effective implementation of MiFID II/MiFIR arising from national legislation or existing market practices?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don't know / no opinion / not relevant

Question 3.1 Please explain your answer to question 3:

Yes, there are impediments, due to regulatory arbitrage and national “gold plating” in certain Member States. The divergent market practices, resulting from the different regulatory standards applied in local markets, hamper both the effective implementation of the MiFID II framework and the integration of European capital markets, namely through the existence of uneven “playing field” for professionals. Simple statistics on the domicile of investment funds in the EU (most UCITS in Luxembourg, most AIFs in France, most UCITS ETFs in Ireland) clearly reflect this “forum shopping” for financial services providers.

Question 4. Do you believe that MiFID II/MiFIR has increased pre- and post-trade transparency for financial instruments in the EU?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don't know / no opinion / not relevant

Question 4.1 Please explain your answer to question 4:

See our reply to question 1.1 above. Unfortunately, today European capital markets – at least with regard to equities – are much more opaque than pre-MiFID II, with about half (at times, more) of large cap stocks being traded in the non-transparent or “dark” venues, such as Systematic Internalisers (SIs), Organised Trading Facilities (OTFs) and over-the-counter (OTC). More details on the severely deteriorated pre- and post-trade transparency for equity instruments are provided in section 2 below.

Question 5. Do you believe that MiFID II/MiFIR has levelled the playing field between different categories of execution venues such as, in particular, trading venues and investment firms operating as systematic internalisers?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don't know / no opinion / not relevant

Question 5.1 Please explain your answer to question 5:

Unfortunately, MiFID II has "backfired" and led to a proliferation of dark pools, and trading thereof, rather than level the playing field. For instance, from merely 14 SIs pre-MiFID II, at the end of 2019 there were around 212 SIs in the ESMA registers, a majority of which were domiciled in the UK.

Question 6. Have you identified barriers that would prevent investors from accessing the widest possible range of financial instruments meeting their investment needs?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don't know / no opinion / not relevant

Question 6.1 If you have identified such barriers, please explain what they would be:

Individual investors are "advised" away from investing directly in capital markets – through ownership of listed equities, bonds, or index ETFs – towards packaged products only, mainly AIFs, unit-linked life insurances and pension funds (see [BETTER FINANCE's CMU Assessment Report 2015-2019](#) in this sense).

The EC Study on the distribution systems of retail investment products confirmed that "in each Member State, "non-independent" advisors at banks and insurance companies almost exclusively proposed (one or a selection of a few) in-house products. Conversely, 3rd party products (e.g. the few ETFs offered were third-party products) **were only proposed in very rare cases**"². The study draws a grim picture analysing the obstacles retail investors face when seeking advice or trying to buy an investment product. Even though the study was conducted in 2017, i.e. before significant regulatory changes - e.g. MiFID II, PRIIPS, IDD - entered into force, it seems that MiFID II has not changed the situation for the better.

ESMA has also reported the tiny share of "retail" investors in the low-cost index ETF market in the EU: about 10% versus 50% in the US. Evidence, including from national competent authorities (NCAs) such as the French supervisor (AMF) shows the main reason is that low-cost (and therefore commission-free) index ETFs are almost never promoted and offered by "retail" intermediaries, except in the UK and in the Netherlands, where - on the contrary - "retail" investments in ETFs have increased since the ban of "inducements" in these two Member States.

A simple outlook on the financial balance sheets of European households is a very illustrative argument: 50 years ago, households were the primary owners of European stocks.³ Today, foreign investors hold 32% of Eurozone listed equity, while households' ownership represents merely 11%. EU27 investors – that is, European citizens that do have financial investments⁴ - gain

² The 2017 EC Study on the distribution systems of retail investment products page https://ec.europa.eu/info/publications/180425-retail-investment-products-distribution-systems_en.

³ Didier Davydoff, Daniele Fano, Li Qin, 'Who Owns the European Economy?' (August 2013) Observatoire de l'épargne Européenne, Insead Oee Data Services, p. 86, Annex 5, Table 3.

⁴ A survey in 10 large Eurozone Member States shows that, on average, only 43% of citizens do have financial investments, which speaks a lot about both households' participation in capital markets and financial inclusion; see European Commission, 'Study on the Distribution

exposure to (and profit from) the EU economy mostly indirectly, through packaged products (46%), while listed shares occupy a mere 4% of their financial balance sheets.⁵

We believe the main reason for this departure is that individual, non-professional savers are “sold” financial products, not advised to buy them. By “sold” we refer to the fact that investment advice is conflicted by monetary (or other types) of benefits advisers receive⁶, coupled with an uncompetitive market between non-independent and independent financial advice. Moreover, as the 2017 EC study pointed out most individual investors are unable to distinguish between the two⁷ types of advice.

Also, many “retail” intermediaries use the MiFID II provisions to preclude individual investors from accessing simple and low cost capital market products such as exchange traded stocks, bonds and ETFs. In particular, they demand eligibility to the criteria for “professional investors” to let individuals invest in such instruments or use the MiFID KYC questionnaire to argue that the client does not have enough risk appetite or enough investment knowledge. What do the EU commission-based or “closed architecture” retail intermediaries (i.e. the vast majority of them) know themselves about listed stocks and bonds as most never talk about those and never promote them to their clients?

More details on this question are provided under Section 3 (*inducements*) below.

⁵ See BETTER FINANCE’s CMU Assessment Report 2015-2019, <https://betterfinance.eu/wp-content/uploads/CMU-Assessment-Report-2019.pdf>.

⁶ The 2017 EC Study, page 31: “As frequently explained by the advisor, the institution’s team of investment experts constructed ex-ante a small portfolio of in-house products that, to a large extent, are suitable to cover the different needs of retail investors, in terms of knowledge and experience, financial situation, investment horizon, objectives and risk tolerance. The job of the advisor merely consisted in picking product(s) out of this limited portfolio which he deemed the most suitable for the specific shopper. A correct ex-ante identification of the target market combined with a thorough suitability assessment of the particular client should ensure that the product ends up with the ‘correct’ type of customers for whose needs and objectives it had been designed, instead of another group of clients with which the product may not be compatible. While this approach, on one hand, potentially reduces the risk of the customer to be exposed to unsuitable products it **highlights** on the other hand **the often reported bias of non-independent advice due to the incentive schemes in place**”. – emphasis added.

⁷ EC 2017 Study, page 106 “Related to this is the ability of retail investors to understand the potential benefits and risks of the different types of investment advice, i.e. independent and nonindependent advice. Respondents stressed that an investor’s ability to make this distinction and understand its implications strongly depends on the financial literacy of the individual in question. Considering that financial literacy in Europe is quite low, CPA and ADR feedback indicates that **most retail investors do not understand the difference between independent and non-independent advice**” – emphasis added.

Section 2. Specific questions on the existing regulatory framework

2.1 Establishment of the EU consolidated tape (CT)

2.1.1. Reasons why the CT has not emerged

Question 7. What are in your view the reasons why an EU consolidated tape has not yet emerged?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N.A.
Lack of financial incentives for the running a CT	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Overly strict regulatory requirements for providing a CT	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competition by non-regulated entities such as data vendors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Lack of sufficient data quality, in particular for OTC transactions and transactions on systematic internalisers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Please specify what are the other reasons why an EU consolidated tape has not yet emerged?

Another reason is the extremely high and increasing fragmentation of EU equity market venues compared to the US where the consolidated tape (CT) has been implemented by two not for profit associations supervised by the Securities and Exchange Commission (SEC). Also, the main OTC venues – the SIs – are totally opaque even right now, especially vis-à-vis individual non-professional (“retail”) investors.

Question 7.1 Please explain your answers to question 7:

MiFID I and II have generated:

- First, a very high fragmentation of equity market venues, in stark inconsistency with the Treaty of Rome goal of a single market for capital and with the more recent “CMU”;
- Second, the emergence of an unregulated very high margin duopoly of providers of capital market trade data, where small investors and in particular individual non-professional investors are totally excluded because of the pricing;
- Last, the dramatic reduction of the role of “lit”, transparent and “retail” investor friendly regulated markets, which is very damaging for individual investors, as the now dominant dark venues (SIs in particular) do not provide any easy and free access to pre- and post-trade data as they enjoy with Regulated Markets.

The prerequisites to any consolidated tape are therefore:

- to require the same transparency (free and easy access to trade data for “retail” investors) and investor protection rules from dark venues, or bar them from any “retail” order flows, directly or indirectly.
- to have the European Commission’s Directorate-General for Competition (DG Comp) investigate the trade data duopoly.

2.1.2. Use cases for a consolidated tape

Question 10. What do you consider to be the use cases for an EU consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N.A.
Transaction cost analysis (TCA)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ensuring best execution	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Documenting best execution	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Better control of order & execution management	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Regulatory reporting requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Market surveillance	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Liquidity risk management	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Making market data accessible at a reasonable cost	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Identify available liquidity	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Portfolio valuation	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please specify what are the other use cases for an EU consolidated tape that you identified?

