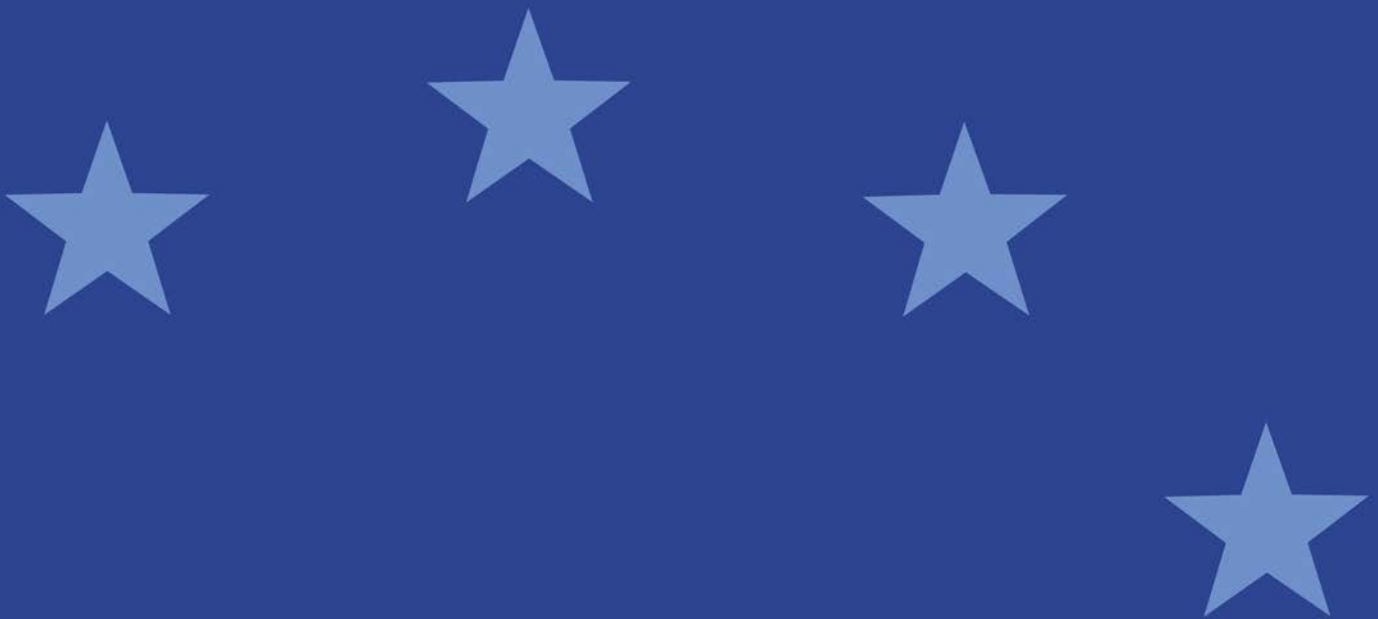




European Securities and
Markets Authority

Reply form for the ESMA MiFID II/MiFIR Consultation Paper



22 May 2014



European Securities and
Markets Authority

Date: 22 May 2014



Responding to this paper

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

Instructions

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

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type <ESMA_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

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

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

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

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

Publication of responses

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

Data protection

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



1. Overview

2. Investor protection

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

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

<ESMA_QUESTION_1>

Yes. Only the combination of the three conditions makes the definition of 'incidental' in line with the spirit of the exemption.

<ESMA_QUESTION_1>

2.2. Investment advice and the use of distribution channels

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

<ESMA_QUESTION_2>

Yes. This is an important point, given the rapid evolution of technology and its uses related to investment advice's distribution channels.

<ESMA_QUESTION_2>

2.3. Compliance function

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

<ESMA_QUESTION_3>

Yes. The draft technical advice constitutes a substantial and necessary improvement to the MiFID Implementing Directive.

<ESMA_QUESTION_3>

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

<ESMA_QUESTION_4>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_4>



2.4. Complaints-handling

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

<ESMA_QUESTION_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_5>

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

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

<ESMA_QUESTION_6>
In the case of financial advice, anonymous remuneration details should be kept, in relation to the number/size of specific products sold (including the details of these products: issuer, etc.). Related remuneration policies should be kept as well.
<ESMA_QUESTION_6>

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

<ESMA_QUESTION_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_7>

2.6. Recording of telephone conversations and electronic communications

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

<ESMA_QUESTION_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_8>

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

<ESMA_QUESTION_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_9>



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

<ESMA_QUESTION_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_10>

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

<ESMA_QUESTION_11>
No.
<ESMA_QUESTION_11>

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

<ESMA_QUESTION_12>
Yes.
<ESMA_QUESTION_12>

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

<ESMA_QUESTION_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_13>

2.7. Product governance

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

<ESMA_QUESTION_14>
The proposed distributor requirements should apply to both primary and secondary markets. From a consumer perspective, it does not make a difference.
<ESMA_QUESTION_14>

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

<ESMA_QUESTION_15>
Yes.
<ESMA_QUESTION_15>

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

<ESMA_QUESTION_16>

Yes, if by 'their experience with the product' is meant issues such as: ability of the distributor to assess if it is suitable and appropriate to its clients, client satisfaction, ability of the client to understand the product, adequacy between the product's 'promises' and its real life experience, etc.

<ESMA_QUESTION_16>

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

<ESMA_QUESTION_17>

In such case, manufacturers should have an obligation to immediately inform the relevant NCA.

<ESMA_QUESTION_17>

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

<ESMA_QUESTION_18>

In such case, distributors should have an obligation to immediately inform the relevant NCA and the clients to whom it sold the product. In case the potential risk arises from a misjudgement by the distributor, the latter shall cover all associated costs – the client must not suffer any cost directly related to a misjudgement by the distributor. Obviously, the client should be offered to resign the related contract at no cost. <ESMA_QUESTION_18>

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

<ESMA_QUESTION_19>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_19>

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

<ESMA_QUESTION_20>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_20>

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

<ESMA_QUESTION_21>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_21>

2.8. Safeguarding of client assets

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

<ESMA_QUESTION_22>

TYPE YOUR TEXT HERE



<ESMA_QUESTION_22>

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

<ESMA_QUESTION_23>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_23>

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

<ESMA_QUESTION_24>

Yes, the examples constitute an inappropriate use of TTCA.

<ESMA_QUESTION_24>

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

<ESMA_QUESTION_25>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_25>

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

<ESMA_QUESTION_26>

Yes.

<ESMA_QUESTION_26>

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

<ESMA_QUESTION_27>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_27>

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

<ESMA_QUESTION_28>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_28>

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

<ESMA_QUESTION_29>

Yes, this proposal is very important.

<ESMA_QUESTION_29>



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

<ESMA_QUESTION_30>

These measures should be extended to all classes of client.

<ESMA_QUESTION_30>

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

<ESMA_QUESTION_31>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_31>

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

<ESMA_QUESTION_32>

Yes, investment firms must evidence the express prior consent of non-retail clients to the use of their financial instruments.

<ESMA_QUESTION_32>

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

<ESMA_QUESTION_33>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_33>

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

<ESMA_QUESTION_34>

Yes.

<ESMA_QUESTION_34>

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

<ESMA_QUESTION_35>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_35>

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

<ESMA_QUESTION_36>

Yes, an intra-group limit deposit limit should be imposed. Yes, an intra-group deposit limit of 20% of client funds is proportionate.



<ESMA_QUESTION_36>

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

<ESMA_QUESTION_37>

Any such exemption should be subject to demonstration that 'other safeguards' are as effective as the 'diversification' requirement – restricting intra-group deposits. <ESMA_QUESTION_37>

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

<ESMA_QUESTION_38>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_38>

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

<ESMA_QUESTION_39>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_39>

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

<ESMA_QUESTION_40>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_40>

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

<ESMA_QUESTION_41>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_41>

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

<ESMA_QUESTION_42>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_42>

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

<ESMA_QUESTION_43>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_43>



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

<ESMA_QUESTION_44>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_44>

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

<ESMA_QUESTION_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_45>

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

<ESMA_QUESTION_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_46>

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

<ESMA_QUESTION_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_47>

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

<ESMA_QUESTION_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_48>

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

<ESMA_QUESTION_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_49>

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

<ESMA_QUESTION_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_50>

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

<ESMA_QUESTION_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_51>

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

<ESMA_QUESTION_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_52>

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

<ESMA_QUESTION_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_53>

2.9. Conflicts of interest

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

<ESMA_QUESTION_54>
Yes. Indeed, the policy might require amendments as potential new forms of conflicts of interest arise. NCAs and ESMA should ensure such policies are appropriate and up-to-date and provide guidelines as to best practices.
<ESMA_QUESTION_54>

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

<ESMA_QUESTION_55>
Conflicts of interest related to inducements, a key issue addressed at level 1, should be made explicit in the measures implementing MiFID II. MiFID II introduces a stricter approach to ensuring inducements received by non-independent advisors are legitimate. Implementing measures should reflect the rationale underlying the new, stricter approach (i.e. the conflicts of interest this approach aims at addressing).
<ESMA_QUESTION_55>

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

<ESMA_QUESTION_56>



TYPE YOUR TEXT HERE
<ESMA_QUESTION_56>

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

<ESMA_QUESTION_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_57>

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

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

<ESMA_QUESTION_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_58>

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

<ESMA_QUESTION_59>
Yes.
<ESMA_QUESTION_59>

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

<ESMA_QUESTION_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_60>

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

<ESMA_QUESTION_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_61>

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

<ESMA_QUESTION_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_62>



2.11. Remuneration

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

<ESMA_QUESTION_63>

Yes

<ESMA_QUESTION_63>

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

<ESMA_QUESTION_64>

Yes but it requires improvements. The positive criteria – the fact that variable remuneration must include a direct link to client satisfaction, the quality of the service provided, the ability to act in the best interest of the client – should be made more explicit. It should be made clear as well that variable remuneration can be collective (not just individual) – and that such collective variable remuneration should be subject to the same provisions as individual variable remuneration.