Pre- and post-trade transparency for individual, non-professional investors. Financial products are the only ones where “retail” clients have to buy without knowing the exact price – unless they pay a very high price to get data from non-regulated equity markets. Especially in volatile markets this can be detrimental and not be absorbed by additional safeguards like stop-loss orders etc.

Pre-trade transparency is as essential as post-trade to ensure that “retail” clients are treated adequately.

2.2 The scope of the consolidated tape

Excerpt short summary: This section discusses the scope of the CT: what asset classes should be covered and what trade transparency data it should include. This section also discusses how to delineate, within an asset class, the exact scope of financial instruments that should be included in the CT.

Question 15. For which asset classes do you consider that an EU consolidated tape should be created?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N.A.
Shares pre-trade ³	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Shares post-trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
ETFs pre-trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
ETFs post-trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Corporate bonds pre-trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Corporate bonds post-trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Government bonds pre-trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Government bonds post-trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Interest rate swaps pre-trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Interest rate swaps post-trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Credit default swaps pre-trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Credit default swaps post-trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Question 28. Do you believe that the scope of the STO should be aligned with the scope of the consolidated tape?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Section 3. Investor protection

Question 31. Please specify to what extent you agree with the statements below regarding the experience with the implementation of the investor protection rules?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N.A.
The EU intervention has been successful in achieving or progressing towards more investor protection.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The different components of the framework operate well together to achieve more investor protection.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
More investor protection corresponds with the needs and problems in EU financial markets.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
The investor protection rules in MiFID II/MiFIR have provided EU added value.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 31.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

We refer to our replies to questions 1.1, 2.1 and 6.1. On overall, BETTER FINANCE believes that the new MiFID II/MiFIR investor protection rules did strengthen – to a certain extent – the investor protection regime in certain EU Member States, and, as such, have provided added value. However, this is no cause for complacency, as market developments and gaps in regulation have created a dire and urgent need for the revision of this framework. The same reasoning stands for the first statement (“*the EU intervention has been successful in achieving or progressing towards more investor protection*”), however qualified by the remark that it ***progressed towards***, not achieved, an adequate standard of investor protection.

However, we believe that the different components of the framework, in particular the rules on investment advice and “inducements” - which create by far the highest amount of detriment to individual investors in the EU, suitability assessment and the disclosure rules, coupled with the qualification of “retail” clients and toxic products – on the client side – should be thoroughly improved in order to strengthen the investor protection regime.

Last, we firmly support the statement that “*more investor protection corresponds to the needs and problems in EU financial markets*”, particularly in light of two important considerations:

1) The establishment of sustainable building blocks for the Capital Markets Union

The CMU project aims to build stronger, more resilient and integrated capital markets in the EU. To achieve the latter, both the [CMU Action Plan](#) (2015), the [NextCMU Report \(2019\)](#), and the

[Interim Report of the HLF CMU](#)⁸ have identified EU savers as a central piece to achieve these goals. Indeed, the largest source of long-term financing, and risk capital, are European citizens, who dispose of large amounts of savings – both financial and non-financial – that could be used to support the growth of the economy and, in return, generate adequate investment returns for their savings goals.

However, while securities markets are underdeveloped (the market infrastructure and the investment culture are missing) compared to the banking sector and, with significant differences between local markets (comparing the German or French market to the Central or Eastern European ones), attracting more “retail” investments into transferable securities creates many challenges to investor protection. To be successful, such a project of migrating huge pools of “retail” capital needs an adequate investor protection regime to support this long-term engagement which policy makers and stakeholders, like us, try to incentivise European citizens to undertake.

2) The consistent lack of citizens’ trust in financial services

Even in absence of a greater CMU ideal, the EU single market for financial services cannot function if individual, non-professional investors do not trust the providers and are poorly protected against breaches of their rights.

The European Commission’s Consumer Markets Scoreboard(s) have, for several editions in a row, ranked financial services and investment products among the lowest in terms of consumer trust. Key for restoring citizens’ trust is **transparency** and proper **disclosure** of relevant or meaningful information. However, trust is not the silver bullet for reconnecting individual savers with capital markets, nor are transparency and disclosure. Adequate protection against breaches of their rights and **fair rules** to counterbalance the lack of negotiating power of consumers with the financial professionals are also part of the same holistic approach needed to build an integrated single market.

Last, the single market cannot grow where the provision of investment services and products are still divided along national lines and cross-border distribution is, at best, merely an instrument to tap beneficial legal regimes in certain Member States. Thus, amendments under MiFID II, in particular regarding distribution channels for financial instruments, must be made in order to reduce the home bias of advisers and individual savers.

⁸ Interim Report of the High-Level Forum on the Future of the Capital Markets Union, expert group established by the European Commission’s DG FISMA, available here: https://ec.europa.eu/info/sites/info/files/business_economy_euro/company_reporting_and_auditing/documents/200220-cmu-high-level-forum-interim-report_en.pdf.

3.1. Easier access to simple and transparent products

Excerpt short summary: The CMU is striving to improve the funding of the EU economy and to foster retail investments into capital markets. The Commission is therefore trying to improve the direct access to simple investment products (e.g. certain plain-vanilla bonds, index ETFs and UCITS funds). On the other hand, adequate protection has to be provided to retail investors as regards all products, but in particular complex products.

Question 32. Which MiFID II/MiFIR requirements should be amended in order to ensure that simple investment products are more easily accessible to retail clients?

	Yes	No	N.A.
Product and governance requirements	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs and charges requirements	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Conduct requirements	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please specify which other MiFID II/MiFIR requirements should be amended:

Firstly, it is very surprising that the Commission did not include the advice requirements in its list, as this is by far the main reason why the legal requirement for the EU Authorities to promote simple products as utterly failed. We refer to some of our previous replies and quoted evidence: the widespread bias advice generated by “inducements” (better named and understood by ordinary citizens as “kick-backs”) is for example totally responsible for the lack of uptick of the use of low cost index ETFs among EU individual investors. The EU must urgently reform its requirements to prevent conflicts of interests in retail distribution by taking the following measures:

- a) the existing specific bans in MIFID II are extended to all substitutable investment products to ensure consistent investor protection across all “retail” investment products and end regulatory arbitrage, by extending the existing ban on inducements for independent advisors and for portfolio management also to IBIPs and personal pensions (therefore amending the Insurance Distribution Directive): ESMA does indeed agree that similar investment products should have the same inducement rules;
- b) the existing ban is extended to “execution only” transactions where, by definition, there is no “advice” to be compensated, like it was done by Canada: there is no ground for maintaining commissions for such transactions;
- c) current barriers to independent advice are removed (independent advisors must be able to easily access “clean share classes” of funds and not be charged, by depositaries or fund platforms, the maximum entry fees (which are not required by -and for -the fund managers).

More information is presented under the answer for question 49 below.

Also, MiFID should enlarge the existing *professional* category to non **-professional qualified investors**; in addition, MiFID should include an additional chapter on **toxic products**, easing the role of the European Supervisory Authorities (ESAs) and national competent authorities (NCAs) to suspend or prohibit the distribution of such products to the retail sector. The main reason – concerning the access to simple investment products – of banning toxic products is related to

conduct of business requirements, i.e. the strong incentives of advisors or internal distribution channels to push toxic products on the balance sheets of individual investors.

Second, MiFID II should introduce a **complete ban on inducements received by non-independent investment advisors**.

Question 32.1 Please explain your answer to question 32:

There is no such thing as a “retail investor”, but individual, non-professional and small investors. Consumers, wanting to or needing to invest money vary significantly – both by way of experience, risk aversion, investment objectives, wealth, trade frequency etc. According to Section II, Annex II of MiFID II, individual investors may request the investment firm to apply professional treatment, thus have a lower level of protection, based on the fulfilment of certain conditions.⁹

However, a vast majority of retail clients will not satisfy any of the conditions attached for professional treatment under MiFID II, not even BETTER FINANCE specialists. Moreover, adjusted disclosure and conduct of business rules to match more experienced individual investors should not be understood as a “lower protection”, as MiFID II currently defined it. On the contrary, the level of investor protection should remain high, while simply adapting information provision rules and access to certain investment products or markets, in particular listed shares or bonds.

Therefore, BETTER FINANCE, together with other stakeholder, have proposed as part of the HLF CMU the amendment of the category of professional clients, adding “**qualified investors**” (QIs) under the MiFID II investor protection regime.