<ESMA_QUESTION_64>

2.12. Fair, clear and not misleading information

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

<ESMA_QUESTION_65>

Yes. The main element here is the proper balance between indications on benefits and risks. To risks should be added any potential downside of the instrument.

<ESMA_QUESTION_65>

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

<ESMA_QUESTION_66>

Yes, but importantly, the probability of each scenario should be properly reflected in the information, i.e. scenarios must not appear as equivalent in terms of probability if they are not. The most likely scenario should be prominent.

<ESMA_QUESTION_66>

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

<ESMA_QUESTION_67>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_67>



2.13. Information to clients about investment advice and financial instruments

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

<ESMA_QUESTION_68>

Yes but one key element is missing. The fact that the ban of inducements is at the heart of the 'independent' business model should be made clear to clients.

<ESMA_QUESTION_68>

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

<ESMA_QUESTION_69>

Yes.

<ESMA_QUESTION_69>

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

<ESMA_QUESTION_70>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_70>

2.14. Information to clients on costs and charges

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

<ESMA_QUESTION_71>

Yes.

<ESMA_QUESTION_71>

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

<ESMA_QUESTION_72>

Yes?

<ESMA_QUESTION_72>

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

<ESMA_QUESTION_73>

Yes.

<ESMA_QUESTION_73>

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

<ESMA_QUESTION_74>

Yes.

<ESMA_QUESTION_74>

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

<ESMA_QUESTION_75>

Yes, only if the aggregated cash amount and percentage come in addition to the detailed (i.e. 'disaggregated') list of costs. Both are necessary for a proper comparability of products.

<ESMA_QUESTION_75>

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

<ESMA_QUESTION_76>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_76>

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

<ESMA_QUESTION_77>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_77>

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

<ESMA_QUESTION_78>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_78>

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

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

<ESMA_QUESTION_79>

We agree that the list should be exhaustive and cannot think at this point of additional benefits to include.

<ESMA_QUESTION_79>

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

<ESMA_QUESTION_80>

Yes.

<ESMA_QUESTION_80>

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

<ESMA_QUESTION_81>

Yes. In particular, point 10. i. is crucial, in relation with point 11. A fee, commission or non-monetary benefit used to pay or provide goods or services that are essential for the recipient firm in its ordinary course of business constitutes a significant conflict of interest if the range of suitable financial instruments and issuers (hence the number and diversity of origin of these fees, commissions or non-monetary benefits) is not wide enough. One could argue that an 'advisor' whose business model depends on inducements received by one or two issuers, or a narrow range of products, has more of a sales or marketing function. The current proposed technical guidance poses no threats to the open architecture model, as long as the client receives access to a wide range of suitable financial instruments or receives advice on an on-going basis. The financial industry's lobby for the status quo (i.e. a vague and weak 'quality enhancement' test) should be ignored.

<ESMA_QUESTION_81>

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

<ESMA_QUESTION_82>

Any potential additional cost for advisors is largely compensated by the indispensable improvements of MiFID 1 in addressing conflicts of interest related to the payment of inducements. This improvement was a clear focus of the legislator in drafting level 1. Any weakening of the legislator's intention on this point would be a significant failure. The financial industry's lobby for the status quo should be ignored.

<ESMA_QUESTION_82>

2.16. Investment advice on independent basis

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

<ESMA_QUESTION_83>

Yes with some remarks. To be effective, the provision on the diversified selection of financial instruments should read 'by type, issuer and product provider', not 'or product provider'. Furthermore, the selection process should contain an additional 'negative' element: there should be no a priori exclusion of a type or class of instruments.

<ESMA_QUESTION_83>

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

<ESMA_QUESTION_84>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_84>

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

<ESMA_QUESTION_85>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_85>

2.17. Suitability

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

<ESMA_QUESTION_86>
Yes.
<ESMA_QUESTION_86>

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

<ESMA_QUESTION_87>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_87>

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

<ESMA_QUESTION_88>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_88>

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

<ESMA_QUESTION_89>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_89>

2.18. Appropriateness

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

<ESMA_QUESTION_90>
TYPE YOUR TEXT HERE



<ESMA_QUESTION_90>

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

<ESMA_QUESTION_91>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_91>

2.19. Client agreement

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

<ESMA_QUESTION_92>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_92>

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

<ESMA_QUESTION_93>

Yes.

<ESMA_QUESTION_93>

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

<ESMA_QUESTION_94>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_94>

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

<ESMA_QUESTION_95>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_95>



2.20.

2.21. Reporting to clients

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

<ESMA_QUESTION_96>

Yes.

<ESMA_QUESTION_96>

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

<ESMA_QUESTION_97>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_97>

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

<ESMA_QUESTION_98>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_98>

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

<ESMA_QUESTION_99>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_99>

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

<ESMA_QUESTION_100>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_100>



2.22. Best execution

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

<ESMA_QUESTION_101>

Article 27 of MiFID II states that 'Member States shall require that investment firms take all sufficient steps to obtain [...] the best possible results for their clients [...]'. In order to avoid the significant potential conflicts of interest within today's market structure, it is crucial that ESMA clarifies what is meant by 'all sufficient steps' – and a minima gives examples of what is considered to meet (positive examples) or fail (negative examples) the 'all sufficient steps' test. What is at stake is to make best execution a reality – from the noble but illusory concept it is today.

<ESMA_QUESTION_101>

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

<ESMA_QUESTION_102>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_102>

2.23. Client order-handling

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

<ESMA_QUESTION_103>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_103>

2.24. Transactions executed with eligible counterparties

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

<ESMA_QUESTION_104>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_104>

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

<ESMA_QUESTION_105>



TYPE YOUR TEXT HERE
<ESMA_QUESTION_105>

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

<ESMA_QUESTION_106>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_106>



2.25. Product intervention

Q107: Do you agree with the criteria proposed?

<ESMA_QUESTION_107>

Yes.

<ESMA_QUESTION_107>

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

<ESMA_QUESTION_108>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_108>



3. Transparency

3.1. Liquid market for equity and equity-like instruments

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

<ESMA_QUESTION_109>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_109>

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

<ESMA_QUESTION_110>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_110>

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

<ESMA_QUESTION_111>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_111>

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

<ESMA_QUESTION_112>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_112>

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

<ESMA_QUESTION_113>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_113>

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

<ESMA_QUESTION_114>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_114>



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

<ESMA_QUESTION_115>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_115>

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

<ESMA_QUESTION_116>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_116>

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

<ESMA_QUESTION_117>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_117>

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

<ESMA_QUESTION_118>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_118>

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

<ESMA_QUESTION_119>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_119>

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

<ESMA_QUESTION_120>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_120>

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

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

<ESMA_QUESTION_121>
TYPE YOUR TEXT HERE



<ESMA_QUESTION_121>

3.3. The definition of systematic internaliser

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

<ESMA_QUESTION_122>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_122>

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

<ESMA_QUESTION_123>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_123>

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

<ESMA_QUESTION_124>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_124>

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

<ESMA_QUESTION_125>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_125>

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

<ESMA_QUESTION_126>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_126>

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



<ESMA_QUESTION_127>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_127>

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

<ESMA_QUESTION_128>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_128>

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

<ESMA_QUESTION_129>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_129>

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

<ESMA_QUESTION_130>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_130>

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

<ESMA_QUESTION_131>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_131>

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

<ESMA_QUESTION_132>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_132>

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

<ESMA_QUESTION_133>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_133>



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

<ESMA_QUESTION_134>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_134>

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

<ESMA_QUESTION_135>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_135>

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

<ESMA_QUESTION_136>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_136>

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

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

<ESMA_QUESTION_137>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_137>

3.5. Exceptional market circumstances and conditions for updating quotes

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

<ESMA_QUESTION_138>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_138>

3.6. Orders considerably exceeding the norm



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

<ESMA_QUESTION_139>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_139>

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

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

<ESMA_QUESTION_140>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_140>

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

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

<ESMA_QUESTION_141>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_141>

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

<ESMA_QUESTION_142>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_142>

4. Data publication

4.1. Access to systematic internalisers' quotes

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

<ESMA_QUESTION_143>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_143>

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

<ESMA_QUESTION_144>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_144>

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

<ESMA_QUESTION_145>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_145>

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

<ESMA_QUESTION_146>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_146>

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

<ESMA_QUESTION_147>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_147>

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

<ESMA_QUESTION_148>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_148>

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

<ESMA_QUESTION_149>
Yes.
<ESMA_QUESTION_149>



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

<ESMA_QUESTION_150>

Yes.

<ESMA_QUESTION_150>

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

<ESMA_QUESTION_151>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_151>

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

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

<ESMA_QUESTION_152>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_152>

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

<ESMA_QUESTION_153>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_153>

4.3. Reasonable commercial basis (RCB)

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

<ESMA_QUESTION_154>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_154>

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

<ESMA_QUESTION_155>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_155>

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

<ESMA_QUESTION_156>



TYPE YOUR TEXT HERE
<ESMA_QUESTION_156>

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

<ESMA_QUESTION_157>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_157>

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

<ESMA_QUESTION_158>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_158>

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

<ESMA_QUESTION_159>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_159>

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

<ESMA_QUESTION_160>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_160>

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

<ESMA_QUESTION_161>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_161>

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

<ESMA_QUESTION_162>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_162>

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

<ESMA_QUESTION_163>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_163>

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

<ESMA_QUESTION_164>
TYPE YOUR TEXT HERE



<ESMA_QUESTION_164>

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

<ESMA_QUESTION_165>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_165>

Q166: If yes, in which circumstances?

<ESMA_QUESTION_166>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_166>

5. Micro-structural issues

5.1. Algorithmic and high frequency trading (HFT)

Q167: Which would be your preferred option? Why?