The amended category would be highlighted by the same principle of optionality and **opt-out inclusion** and **voluntary revocation** of the said status. Moreover, it would still be conditions by fulfilment of certain criteria, **mostly related to knowledge and understanding of investment products**, not to wealth or prior trading experience. We would suggest the following approach:

- fundamentally, opting-in for the higher category regime would be optional, pursuant only to the explicit (and revocable) request of the client;
- the financial intermediary may be allowed to inform the client of this possibility, while respecting the general rule of Art. 24(3) MiFID II and observing the disclosure rules of Art. 44 MiFID II DA, in particular to equally exhibit both advantages and disadvantages to the “retail” client on this choice;
- the choice for the QI treatment is revocable by the client and not subject to other conditions and exclusively on responsibility of the client;
- the **credit institution / investment firm has to initially check the relevant admission criteria**, but has no obligation to continuously monitor his/her accordance with them.

The criteria for such an assessment is included under Question 45.1 below.

⁹ According to MiFID II, either two of the three must be fulfilled:

- the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
- the size of the client’s financial instrument portfolio, defined as including cash deposits and financial instruments exceeds €500,000;
- the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.

Question 33. Do you agree that the MiFID II/MiFIR requirements provide adequate protection for retail investors regarding complex products?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 33.1 If your answer to question 33 is on the negative side, please indicate in the text box which amendments you would like to see introduced to ensure that retail investors receive adequate protection when purchasing products considered as complex under MiFID II/MiFIR:

Individual, non-professional (“retail”) investors most often rely on investment “advisors”¹⁰ to take investment decisions due to information asymmetry, lack of financial literacy and the nature of *credence goods*¹¹ that characterises investment products. Experience has shown that, on many occasions, non-professional investors have been sold *certain*¹² highly complex and risky products, underpinned by a high likelihood to decrease the client’s investments both in nominal and real terms (*lose money*). While BETTER FINANCE argues that the European Supervisory Authorities (ESAs) should have the power to ban such *toxic products*, it is the role of the European Commission to ensure that a proper definition of toxic products is covered by MiFID II.

Such a definition of toxic products would concern all those:

- 1) that have failed to meet their investment objective and have generated real losses for their recommended holding period or longer, and have failed to disclose this serious issue prominently as required by MIFID II;
- 2) that have a very high probability of generating losses in real terms for the investor over their recommended holding period (RHP) or longer and do not disclose this high risk clearly;
or
- 3) those that are highly complex and risky.

The definition of toxic investment products should be cross-sectorial and should cover all investment products, regardless of being insurance-based or not and regardless whether these are habitually sold or advised to non-professional investors or not.

While the actual wording of the definition could be fine-tuned in collaboration with the ESAs (by way of Regulatory Technical Standards, for instance), certain key elements should be considered:

- (i) *failure to meet own investment objectives and generating real losses over at least own recommended holding period (RHP), and failure to clearly disclose these serious issues*
- (ii) *high likelihood of losses in real terms over its RHP;*
- (iii) *high complexity, and*
- (iv) *high riskiness.*

¹⁰ Mostly professionals compensated directly (commissions) or indirectly (closed architecture) through product sales – not through advice – by the product providers, re: the HLF CMU debate on inducements.

¹¹ See the explanation that credence goods are those for which consumers cannot rely on research (cannot be browsed or verified before purchase), nor on experience (cannot be tested after purchase) - David Merenda, ‘Protection of Retail Investors’ (6 December 2018) Prague Law Working Papers Series 2018/III/1, p. 2.

¹² Unfortunately, toxic products are not the only *high complexity - high risk* products sold to “retail” investors.

Question 33.1 Please explain your answer to question 33:

The explanation is already provided in the above answer.

3.2. Relevance and accessibility of adequate information

Excerpt short summary: Information should be short, simple, comparable, and thereby easy to understand for investors. One challenge that has been raised with the Commission are the diverging requirements on the information documents across sectors. One aspect is the usefulness of information documents received by professional clients and eligible counterparties ('ECPs') before making a transaction ('ex-ante cost disclosure'). Currently, the ex-ante cost information on execution services apply to retail, professional and eligible clients alike. With regard to wholesale transactions a wide range of stakeholders consider certain information requirements a mere administrative burden as they claim to be aware of the current market and pricing conditions.

Question 34. Should all clients, namely retail, professional clients per se and on request and ECPs be allowed to opt-out unilaterally from ex-ante cost information obligations, and if so, under which conditions?

	Yes	No	N.A.
Professional clients and ECPs should be exempted without specific conditions.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Only ECPs should be able to opt-out unilaterally.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Professional clients and ECPs should be able to opt-out if specific conditions are met.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
All client categories should be able to opt out if specific conditions are met.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please specify what is your other view on whether all clients, namely retail, professional clients per se and on request and ECPs should be allowed to opt-out unilaterally from ex-ante cost information obligations?

N/A.

Question 34.1 Please explain your answer to question 34 and in particular the conditions that should apply:

N/A.

Question 35. Would you generally support a phase-out of paper-based information?

- 1 - Do not support
- 2 - Rather not support
- 3 - Neutral
- 4 - Rather support
- 5 - Support completely
- Don't know / no opinion / not relevant

Question 35.1 Please explain your answer to question 35:

BETTER FINANCE is a strong supporter of the green objectives of the EU and protecting the environment, reason for which we do not generally argue in favour of paper-based communication. In particular, considering the development and digitalisation of financial services, coupled with the increase used of “smart” mobile technology, we believe that communication of marketing and legal documents should be done mostly through applications and electronically. However, we cannot ignore the fact that many financial services users may not have access, or readily have access, to electronic equipment necessary for phasing out paper-based communication and, even with access, many may find difficulties in handling it.

For these reasons, we would not support a phase-out of paper-based communication in absence of action plans meant to ensure that all individual savers will have access, and will be taught to use, the technology needed to access electronic-only communication materials.

In particular considering IBIPs, for reasons of transparency and understandability, we stress that the paper-based information should continue to constitute a mandatory option to be offered to the customers. This is due to the complexity of KIDs, PBS and terms and conditions of the contracts. Usually IBIPs are highly complex products (combination of long-term savings and risk coverage like longevity, death or disability). In consequence, even the average financially educated customer needs a lot of time in order to understand as precisely as possible these documents and to be enabled to take a well-informed decision.

Question 36. How could a phase-out of paper-based information be implemented?

	Yes	No	N.A.
General phase-out within the next 5 years	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
General phase out within the next 10 years	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
For retail clients, an explicit opt-out of the client shall be required.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
For retail clients, a general phase out shall apply only if the retail client did not expressly require paper based information	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please specify in which other way could a phase-out of paper-based information be implemented?

In line with our previous answer, we believe that the opt-out should be explicit for retail clients, hypothesis in which a phase-out could be implemented.

Excerpt: Some retail investors deplore the lack of comparability of the cost information and the absence of an EU-wide database to obtain information on existing investment products.

Question 37. Would you support the development of an EU-wide database (e. g. administered by ESMA) allowing for the comparison between different types of investment products accessible across the EU?

- 1 - Do not support
- 2 - Rather not support
- 3 - Neutral
- 4 - Rather support
- 5 - Support completely
- Don't know / no opinion / not relevant

Question 37.1 Please explain your answer to question 37:

BETTER FINANCE has long advocated for publicly available databases for cost, risk and past performance of retail investment products in the EU, which could take the form of web-comparison tools, “fund supermarkets” etc. In particular, in context of important savings products, such as retirement provision vehicles,¹³ or the more “popular” products,¹⁴ such as unit-linked life insurances or investment funds, these are a necessary component to enable transparency for individual, non-professional investors, stimulate price competition,¹⁵ and endowing European citizens with the necessary tools to make aware and informed investment decision.

The European Supervisory Authorities’ (ESAs) mandate from the European Commission¹⁶ to report on the cost and past performance of retail investment products unfortunately missed the opportunity to request the creation of publicly available databases to be managed by the ESAs.¹⁷ BETTER FINANCE has requested the ESAs in that context, but also in the context of PEPP, in the context of the CMU, and in the context of the European Commission’s study for web-comparison tools, to create such databases managed by the ESAs, but preferably by only one of them.

Unfortunately, the creation of such a database relies on the accuracy of input data, which will no longer be available under the current PRIIPs Regulation. A database for investment products should contain simple, factual information, not legal waivers, disclaimers or warnings framing cost, risk and return estimations. The absence of historical data on cost and returns in the PRIIPs KID has made the ESAs (in particular EIOPA and EBA) unable to properly report on the costs and relative past performances of retail investment products in their scope.

If the ESAs themselves are unable to know what the costs and performance of the products under their remit is, no wonder individual investors are “in the dark” and cannot compare financial products which is crucial in order to achieve an informed investment decision.

The example of the Finansportalen in Norway is clear evidence that it is possible to set up such a database and how useful it is for investors.

We believe that the database should be underpinned by the following characteristics:

¹³ See the latest BETTER FINANCE report on the Real Return of Long-Term and Pension Savings (2019), page 70 available at: <https://betterfinance.eu/wp-content/uploads/Pension-Savings-The-Real-Return-2019-Edition-1.pdf>.