<ESMA_QUESTION_167>

Option 2. For two main reasons: 1) it is likely to include more actors in the definition of HFT (criteria's included in Option 1 are easier to circumvent) 2) contrary to Option 1, Option 2 does not require a frequent update of its criteria's (for which ESMA would not have the mandate anyway).

<ESMA_QUESTION_167>

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

<ESMA_QUESTION_168>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_168>

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

<ESMA_QUESTION_169>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_169>

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

<ESMA_QUESTION_170>

We agree with taking into account only orders sent for liquid instruments.

<ESMA_QUESTION_170>

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

<ESMA_QUESTION_171>

Yes, this provision is crucial.

<ESMA_QUESTION_171>

5.2. Direct electronic access (DEA)

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

<ESMA_QUESTION_172>

TYPE YOUR TEXT HERE



<ESMA_QUESTION_172>

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

<ESMA_QUESTION_173>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_173>

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

<ESMA_QUESTION_174>

In principle, no. But a thorough examination is required to assess if this could constitute a potential loophole – i.e. if indeed electronic order transmission systems permit algorithmic trading techniques.

<ESMA_QUESTION_174>

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

<ESMA_QUESTION_175>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_175>

6. Requirements applying on and to trading venues

6.1. SME Growth Markets

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

<ESMA_QUESTION_176>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_176>

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

<ESMA_QUESTION_177>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_177>

Q178: Do you agree with the approach described above (in the box Fehler! Verweisquelle konnte nicht gefunden werden.), that only falling below the qualifying 50% threshold for a number of three consecutive years could lead to deregistration as a SME-GM or should the period be limited to two years?

<ESMA_QUESTION_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_178>

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

<ESMA_QUESTION_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_179>

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

<ESMA_QUESTION_180>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_180>

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

<ESMA_QUESTION_181>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_181>



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

<ESMA_QUESTION_182>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_182>

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

<ESMA_QUESTION_183>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_183>

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

<ESMA_QUESTION_184>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_184>

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

<ESMA_QUESTION_185>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_185>

Q186: Do you agree with Fehler! Verweisquelle konnte nicht gefunden werden., Fehler! Verweisquelle konnte nicht gefunden werden. or Fehler! Verweisquelle konnte nicht gefunden werden. Fehler! Verweisquelle konnte nicht gefunden werden.?

<ESMA_QUESTION_186>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_186>

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

<ESMA_QUESTION_187>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_187>

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

<ESMA_QUESTION_188>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_188>

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

<ESMA_QUESTION_189>



TYPE YOUR TEXT HERE
<ESMA_QUESTION_189>

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

<ESMA_QUESTION_190>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_190>

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

<ESMA_QUESTION_191>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_191>

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

<ESMA_QUESTION_192>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_192>

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

<ESMA_QUESTION_193>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_193>

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

<ESMA_QUESTION_194>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_194>

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

<ESMA_QUESTION_195>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_195>

Q196: Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph Fehler! Verweisquelle konnte nicht gefunden werden.) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?



<ESMA_QUESTION_196>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_196>

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

<ESMA_QUESTION_197>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_197>

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

<ESMA_QUESTION_198>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_198>

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

<ESMA_QUESTION_199>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_199>

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

<ESMA_QUESTION_200>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_200>

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

<ESMA_QUESTION_201>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_201>

6.2. Suspension and removal of financial instruments from trading

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

<ESMA_QUESTION_202>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_202>

Q203: Do you agree that NCAs would also need to consider the criteria described in paragraph Fehler! Verweisquelle konnte nicht gefunden werden. Fehler! Verweisquelle konnte nicht gefunden werden. and Fehler! Verweisquelle konnte nicht gefunden werden., when making an assessment of relevant costs or risks?

<ESMA_QUESTION_203>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_203>

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

<ESMA_QUESTION_204>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_204>

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

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

<ESMA_QUESTION_205>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_205>

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

<ESMA_QUESTION_206>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_206>

6.4. Monitoring of compliance – information requirements for trading venues

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

<ESMA_QUESTION_207>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_207>



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

Q208: Do you support the approach suggested by ESMA?

<ESMA_QUESTION_208>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_208>

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

<ESMA_QUESTION_209>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_209>

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

<ESMA_QUESTION_210>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_210>

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

<ESMA_QUESTION_211>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_211>

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

<ESMA_QUESTION_212>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_212>

7. Commodity derivatives

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

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

<ESMA_QUESTION_213>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_213>

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

<ESMA_QUESTION_214>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_214>

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

<ESMA_QUESTION_215>

It is imperative that ESMA maintains its position with respect to optionality articulated in paragraph 12 (p. 279 in the consultation paper): there must be *no* option for either party to replace physical delivery with cash settlement in order that a contract be considered one which must be physically settled.

Importantly, this includes the ability to offset physical delivery across regions with payment of a cash basis, as is commonly practiced in power and gas markets today using a combination of spot and day-ahead markets.

For example, a company with a plant in the Netherlands contacted to supply power in Belgium and a Belgian company contracted to supply power in the Netherlands might offset their delivery obligations in exchange for a cash payment equal to the difference in market rates at the two locations. This is operationally equivalent to a basis swap between power at those two locations, and is therefore a paradigm example of an energy derivatives contract.

A significant loophole arises if such contracts are characterized as "must be physically settled" since they can operate exactly like a basis swap (and indeed are usually used as such). Yet should they be so classed, they would fall outside of the scope of MiFID II, including the position limits and transparency regimes necessary to ensure fair markets. Given the recent high profile price fixing scandals in these markets, such a gap in their regulation would be entirely inappropriate. For electricity, see:

http://www.nytimes.com/2011/12/14/nyregion/4-8-million-sought-from-morgan-stanley-in-electricity-price-fixing-case.html?_r=0; for natural gas see:

<http://www.nbcnews.com/id/55552204/ns/politics/t/high-court-hear-natural-gas-price-fixing-claims/#.U9ZEnLGiI74>

<ESMA_QUESTION_215>

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

<ESMA_QUESTION_216>

Operational netting involves the practice of offsetting physical delivery across regions with payment of a cash basis, a practice which may involve transactions in the spot and day-ahead markets as well as bilateral agreements. The practice is so widespread that in general only a small minority of physical delivery contracts in the natural gas and electricity markets are actually delivered on. See also:

<https://www.iit.upcomillas.es/docs/TM-08-110.pdf>.

For example, a company with a plant in the Netherlands contacted to supply power in Belgium and a Belgian company contracted to supply power in the Netherlands might offset their delivery obligations in exchange for a cash payment equal to the difference in market rates at the two locations. This is operationally equivalent to a basis swap between power at those two locations, and is therefore a paradigm example of an energy derivatives contract.

<ESMA_QUESTION_216>

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

<ESMA_QUESTION_217>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_217>

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

<ESMA_QUESTION_218>

The concept of force majeure has a robust legal literature surrounding it. The extension to “other bona fide inability to settle” poses some interpretive difficulties. What is clear is that the intent is to rule out financial elements, such as optionality, as a reason for non-performance. Recital (10) in the Directive's text explicitly states that the exclusion for contracts that *must* be physically settled “should be limited to avoid a loophole that may lead to regulatory arbitrage”.

The key test must be whether any such clause is related to unforeseeable hazards, rather than market- or business-related risks. For instance, a clause allowing cash settlement under conditions of extreme market volatility is in fact an embedded option, not a *bona fide* “inability to settle” clause. Legitimate unforeseeable hazards include: natural disasters, failure of major infrastructure, geopolitical crises. Financial clauses that should not be allowed include: changes in supply and demand conditions, changes in price, fluctuations in interest rates, inflation rates, foreign exchange rate or credit risks, default of a third party or intermediary.

<ESMA_QUESTION_218>

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

<ESMA_QUESTION_219>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_219>

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

<ESMA_QUESTION_220>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_220>

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

<ESMA_QUESTION_221>
The definition should be strengthened to mirror other similar clauses in MiFID II by adding the expression “objectively measurable as” before “necessary to keep in balance the supplies and uses of energy at a given time”. With the dramatic increase in size of OTC derivatives markets in recent years and the high stakes associated with avoiding regulation, such an inclusion would limit the exemption to legitimate use of contracts for commercial purposes.
<ESMA_QUESTION_221>

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

<ESMA_QUESTION_222>
Clearing is not an appropriate component of a definition of derivative instruments for the reasons outlined in the text: it creates a circularity, whereby the statute requires derivatives to be cleared, but defines derivatives as instruments that are already cleared.
<ESMA_QUESTION_222>

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

<ESMA_QUESTION_223>
Standardisation in the derivatives markets is far more widespread than the industry would have people believe. At present, the text suggests that “a contract should be considered as standardised if parameters such as the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates” (Consultation Paper, p. 288). This list is a fair approximation of terms that can be standardised, but should be amended to include the following rider: any contract that can be perfectly hedged with some combination of other standardized instruments should also be classed as standardized.

For instance, a long OTC forward with a non-standard lot (say, 125 tonnes of wheat) priced at a fixed differential from the futures contract can be perfectly hedged using exchange traded contracts (in this case, with 2 futures and an at-the-money call option). It should therefore be considered a standardised derivative, and thus a financial instrument.

<ESMA_QUESTION_223>

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

<ESMA_QUESTION_224>
TYPE YOUR TEXT HERE



<ESMA_QUESTION_224>

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

<ESMA_QUESTION_225>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_225>

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

<ESMA_QUESTION_226>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_226>

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

<ESMA_QUESTION_227>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_227>

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

<ESMA_QUESTION_228>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_228>

7.2. Position reporting thresholds

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

<ESMA_QUESTION_229>

There is no need to require a minimum of 30 participants before reporting is mandated. In the latest US Commitments of Traders,¹ for example, there are as few as 20 reporting traders in Mini Soybeans and 22 in Dry Milk. In the energy complex, a significant number of contracts have fewer than 30 reporting traders, including 1.0% sulphur fuel with 25, 3% fuel oil with 24, and WTI crude oil calendar swaps with 26. These reports are essential to bring transparency to the relationship between the physical and derivatives markets.