¹⁴ Due to conflicted investment advice, we believe (based on observable empirical evidence) that savers are mostly “sold” packaged products, therefore these are not *per se* popular, but are the most subscribed to.

¹⁵ Many reports, including those of the ESAs on cost and past performance of retail investment products, but others as well, highlight the high detriment of costly investment products on returns. In our experience, it is informally acknowledged that in the EU, the cost of investment products is higher than in the US.

¹⁶ See https://ec.europa.eu/info/sites/info/files/171013-request-to-esas-to-report_en.pdf.

¹⁷ See ESMA (https://www.esma.europa.eu/sites/default/files/library/esma50-165-1106-asr-performance_and_costs.pdf) and EIOPA (https://www.eiopa.europa.eu/content/cost-and-past-performance-2020-report_en) Reports on Cost and past performance of retail investment products.

- must be free of charge;
- must include the necessary and sufficient information compare risks, costs, performance of all products available to individual investors (the investor is not searching for a product, but for a means to reach his target);
- based on accurate data;
- unbiased, i.e. not financed by the industry; and
- publicly available.

Question 38. In your view, which products should be prioritised to be included in an EU-wide database?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
All transferable securities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
All products that have a PRIIPs KID/ UCITS KIID	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Only PRIIPs	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Please specify what other products should be prioritised?

The EC should not give “priority” to any type of products as this may create unwanted biases for individual investors. The comparison database should include all the main “retail” investment products: transferable securities, from simple listed stocks and bonds to more complex products, to packaged investment products, such as investment funds, IBIPs and personal pensions. As such, if the database would be incomplete and does not include all the main “substitutable” products, individual savers will be presented only with “selected” investment options, leaving the impression that there are no other alternatives. Therefore, we strongly advise the EC not to “prioritise” any investment products and to get inspiration from the Norwegian FinansPortalen.

Question 38.1 Please explain your answer to question 38:

However, should the EC decide to adopt a staggered approach in building the database, the most important products to be included are: simple shares and bonds, UCITS and UCITS ETFs and IBIPs. This is because the UCITS and IBIPs are the most “popular” investment products (and most sold), and that simple shares and bonds should be promoted as a priority for the completion of the CMU.

Secondly, PRIIPs concern so far the majority of retail investment product, making up for a large part of the market, to which the rest is constituted by UCITS. Therefore, the database should cover at a second stage a completion with all products that fall under the material scope of UCITS and PRIIPs.

Last, there are other types of investment products used or distributed in large numbers to the “retail” sector, i.e. pension products. Considering the importance of IORPs, and the future take off for PEPPs – although, there is a separate discussion under that umbrella project as well, i.e. to create a database for PEPP as well– the Commission should mandate these types of products with priority as well.

Question 39. Do you agree that ESMA would be well placed to develop such a tool?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 39.1 Please explain your answer to question 39:

The more transferable securities are included the more ESMA seems to be well placed to develop such a tool. However, the more long-term and pension products are included, the more EIOPA should be involved in this development. However, establishing several databases – by competence of the ESAs – would be less useful for consumers who are not really interested in this kind of sectoral approach but rather expecting having all functionally equivalent (investment) products under one roof/portal. If the European Commission should consider that the database would be based on and managed by the ESMA website, the two other ESAs should establish weblinks on their websites and give additional explanations on this database.

3.3. Client profiling and classification

Excerpt short summary: MiFID II/MiFIR currently differentiates between retail clients, professional clients and eligible counterparties. In line with the procedure and conditions laid down in the Annex of MiFID II, retail clients can already “opt-up” to be treated as professional clients. Some stakeholders indicated that the creation of an additional client category (‘semi-professional investors’) might be necessary in order to encourage the participations of wealthy or knowledgeable investors in the capital market. In addition, other concepts related to this classification of investors can be found in the draft Crowdfunding Regulation which further developed the concept of sophisticated investors¹⁸. The CMU-Next group suggested a new category of experienced High Net Worth (“HNW”) investors with tailor made investor protection rules¹⁹.

Question 40. Do you consider that MiFID II/MiFIR can be overly protective for retail clients who have sufficient experience with financial markets and who could find themselves constrained by existing client classification rules?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 40.1 Please explain your answer to question 40:

We refer to our answers on questions 32 and 32.1 for this purpose.

¹⁸ According to the draft of the Crowdfunding Regulation (to be finalised in technical trilogues) a sophisticated investor has either personal gross income of at least EUR 60 000 per fiscal year or a financial instrument portfolio, defined as including cash deposits and financial assets, that exceeds EUR 100 000.

¹⁹ According to the CMU-NEXT group “HNW investors” could be defined as those that have sufficient experience and financial means to understand the risk attached to a more proportionate investor protection regime.

Question 41. *With regards to professional clients on request, should the threshold for the client's instrument portfolio of EUR 500 000 (See Annex II of MiFID II) be lowered?*

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 41.1 *Please explain your answer to question 41:*

BETTER FINANCE believes that the European Commission should reconsider this threshold or, at least, reduce it to €50,000. The criterion may prove too high for a majority of individual savers at the earlier stages of the working life or investments cycle. Considering the median monthly net disposable income (in 2017, according to Eurostat) of €1,500 for EU citizens starting their careers, and assuming an average 2% annual income growth rate at least for the first 10 years of savings, it would simply preclude (save where neither of the other two criteria are met) young, individual savers from accessing a wider, more diversified range of product offering and transferable securities.

Moreover, we do not see merit in restricting EU citizens – at any age - from making riskier or more complex investment decisions based on a level of financial worth which, in our view, does not qualify in any manner the capacity to understand information and act responsibly concerning their savings.

A prerequisite is to rename the “professional” category “professional and qualified nonprofessional”.

Question 42. *Would you see benefits in the creation of a new category of semi-professionals clients that would be subject to lighter rules?*

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 42.1 *Please explain your answer to question 42:*

Drawing reference to Questions 32 and 32.1 above, the clear advantages would concern: an improved access to a wider range of products and investments, most importantly plain vanilla shares and bonds (transferable securities) and, second, better suited information disclosure for more experienced investors.

The wider range of investment products, including simple, direct ownership of transferable securities, is triggered by the suitability assessment both independent and non-independent advisers must undertake when giving investment advice to clients. In most cases, as the 2017 EC study on retail distribution of investment products as well as experience from our member associations, as well as other stakeholders, shows that usually a narrow range of packaged retail investment products is offered to individual, non-professional investors because of their complexity or riskiness attached.

Second, in our view, the investor protection regime - from a transparency and disclosure perspective - is made to accommodate the needs of the average individual investor, which is generally evaluated as having a low level of financial literacy. As such, more simplistic and high-level information (such as an annualized historical track record, simplified total cost figure etc.) is presented in order to enable the “retail” clients understand certain key characteristics and risks of the investment, help them make comparisons with other products and make an informed investment decision. This is, in our view, the baseline for retail investor protection.

Consequently, more knowledgeable individual investors, either by virtue of training or experience, may wish to have access to more complex, granular information on investment products, disclosed to professional clients. As such, the current criteria attached to opting-in the professional client regime precludes, in theory, such experienced investors from obtaining more specific information or, in many instances, receive less, but more valuable disclosures, tailored to their experience and needs, as well as the possibility to trade in transferable securities or have more access to alternative investment options.

However, we believe that creating a third category does not necessarily serve the purpose, and alternative amendments to MiFID II could address the issue. In particular, not the client categorisation per se is an issue as are the criteria to qualify in one category or another. Therefore, BETTER FINANCE recommends renaming the non-retail category “professional and qualified non-professional” clients, with a consequent reduction in the thresholds as described under question 45 below.

Question 43. What investor protection rules should be mitigated or adjusted for semi-professionals clients?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
Suitability or appropriateness test	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Information provided on costs and charges	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Product governance	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Please specify what other investor protection rules should be mitigated or adjusted for semi-professionals clients?

We believe that, first and foremost, disclosure of past performance (in comparison with a benchmark) and factual cost figures should be made available for *qualified investors*, especially in light of the risk of losing all such information for retail investors as of 2022.

Question 43.1 Please explain your answer to question 43:

Very often it is mentioned that past performance can be risky and misleading for retail clients due to the potential of being empirically extrapolated in the future. Albeit not the case, as individual

investors understand better²⁰ such information compared to return estimations, the narrative of the co-legislators follows this reasoning.

In essence, if past performance, actual risk and cost will be considered by the co-legislators as more difficult to understand compared to what the PRIIPs KID offers, then these informations should be considered more suitable and appropriate for investors that have a higher level of understanding of financial products and markets.