Indeed, when the CFTC sought public comment on whether it should cease publishing the Commitments of Traders for less popular contracts, there was unanimous rejection of the idea from stakeholders across

¹ <http://www.cftc.gov/MarketReports/CommitmentsOfTraders/Index.htm> (as of July 15th 2014)

the spectrum, including exchanges, individual hedgers, academics, and trade associations.² In fact, requests were made for more granular, more frequent data on a broader range of markets, specifically those with fewer reporting traders, due to the utility of such information in plugging information gaps that generate markets asymmetries.³ Tighter markets may, in fact, benefit even more than larger ones from the publication of data that enables producers and consumers to distinguish physical market-driven trends from those that are speculative in nature.⁴

Notably, the only dissenting voice during the CFTC review was ISDA, representing the largest swap dealers and banks,⁵ for whom increased transparency was and still is anathema, despite the fact that it is clearly and explicitly enshrined as a core value of MiFID II. At the time of the CFTC review, large swap dealers were benefitting from the fact that they were classed as commercial traders in the Commitments of Traders reports, hiding their vast commodity indexing programs (which, it later emerged, accounted for over 50% of open interest in some key commodities including wheat),⁶ and avoiding position limits in the process.

Public reporting must therefore tend towards *greater* transparency than the United States, rather than less. Comprehensive Commitments of Traders data must be made available in as many markets as possible. Moreover, this information must be easily accessible to the public, not just competent authorities. Unless such information is publicly disseminated, it will be useless for improving price discovery through closing informational gaps, and will be invisible to academics, civil society, and the general public, whose ability to scrutinize of the markets that set the prices of their food and energy should be considered a basic right.

Nor will it suffice to say that more granular information will be available to academics behind closed doors. Such a program was begun in the United States, but its findings were quickly suppressed when they clashed with the interests of some powerful exchanges.⁷

Although ICE Futures Europe hosts more energy trading than its US counterparts,⁸ listed agricultural derivatives and other essential contract are far less developed in Europe.⁹ This relative fragmentation means it is likely that many markets will have fewer reporting traders than in the United States. A threshold of 10 or 20 reporting traders is therefore more appropriate, since even in the United States a significant number of markets have fewer than 30 reporting traders.

<ESMA_QUESTION_229>

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

<ESMA_QUESTION_230>

There is no reason to wait until derivatives outstrip deliverable supply by a factor of 4 before reporting requirements kick in. Derivatives open interest equal to deliverable supply is ample grounds for reporting requirements, since it suggests that in theory all available supply is already accounted for. Should a significant proportion of participants choose to take delivery in such a scenario, the impact on the market would

² <http://www.cftc.gov/files/cftc/cftcnoticeonsupplementalcotreport.pdf>, 3-5

³ Id.

⁴ http://unctad.org/meetings/en/Presentation/SUC_GCF2013_19-03-2013_Stephane%20GRABER.pdf

⁵ Op Cit.

⁶

<http://www.hsgac.senate.gov//imo/media/doc/REPORTExcessiveSpeculationintheWheatMarketwoexhibitschartsJune2409.pdf>

⁷ <http://www.reuters.com/article/2013/04/24/cftc-cme-research-idUSL2NOD91IT20130424>

⁸ <https://www.theice.com/futures-europe>

⁹ For instance, <http://www.cmegroup.com/education/files/bottom-line-vs-top-of-book-eurodollar-futures-at-cme-and-elsewhere.pdf>

be substantial. Therefore, the ability for the public and market participants to monitor a market with derivatives open interest equal to deliverable supply is important.

At the very least, ESMA should not consider raising the threshold above the current proposal. It is true that the most liquid derivatives markets have many times more open interest than deliverable supply. But ESMA must not risk losing transparency in the less liquid markets simply because the largest markets are so developed.

Finally, the accurate calculation of open interest is crucial for determining when the threshold has been met. This should not be artificially reduced by allowing OTC market participants to apply a delta of 0.5 for all derivatives that do not have an exchange-published delta. A delta of 0.75 would be more appropriate: 0.5 to reflect the theoretical delta of an at-the-money option, plus an opacity premium of 0.25.

<ESMA_QUESTION_230>

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

<ESMA_QUESTION_231>

Once the reporting threshold is breached, reporting should begin immediately as part of reports published at least weekly. After this, the reporting should remain for at least 6 months, if not a year. The fact a contract breaches the reporting threshold is a clear indicator that it is an actively traded contract, and must therefore be publicly monitored even if trading drops temporarily below the threshold. Transparency in derivatives markets was one of the key principles underlying the G-20's OTC reform agenda.¹⁰ The emphasis must therefore be towards inclusiveness of reporting. A single quarter of reporting represents a mere snapshot, whereas a year of data would give the public the opportunity properly to study the state of the market over time.

<ESMA_QUESTION_231>

7.3. Position management powers of ESMA

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

<ESMA_QUESTION_232>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_232>

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

<ESMA_QUESTION_233>

ESMA is empowered to intervene in cases where a competent authority has failed to act, or where a competent authority lacks the mandate to act. Such interventions are limited to cases where a threat exists "to the orderly functioning and integrity of financial markets." The intervention may include requiring liquidation of positions by individual traders or groups thereof.¹¹

The key factor missing from the discussion is the fact that imbalance between hedging and speculating is a key source of disruption to the orderly functioning and integrity of the commodity markets. This is despite the fact that the Regulation directs ESMA to consider "the degree to which positions are used to hedge

¹⁰ http://www.financialstabilityboard.org/publications/r_130902a.pdf

¹¹ Consultation Paper, 298

positions in physical contracts or commodity contracts and the degree to which prices in underlying markets are set by reference to the prices of commodity derivatives.”¹²

In many agricultural and energy commodities, prices in the physical market are pegged to benchmark futures contracts.¹³ Consequently, it is essential that futures prices reflect fundamental supply and demand, which will no longer be the case if financial trading outweighs hedging by actual consumers and producers. For this reason, ESMA must clarify that it will intervene if such a scenario arises.

<ESMA_QUESTION_233>

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

<ESMA_QUESTION_234>

Commodity markets serve a fundamentally different economic function from that of financial markets. Unlike pure financial markets, commodity markets are not based on cash flow of assets but on the fundamental utility derived from consumption of the commodities traded. A barrel of oil or tonne of wheat produces no cash flow outside of changes in value arising from changes in supply and demand. Consequently, it is essential that commodity derivatives prices reflect underlying supply and demand of the commodity in question rather than the trading patterns and strategies of financial investors. This can be considered *the* fundamental purpose of those markets, since without it hedges become unreliable, and significant economic costs are incurred. Therefore, a “threat to the orderly functioning and integrity of... commodity markets” is present in any situation where price formation is likely to be transferred from consumers and producers of the commodity to other market participants such as financial traders.

Criterion i of Paragraph 10 recognizes this when it highlights “an efficient and fair method of price discovery through the matching of supply and demand.”¹⁴ Nevertheless, this should be clarified by adding that in cases where the underlying commodity is a foodstuff, energy product, or key industrial input, proper market function also includes “price discovery that reflects fundamental supply and demand of the underlying commodity by end users as distinct from non-commercial traders.”

Similarly, since a threat to the orderly functioning and integrity of a commodity market arises when majority open interest ownership is transferred from commercial participants to non-commercial,¹⁵ factor iii of paragraph 11 alone is insufficient to prevent a failure of price discovery being triggered by a breakdown in market composition. A suitable addition would be the following:

v. a majority of open interest ownership being held by non-commercial market participants.

<ESMA_QUESTION_234>

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

<ESMA_QUESTION_235>

Unlike pure financial markets, commodity markets are not based on cash flow of assets but on the fundamental utility derived from consumption of the commodities traded. A barrel of oil or tonne of wheat produces no cash flow outside of changes in value arising from changes in supply and demand. Consequently, it is essential that commodity derivatives prices reflect underlying supply and demand of the commodity in question rather than the trading patterns and strategies of financial investors. This can be considered *the* fundamental purpose of those markets, since without it hedges become unreliable, and significant economic costs are incurred. Therefore, a “threat to the orderly functioning and integrity of...

¹² MiFIR 45(10)

¹³ <http://www.platts.com/IM.Platts.Content/InsightAnalysis/IndustrySolutionPapers/moc.pdf>

¹⁴ Consultation Paper, 301

¹⁵ <http://www.loe.org/images/content/080919/Act1.pdf>

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Similarly, since a threat to the orderly functioning and integrity of a commodity market arises when majority open interest ownership is transferred from commercial participants to non-commercial,¹⁷ factor iii of paragraph 11 alone is insufficient to prevent a failure of price discovery being triggered by a breakdown in market composition. A suitable addition would be the following:

v. a majority of open interest ownership being held by non-commercial market participants.
<ESMA_QUESTION_235>

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

<ESMA_QUESTION_236>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_236>

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

<ESMA_QUESTION_237>

The language cited is a direct reference to the primary purpose of listed commodity derivatives markets: as hedging venues, and central price setters for the underlying physical markets. It directly implies that a market in which positions are primarily used for speculative purposes, and in which this thereby impacts the price of the underlying physical commodity, is dysfunctional.

Therefore, to fulfil the mandate set forth in the Regulation, ESMA should make explicit that it will intervene in cases where positions in a commodity market are primarily used for speculation rather than hedging.

<ESMA_QUESTION_237>

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

<ESMA_QUESTION_238>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_238>

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

<ESMA_QUESTION_239>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_239>

¹⁶ Consultation Paper, 301

¹⁷ <http://www.loe.org/images/content/080919/Act1.pdf>



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

<ESMA_QUESTION_240>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_240>

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

<ESMA_QUESTION_241>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_241>

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

<ESMA_QUESTION_242>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_242>

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

<ESMA_QUESTION_243>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_243>



8. Portfolio compression

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

<ESMA_QUESTION_244>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_244>

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

<ESMA_QUESTION_245>
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<ESMA_QUESTION_245>