Question 45. What should be the applicable criteria to classify a client as a semi-professional client?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
Semi-professional clients should possess a minimum investable portfolio of a certain amount (please specify and justify below).	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Semi-professional clients should be identified by a stricter financial knowledge test.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Semi-professional clients should have experience working in the financial sector or in fields that involve financial expertise.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Semi-professional clients should be subject to a one-off in-depth suitability test that would not need to be repeated at the time of the investment.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Please specify what other criteria should be the one applicable to classify a client as a semi-professional client:

Reiterating the arguments under question 42.1 above, that not the third category would prove the “silver bullet”, but actually lowering the thresholds, BETTER FINANCE suggests the European Commission to consider:

1. the **personal request** by the client to be recognized as a QI; this personal request should be revocable by the client without any conditions or fees attached;
2. the client has a **proven track-record of trading** with different types of financial instruments over at least **3 years**;
3. the **client has financial assets of at least EUR 50,000 at his/her personal disposal**

Alternatively, if criteria 2 and 3 cannot be met, the client could provide a “qualified investor license” (like a driver license is required to purchase and drive a car) to ensure a minimum level of financial and capital markets literacy or subject to a knowledge test. The QI license could be obtained via an EU wide online exam. This exam should be designed after consulting the main stakeholders: individual investor and consumer organizations, professional organizations

²⁰ See BETTER FINANCE Response to ESAs JC Public Consultation on the PRIIPs KID, <https://betterfinance.eu/publication/better-finance-response-to-the-esas-icp-16-10-2019-on-amendments-to-the-priips-kid/>.

(financial advisors, financial planners, etc.). Most importantly, the financial intermediary can inform the client of this possibility to opt-in for this category of “professional and qualified non-professional category” if such information abides to the general rules of disclosure (*fair, clear, and not misleading*, enshrined in Art. 24(3) MiFID II) and the presentation rules contained in Art. 44 MiFID II DA regarding the obligation to disclose both advantages and disadvantages on such a choice in an equal, unbiased manner.

Question 45.1 Please explain your answer to question 45 and in particular the minimum amount that a retail client should hold and any other applicable criteria you would find relevant to delineate between retail and semi-professional investors:

See answer to Question 45.1 above.

3.4. Product Oversight, Governance and Inducements

Excerpt short summary: The product oversight and governance requirements shall ensure that products are manufactured and distributed to meet the clients’ needs. Before any product is sold, the target market for that product needs to be identified. Product manufacturers and distributors should thus be well aware of all product features and the clients for which they are suited. To do so, distributors should use the information obtained from manufacturers as well as the information which they have on their own clients to identify the actual (positive and negative) target market and their distribution strategy. There is a debate around the efficiency of these requirements. Some stakeholders criticise that the necessary information was not available for all products (e.g. funds). Others even argue that this approach adds little benefit to the suitability assessment undertaken at individual level. Similar doubts are mentioned with regards to the review of the target market, in particular for products that don’t change their payment profile. Concerns are raised that the current application of the product governance rules might result in a further reduction of the products offered.

Question 46. Do you consider that the product governance requirements prevent retail clients from accessing products that would in principle be appropriate or suitable for them?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 46.1 Please explain your answer to question 46:

The product governance rules are very paternalistic, shifting the responsibility for decision-making from the investor to the distributor. We consider that it should always be the investor having the last word regarding his or her investment and not the distributor. The distributor should have the role of warning against investments that are not suitable but not from the start preclude retail clients from certain investments.

We see moreover a restrictive interpretation of the target market for retail clients at distribution level wherever rules leave room for interpretation. Distributors at least in some MS seem to be afraid of liability claims or administrative fines and therefore interpret the target market stricter than necessary to the detriment of retail clients (self-censoring). Consequently, many products are not considered suitable and are therefore not available for retail clients, especially in the execution-only area.

In addition, distributors seem to be not able or willing to devote sufficient resources to provide target market descriptions for numerous products from manufacturers not subject to MiFID II. In order to reduce their compliance burden, product distributors consequently limit the number of products they offer.

Question 47. Should the product governance rules under MiFID II/MiFIR be simplified?

	Yes	No	N.A.
It should only apply to products to which retail clients can have access (i.e. not for non-equities securities that are only eligible for qualified investors or that have a minimum denomination of EUR 100.000).	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
It should apply only to complex products.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Other changes should be envisaged – please specify below.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Simplification means that MiFID II/MiFIR product governance rules should be extended to other products.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Overall the measures are appropriately calibrated, the main problems lie in the actual implementation.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
The regime is adequately calibrated and overall, correctly applied.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Question 47.1 Please explain your answer to question 47:

See our answers above.

Explanation excerpt: Further, even though ESMA clarified in its guidelines that the sale of products outside the actual target market is possible in so far as this can “be justified by the individual facts of the case”, distributors seem reluctant to do so even if the client insists. This consultation is therefore assessing if and how the product governance regime could be improved.

Question 48. In your view, should an investment firm continue to be allowed to sell a product to a negative target market if the client insists?

- Yes
- Yes, but in that case the firm should provide a written explanation that the client was duly informed but wished to acquire the product nevertheless.
- No
- Don't know / no opinion / not relevant

Question 48.1 Please explain your answer to question 48:

BETTER FINANCE’s answer is simply underpinned by the argument that retail investors should, in principle, have the freedom to buy and contract whatever types of products they wish (according to civil law principles of contractual freedom, except where mandated by public interest) and that, secondary, sometimes even investment professionals, acting as sellers or advisers, may be wrong in the categorisation/assessment of the client.

Excerpt explanation: MiFID II/MiFIR establishes strict rules for investment firms to accept inducements, in particular as regards the conditions to fulfil the quality enhancement test and as regards disclosures of fees, commissions and non-monetary benefits.

Question 49. Do you believe that the current rules on inducements are adequately calibrated to ensure that investment firms act in the best interest of their clients?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 49.1 Please explain your answer to question 49:

Unfortunately, it is actually the opposite: current rules on inducements widely allow most intermediaries not to act in the best interest of their clients, and BETTER FINANCE and others have supplied ample evidence of this highly detrimental situation.

Given the increasing complexity of financial products and the decreasing levels of financial literacy of the adult population in the EU, investment “advice” at the point of sale plays a key role in the evolution of retail finance and the direction it takes.

Independent research has shown that, from the largest shareowner of European corporations in 1969, EU households have been more and more directed to “packaged” investments and drawn away from direct security ownership. In 2012, only 11% of European equity was held by individual and small investors compared to the 38% share in 1969. Moreover, in 2018 less than 40% of their savings went into financial assets, and out of those 78% is held with banking and complex, highly packaged and commission-laden products (cash, deposits, investment funds, life insurances, pensions). Investment products are mostly “sold” not bought.

“Non-independent” investment advisors can receive “inducements”, provided that they disclose it ex-ante to retail investors. However, a study in the Netherlands showed that more than 90% of clients do not read these warnings (or read them superficially).²¹ As such, these prominent warnings have the only purpose of shielding intermediaries against biased advice.

Inducements generate a conflict of interest: the remuneration of “advisors” is not linked to any advice but to a specific product sale. The European Commission should amend MiFID II and ban inducements in non-independent investment advice for individual investors. There is another contribution more specifically on this issue. “Advice” is mostly sold as “free” to non-professional investors, who actually indirectly pay advisors with sales commissions without knowing it.

Therefore, this MiFID II review should at the very least unbundle sales commissions and/or payments from the distributor company to the manufacturing company (in the case of “closed” architecture model) from any other fees paid. We refer to our precise proposal below in reply to question 50.

²¹ See BEUC, The Case for a Ban on Inducements https://www.beuc.eu/publications/beuc-x-2019-046_the_case_for_banning_commissions.pdf.

Excerpt explanation: Some consumer associations have stated that inducement rules inducements under MiFID II/MiFIR are not sufficiently dissuasive to prevent conflicts of interest in the distribution process. They consider that financial advisers are incentivised to sell products for which they receive commissions instead of recommending the most suitable products for their clients. Therefore, some are calling for a ban on inducements.

Question 50. Would you see merits in establishing an outright ban on inducements to improve access to independent investment advice?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 50.1 Please explain your answer to question 50:

In our view, it is difficult to demonstrate the positive advantages or gains for individual investors that would arise from rewarding advisors for pushing certain investment products compared to others. Moreover, not only we have yet to see such advantages, but significant evidence from research²² contributions have been brought on the case for banning inducements. Inducements in financial advice represent, by essence, a cause for conflicts of interests.²³ For instance, evidence put forward by the European Commission,²⁴ AMF,²⁵ ESMA²⁶ show that low-cost UCITS ETFs are scarcely available for “retail” savers, which consequently do not get exposure to them.

In our view, the problem is the misguided belief that *advice* and *sale* are equivalent, which is clearly not the case.²⁷ Inducements do not compensate the provision of investment advice, but the provision of selling of investment products.

While there was opportunity to demonstrate the contrary – that individual savers benefit from industry-rewarded advice – evidence from the EU and US suggests otherwise. A study on the US retirement savings market concludes that conflicted advice could cost 1% p.a. the average saver and that “*conflicted advice costs Americans about \$17 billion in foregone retirement earnings each year*”.²⁸ In Europe, studies from the two jurisdictions that have banned inducements showcase the increase in passive, cheaper products offered to individual investors.²⁹

²² See BEUC, *op. cit.*, 4, which refers to “*upfront commissions*” and “*trailing commissions*”.

²³ Veerle Colaert, Thomas Incalza, ‘Conflicts of Interest and Inducements in the Financial Sector’ in Veerle Colaert, Thomas Incalza, Danny Busch (eds), *European Financial Regulation: Levelling the Cross-Sectorial Playing Field* (2020) Hart Publishing, 377-394. 377.

²⁴ European Commission, ‘Study on the Distribution Systems of Retail Investment Products Across the EU’ (2018), available here: https://ec.europa.eu/info/sites/info/files/180425-retail-investment-products-distribution-systems_en.pdf

²⁵ French Financial Markets Authority (Autorite des Marchés Financiers), *Risk and Trend Mapping* (no 17) (July 2016), available at: https://www.amf-france.org/sites/default/files/contenu_simple/lettre_ou_cahier/risques_tendances/Risk%20and%20Trend%20Mapping%20ndeg17%20-%202016%20Risk%20Outlook.pdf.

²⁶ ESMA Annual Statistical Report, Performance and Cost of Retail Investment Products in the EU (2019), available at: https://www.esma.europa.eu/sites/default/files/library/esma50-165-731-asr-performance_and_costs_of_retail_investments_products_in_the_eu.pdf.

²⁷ Michael Haliassos, Alexander Michaelides, ‘Asset and Debt Participation of Households: Opportunities and Challenges in Eliminating Borders’ in Franklin Allen, Ester Faia, Michael Haliassos, Katja Langenbacher, *Capital Markets Union and Beyond* (2019) The MIT Press, 113 – 122, 117.

²⁸ Obama White House Archives (2015): THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS, available here: https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

²⁹ See BEUC, The Case for Banning Commissions in Financial Advice (9 September 2019, BEUC-X-2019-046), pages 4-5.

BETTER FINANCE also gathered evidence of very negative evolutions with regards to conflicts of interests in the distribution of retail investment products. We estimate the recent “lift” of the inducements ban by the French Government to cost French savers at least €20 billion.³⁰

On the other hand, inducements increase the cost of advice, which is ultimately borne by individual investors through entry (load) fees and ongoing charges. Moreover, we believe that stakeholders and market participants take advantage of the “illusion” that non-independent advice is free, whereas truly independent advisors must charge upfront fees directly, precluding the development of that market segment.

It is our view that a clear cost-efficiency gain can be found in banning inducements, which would most probably reduce a vast majority of entry (load) fees. What is more, it would ensure a level playing field for the development of the independent advice market. If industry lobbies once again prove too powerful for EU Authorities to make a full ban on inducements happen - even though authorities in the UK and in the Netherlands were able to achieve this - we ask, at the very least, that:

- a. the existing specific bans in MIFID II are extended to all substitutable investment products to ensure consistent investor protection across all “retail” investment products and end regulatory arbitrage, by extending the existing ban on inducements for independent advisors and for portfolio management also to IBIPs and personal pensions (therefore amending the Insurance Distribution Directive): ESMA does agree that similar investment products should have the same inducement rules;
- b. the existing ban is extended to “execution only” transactions where, by definition, there is no “advice” to be compensated, like it was done by Canada: there is no ground for maintaining commissions for such transactions;
- c. current barriers to independent advice are removed (independent advisors must be able to easily access “clean share classes” of funds and not be charged, by depositaries or fund platforms, the maximum entry fees (which are not required by the fund managers)).

Excerpt explanation: As regards the criteria for the assessment of knowledge and competence required under Article 25(1) of MIFID II, ESMA’s guidelines established minimum standards promoting greater convergence in the knowledge and competence of staff providing investment advice or information about financial instruments and services. Nonetheless, due to the diversified national educational and professional systems, there are still various options on how to test the relevant knowledge and competences across Member States.

Question 51. Would you see merit in setting-up a certification requirement for staff providing investment advice and other relevant information?

- 1 - Disagree
 2 - Rather not agree
 3 - Neutral
 4 - Rather agree
 5 - Fully agree
 Don't know / no opinion / not relevant

Question 51.1 Please explain your answer to question 51:

We believe that fairness and quality of investment advice go hand in hand. A “non independent (“biased” in plain English) advice will be highly detrimental whether it is “certified” or not. In addition, there are in most cases already schemes in place at national level for the certification of

³⁰ For more info, see BETTER FINANCE response to the ESMA Public Consultation on Inducements and Cost Disclosure

investment professionals and intermediaries, which differ from one jurisdiction to another. Therefore, this is not very likely to thoroughly improve the protection of individual investors. The European Commission could potentially empower ESMA and EIOPA with coordination attributes in this sense.

Question 52. Would you see merit in setting out an EU-wide framework for such a certification based on an exam?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 52.1 Please explain your answer to question 52:

Yes, we believe that a pan-EU exam-based certificate would be helpful and it would ensure higher competition for those who do not or cannot access self-regulatory bodies that issue equivalent certifications.

3.5. Distance communication

Excerpt short summary: Provision of investment services via telephone requires ex-ante information on costs and charges (please consider also ESMA's guidance on this matter). When a client wants to place an order on the phone, the service provider is obliged to send the cost details before the transaction is executed, a requirement which may delay the immediate execution of the order. Further, MiFID II/MiFIR requires all telephone communications between the investment firm and its clients that may result in transactions to be recorded. Due to this requirement, several banks argue to have ceased to provide telephone banking services altogether.

Question 53. To reduce execution delays, should it be stipulated that in case of distant communication (phone in particular) the cost information can also be provided after the transaction is executed?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 53.1 Please explain your answer to question 53:

We disagree with the statement: clients must have the cost information prior to its execution: otherwise, it will resemble to a “blank cheque” given to investment intermediaries. Distance communication should not be a justification to lower the transparency and disclosure requirements for “retail” clients.

3.6. Reporting on best execution

Excerpt short summary: Investment firms shall execute orders on terms most favourable to the client. The framework includes reporting obligations on data relating to the quality of execution of transactions whose content, format and periodicity are detailed in Delegated Regulation 2017/575 (also known as ‘RTS 27’). The best execution framework also includes reporting obligations for investment firms on the top five execution venues in terms of trading volumes where they executed client orders and information on the quality of information. Delegated regulation 2017/576 (also known as ‘RTS 28’) specifies the content and format of that information.

Question 55. Do you believe that the best execution reports are of sufficiently good quality to provide investors with useful information on the quality of execution of their transactions?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 55.1 Please explain your answer to question 55:

Information provided by the information report is rather complete and satisfactory on costs but not on the quality of execution. No information is provided on the relevance of the execution. The question is not so important on limit orders, but it is on market orders and other type of orders such as conditional or stop orders. Experience from the UK showed that, currently, very little best execution information is reaching end clients. Intermediaries work on an assumption that best execution has been achieved, with no test that this is the case. For illiquid securities (or in fast markets) strict best execution of a buy or sell order can produce very poor outcomes (for example lifting an offer when the activity is heavily focused on the bid side) with no obligation on the broker to use initiative and no information to the investor about this opportunity cost.

Question 56. What could be done to improve the quality of the best execution reports issued by investment firms?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
Comprehensiveness	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Format of the data	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of data	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Question 56.1 Please explain your answer to question 56:

The quality of execution of transactions on non-limit orders can make a significant difference over time since the transaction is executed on criteria such as speed, cost, or a mix of both. On very liquid stocks, the criterion should consider only costs, as brokers provide volume to transactional platforms. Therefore, the question is whether the brokers are induced to do so and at what cost for the investor. Moreover, the quality should be unquestionable. The format and comprehensiveness are important to get attention and stimulate the individual, non-professional investor to read them.

Section 4. Research unbundling rules and SME coverage

Excerpt short summary: New rules on unbundling of research and execution services have been introduced in MiFID II/MiFIR, principally to increase the transparency of research prices, prevent conflict of interests and ensure that research costs are incurred in the best interests of the client. In particular, unbundling of research rules were put in place to ensure that the cost of research funded by client is not linked to the volume or value of other services or benefits or used to cover any other purposes, such as execution services.³¹

Question 58. What is your overall assessment of the effect of unbundling on the quantity, quality and pricing of research?

BETTER FINANCE members highlighted that individual investors have very little access to research compared to 20 years ago, and that small amount derives from the financial press and online brokers, or it comes for a fee (from different platforms). As such, the effects of unbundling of research costs have not been strongly felt by the majority of individual investors, which lack access to it anyway. Some BETTER FINANCE members believe that the research cost unbundling pursuant to MiFID II has been very detrimental, reducing dramatically the quantity of research available for “retail” investors. Even where independent research exists it cannot be trickled down by brokers to retail investors. The only research effectively available to retail investors is paid-for research which cannot be regarded as independent. This is a serious unintended and negative consequence of unbundling. The treatment of research material as an inducement should be urgently reviewed as currently the only research available to retail investors is non-independent research paid by the target company.

4.1. Increase the production of research on SMEs

4.1.1. EU Rules on research

Question 59. How would you value the proposals listed below in order to increase the production of SME research?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
Introduce a specific definition of research in MiFID II level 1	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Authorise bundling for SME research exclusively	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Exclude independent research providers' research from Article 13 of delegated Directive 2017/593	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prevent underpricing in research	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Amend rules on free trial periods of research	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

³¹ The review clause in Article 90 paragraph (1)(h) of MiFID II is covered by this section.

Please specify what other proposals you would have in order to increase the production of SME research:

See answer to question 59.1 below.

Question 59.1 Please explain your answer to question 59 and in particular if you believe preventing underpricing in research and amending rules on free trial periods of research are relevant:

The lack of SME research is very detrimental for individual non-professional (“retail”) investors, as their role in the mid and small cap primary and secondary markets is much higher than in the big caps ones. Reversely, the role of professional “institutional” investors in SME markets is much reduced compared to their role in the “blue chips” markets. This is well documented, and the EC would benefit from investigating if there is not a link between this smaller interest and role of professional investors in SME markets and the reduced research level on listed SMEs.

This being said, BETTER FINANCE members indicate that SMEs already had a fairly small number of researchers, which has decreased even more post-MiFID II. Although the reasons for this are not obvious, it creates, first, an uneven playing field with large caps and, second, hampers the development of SME markets and the EU economy since individual, non-professional investors cannot be offered – or be aware of – listed issuers on which there is no proper equity research undertaken.

This also leads to the problem of issuer-sponsored research, which may lead to conceptual conflicts, as it happens with inducements in investment advice. The result of cost unbundling have lead to many SMEs taking the initiative and contracting equity research firms, thus generating distrust and lack of recognition among investors. Nevertheless, considering the scarcity of SME research, issuer-sponsored research should at least be accompanied by a prominent warning for individual investors as such.

Although BETTER FINANCE still supports the purpose behind the cost unbundling, the European Commission must come up with a “backup” plan to revive equity research, in particular for SMEs and new entrants on the market, in order to ensure that the CMU project can take off.

Moreover, individual investors (and, consequently, SMEs) should not have to rely solely on research companies to provide the necessary outreach in order to increase liquidity and stimulate proper price formation.

A potential solution would be to create – similar to investment products – a comparison database, where equity researchers can share ratings or analyses based on issuers, thus increasing the function of peer review, to which individual investors would also have access to. A potential good practice example can be the Polish Stock Exchange which offers SME research free of charge on their website.

Question 60. Do you consider that a program set up by a market operator to finance SME research would improve research coverage?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 60.1 *If you do consider that a program set up by a market operator to finance SME research would improve research coverage, please specify under which conditions such a program could be implemented:*

Such a program must be underpinned by equal access and impartiality, which may come in conflict with having one market operator financing SME research.

Question 61. *If SME research were to be subsidised through a partially public funding program, can you please specify which market players (providers, SMEs, etc.) should benefit from such funding, under which form, and which criteria and conditions should apply to this program:*

The research funding should be made available for research platforms, which would provide then the service based on criteria established by EU law. A key success factor is to provide this research output for free to individual non-professional investors. Moreover, the public funding program should also aim at enabling digitalisation and FinTech companies improve the research process (including the distribution of reports) and enable cost efficiency gains.

Question 62. *Do you agree that the use of artificial intelligence could help to foster the production of SME research?*

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 62.1 *If you agree, which recommendations would you make on the form that such use of artificial intelligence could take and do you see risks associated to the development of AI-generated research?*

Artificial intelligence could help support a large part of research analysis, but should be coupled at its early stages at least by human-made research. However, incentive legislative framework to integrate FinTechs and the use of AI and machine learning would be beneficial both for issuers and for individual investors.

4.1.3. Promote access to research on SMEs and increase quality of research

Excerpt explanation: The lack of access to SME research deprives issuers from visibility and financing opportunities. However, access to SME research can be improved by creating a EU-wide SME research database. The creation of an EU database compiling research on SMEs would ensure the widest possible access to research material. Via this public EU-wide database, anyone could access and download research on SMEs for free. Such a tool would allow investors to access research in a more efficient manner and at a lower cost, while improving SMEs visibility.

Question 63. *Do you agree that the creation of a public EU -wide SME research database would facilitate access to research material on SMEs?*

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 63.1 If you do agree that the creation of a public EU-wide SME research database would facilitate access to research material on SMEs, please specify under which conditions this database should operate:

Yes, we refer to our answer to question 59.1 above.

Question 64. Do you agree that ESMA would be well placed to develop such a database?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 64.1 Please explain your answer to question 64:

N/A.

Question 65. In your opinion, does issuer-sponsored research qualify as acceptable minor non-monetary benefit as defined by Article 12 of Delegated Directive (EU) 2017/593?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 66. In your opinion, does issuer-sponsored research qualify as investment research as defined in Article 36 of Delegated Regulation (EU) 2017/565?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 66.1 Please explain your answer to question 66:

Since the entry into force of MiFID 2, on many instances the only research available for individual investors is issuer-sponsored research. Therefore, disqualifying it as investment research in the sense of Art. 36 of DR 2017/565 may prevent brokers and individual investors from having access even to this information. The requirement to safeguard investors' interests is to prominently and thoroughly indicate that the research on the company is non-independent.

Independent research

Question 67. Do you consider that rules applicable to issuer-sponsored research should be amended?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 67.1 If you do consider that rules applicable to issuer-sponsored research should be amended, please specify how:

Issuer sponsored research requires a fuller disclosure than we are currently seeing of the financial relationship between issuer and researchers and a risk warning about the lack of independence and possible resulting bias.

PART 2: AREAS IDENTIFIED AS NON-PRIORITY FOR REVIEW

Double Volume Cap

Question 82. Please specify to what extent you agree with the statements below regarding the experience with the implementation of the Double Volume Cap?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N.A.
The EU intervention been successful in achieving or progressing towards the objective of more transparency in share trading.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The different components of the framework operate well together to achieve more transparency in share trading.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
More transparency in share trading correspond with the needs and problems in EU financial markets.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The DVC has provided EU added value	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 82.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

We reiterate our response to the ESMA Public Consultation on the transparency regime for equity and equity-like instruments below:

BETTER FINANCE acknowledges the necessity of allowing certain large trades to take place outside regulated markets so as to not distort price formation or generate a significant market impact. However, as we pointed out above, and resulting from the essence of such large trades, these must be **exceptional**. In our view, in order to enable capital market structures' full potential, the vast majority of equity trading should be subject to information and protection rules for individual, non-professional investors. Pre- and post-trade data should be available for free and easily accessible at the very least 15 minutes after the trade takes place not only for RMS as it is the case today, but **also for dark venues**, and should cover the entire market, i.e. blue chips/large caps and SMID caps.

In order to increase investor protection and limit dark trading on financial markets – affecting the price formation process, BETTER FINANCE puts forward an alternative recommendation to remove the double-volume cap – which has proved inefficient – and replace it with a much higher large-in-scale threshold, thus simplifying the market structure rules and avoiding the regulatory loophole.

Digitalisation and new technologies

Excerpt short summary: Technology neutrality is one of the guiding principles of the Commission's policies and one of the key objectives of the Commission's Fintech Action Plan. A technology-neutral approach means that legislation should not mandate market participants to use a particular type of technology. It is therefore crucial to address obstacles or identify gaps in existing EU laws which could prevent the take-up of financial innovation or leave certain of the risks brought by these innovations unaddressed. Furthermore, it is evident that digitalisation and new technologies are transforming the financial industry across sectors, impacting the way financial services are produced and delivered, with possible emergence of new business models. The digital transformation can bring huge benefits for the investors as well as efficiencies for industry. To promote digital finance in the EU while properly addressing the new risks it may bring, the Commission is considering proposing a new Digital Finance strategy building on the work done in the context of the FinTech action plan and on horizontal public consultations. The Commission recently published two public consultations focusing on crypto assets and operational resilience in the financial sector, and may consult later this year on further topics in the context of the future Digital Finance strategy. In that context, and to avoid overlapping, this consultation will only focus on targeted aspects, which are not covered by these horizontal consultations. The Commission will of course take into consideration any relevant input received in the horizontal consultations in its future policy work on the MiFID II/MiFIR framework.

Question 86. Where do you see the main developments in your sector: use of new technologies to provide or deliver services, emergence of new business models, more decentralised value chain services delivery involving more cooperation between traditional regulated entities and new entrants or other? Please explain your answer.

BETTER FINANCE welcomes the EC's initiative to develop digital finance and create an environment where the use of artificial intelligence (AI) and digital solutions can flourish in safe, stable conditions and safeguard the rights and interests of individual investors. However, the EC should attempt to better coordinate the parallel consultations – as they concern the same domain – and provide uniform solutions, thus avoiding the “silo” approach characteristic for EU financial regulation.

However, FinTechs – understood as new market entrants enabling innovative solutions – must be ensured a level playing field with incumbents in order to tap on their disruptive potential of traditional market practices. The use of FinTech has many advantages, from lower costs, higher transparency to financial inclusion and increased competition in the market.

Several EU jurisdictions, as well as third-countries, have already taken steps to ensure that FinTech can flourish. This creates uneven development hubs, which may trigger fragmentation of the internal market, through gold-plating, regulatory arbitrage or, on the other hand, lack of action. Already important steps have been taken to enable a safe environment for individual

investors to access the new technologies, such as crowdfunding. However, the approach must be consistent and policy-making must adopt an activity-based regulation of FinTech, which would create a harmonised regime for all start-ups in the internal market.³²

Excerpt explanation: The online environment puts a strong focus on providing products to customers as fast as possible, with as few barriers as possible. As far as financial services are concerned, this might endanger retail clients if they do not take enough time to reflect on purchasing complex financial products. On the other hand, making the product quick and easy to purchase (e.g. speedy or 'one-click' products) makes it easier for clients to buy and sell at least simple investment products online. Taking all of the above into consideration, the Commission would like to gather feedback on whether certain rules in the MiFID II/MiFIR framework on marketing and provision of information to clients should be adjusted to better suit the provision of services online.

Question 90. Do you believe that certain product governance and distribution provisions of the MiFID II/MiFIR framework should be adapted to better suit digital and online offers of investment services and products?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 90.1 Please explain your answer to question 90:

BETTER FINANCE's four editions of the Robo-advice reports highlight the disruptive potential of automated investment advice for individual investors, especially in terms of cost efficiency gains. In the ongoing environment of low capital market returns, FinTech could make a real difference on the actual performance of financial advice and investment management.

The rise of robo-advice holds a lot of promise for individual investors, potentially killing two birds with one stone: enabling EU citizens to invest and hold directly shares and bonds, or low-cost ETFs (as it already happens) and reducing distribution costs.

However, BETTER FINANCE acknowledges the risks related to the replacement of the "human" element with artificial intelligence. The risks relate to the algorithms used to generate the investment advice, to transparency, the often-limited understanding for complex situations and the issue of liability. Our research compared the results of the AI investment advice algorithms, based on the same investor profiles, to uncover significant divergences between the expected returns, equity allocations by platforms. Moreover, the mandatory prominent warning on future performance information is often missing or inadequate. These alarming findings put again the reliability of the algorithms used into question and jeopardize the suitability of the investment advice provided. This serious issue of the reliability of algorithms is of course not specific to robo-advisors, but to any other intermediary using them. They also once again question the validity of using future performance forecasts instead of the far more robust and less misleading long-term past performance relative to the providers' objectives (benchmarks).

The European Commission should consider and propose adapted amendments to accommodate the new technologies and digitalisation for financial services, also as its own 2017 study stated that "in view of upcoming regulations, robo-advisors seem to have significant potential to develop themselves faster and cater to a large potential client base"³³.

³² See Eugenia Macchiavello, 'FinTech Regulation from a Cross-Sectoral Perspective' in V. Colaert, D. Busch, T. Incalza, *European Financial Regulation: Levelling the Cross-Sectoral Playing Field* (2020) Hart Publishing, 63-86.

³³ 2017 EC Study, 141.

Question 91. Do you believe that certain provisions on investment services (such as investment advice) should be adapted to better suit delivering of services through robo-advice or other digital technologies?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 91.1 Please explain your answer to question 91:

The first challenge is to provide clarity on when the use of automated platforms constitutes investment advice or merely distribution. In this sense, ESMA has clarified in its guidelines on suitability that the regime applicable to “human” advisors is the same for robo-advisors. As a first step, the European Commission could add clarity also in MiFID II and specify, for instance in the definition of investment advice of Art. 4(4) of MiFID II.

We believe that the initiative taken with the EU Digital Innovation Hub could be built on and create an EU regulatory sandbox for FinTech and robo-advisors, and that the European Commission should explore this possibility.

PART 3: ADDITIONAL COMMENTS

You are kindly invited to make additional comments on this consultation if you consider that some areas have not been covered above. Please, where possible, include examples and evidence.

Question 94. Have you detected any issues beyond those raised in previous sections that would merit further consideration in the context of the review of MiFID II/MiFIR framework, in particular as regards to the objective of investor Protection, financial stability and market integrity?

Please explain your answer:

- A. Performance and costs disclosure requirements in MiFID II are good sense and adequate ones and are fully compliant with its overarching investor protection rule requiring **clear, fair and not misleading information**, and so much so overarching as it has also been included in IDD for IBIPs. However, these sensible requirements have been nullified at the same time (01/01/2018) by the parallel PRIIPS regulation as far as pre-contractual disclosures are concerned, where several provisions (mostly in level II) violate basic MiFID rules. MiFID II must more clearly state that its requirements supersede any other more specific EU legislative requirements, and therefore the EU must also amend accordingly the PRIIPs Regulation as soon as possible to prevent even more detriment to EU citizens as savers and individual investors. A BETTER FINANCE survey on the application of the newly available disclosure documents showed that less than a half of individual investors feel better informed with the new PRIIPs KID, which is very detrimental.
- B. BETTER FINANCE continuously provides research-based arguments highlighting that the high costs paid for investment products, in particular packaged ones, are significantly harming the returns of individual savers. Costs still represent a very sensitive topic for

transparency and disclosure. While BETTER FINANCE supports indirect “macro” cost-reduction measures (such as consolidating the UCITS/AIF markets to build up economies of scale and streamline the costs for investing), we believe savers should be made more aware of the effects high costs can have on their returns.

Therefore, a prominent warning – drawing the attention to costs– should be present in all investor disclosure documents. The warning follows the same rationale as for the performance sections warning, i.e. to highlight limitations or drawbacks of the elements presented in the disclosure documents. The prominent warning should not distinguish between levels of fees and should not readily indicate whether a product is expensive or not, or whether the costs will negatively affect the returns of the product more than for other products, but it should simply serve the purpose of raising awareness for the individual investor that he or she should pay particular attention to costs. The warning should highlight that higher costs do not entail better performances and that these could reduce (significantly) their long-term returns.

This choice is justified by ample evidence on the effects of costs on the net returns for individual savers. While higher costs do not always mean a less performant product, BETTER FINANCE,³⁴ ESMA³⁵ and other research publications³⁶ indicate that actively managed products return, in net terms, lower yields than passively managed, index products, and this is mainly due to costs. Therefore, we believe that disclosure is not key, as the individual saver will be overwhelmed by the vast amount of information received. Nevertheless, particular attention to certain elements is needed. The individual, non-professional investor also needs “nudging” with regards to certain essential features of investment options, one of them being costs.

- C. Better regulation does not mean more regulation: The regulatory framework is overly complex and impenetrable to retail investors, and burdensome for many professional investors and other market participants. We believe that the recent attempts to harmonise financial law provisions has been a good stepping stone but has resulted in a very complex body of provisions only intelligible to very few individuals and that are interpretable only by a small number of specialised lawyers or compliance professionals. This results in a significant cost and operational burden which, in many instances, outweighs or completely invalidates the protective intention of such legislation. MiFID II and PRIIPs are two clear examples of this.

³⁴ BETTER FINANCE, Study on the Correlation Between Cost and Returns of EU Equity Retail funds, <https://betterfinance.eu/wp-content/uploads/BETTER1.pdf>.

³⁵ ESMA Annual Statistical Report(s): Performance and Costs of Retail Investment Products in the EU, 2019 (<https://op.europa.eu/en/publication-detail/-/publication/b098b6ca-574c-11e9-a8ed-01aa75ed71a1>) and 2020 (https://www.esma.europa.eu/sites/default/files/library/esma50-165-1106-asr-performance_and_costs.pdf) editions.

³⁶ See Vanguard’s Principles for Investing Success (April 2017), page 17, available at: https://about.vanguard.com/what-sets-vanguard-apart/principles-for-investing-success/ICRPRINC_042017_Online.pdf; See the USA Securities Exchange Commission’s Investor Bulletin: How Fees and Expenses Affect Your Investment Portfolio, https://www.sec.gov/investor/alerts/ib_fees_expenses.pdf; Fama, E.F. and K.R. French. 2010. Luck versus Skill in the Cross–Section of Mutual Fund Returns. In: Journal of Finance, 2010, Vol. 65(5), pages 1915–1947.