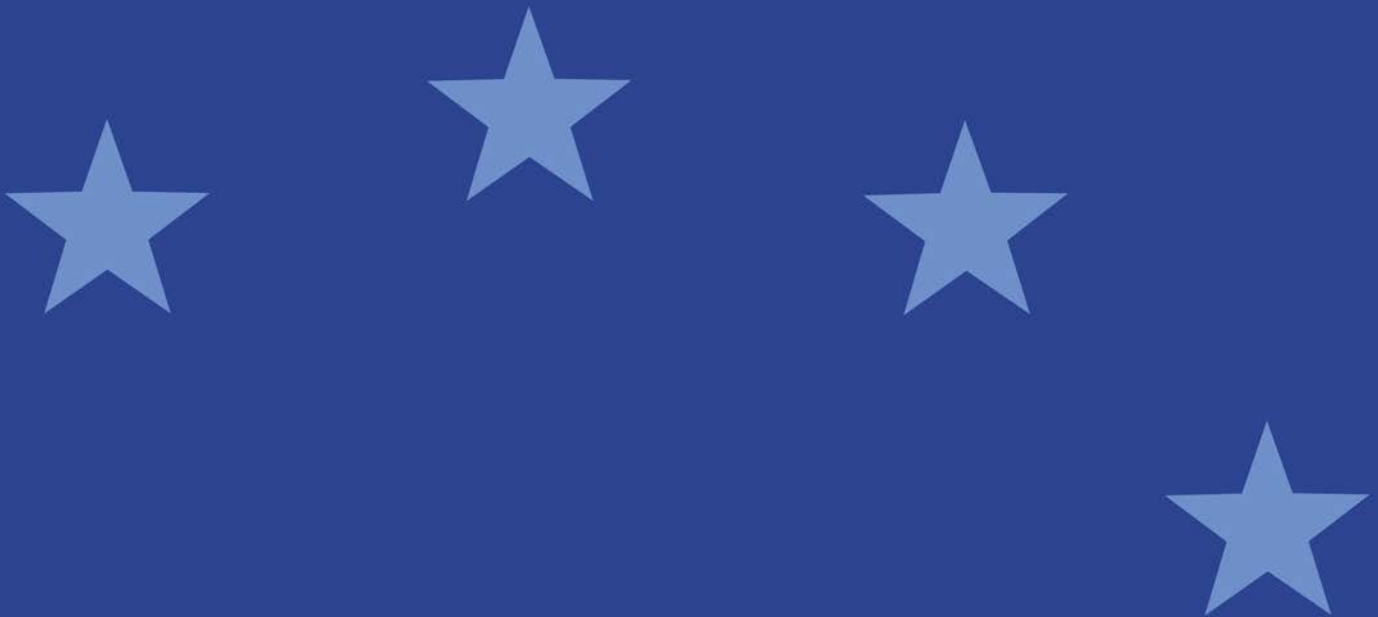




European Securities and  
Markets Authority

Anlage 3

# **Reply form for the ESMA MiFID II/MiFIR Consultation Paper**



22 May 2014



European Securities and  
Markets Authority

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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](http://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](http://www.esma.europa.eu) under the heading ‘Disclaimer’.



## 1. Overview

## 2. Investor protection

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

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

<ESMA\_QUESTION\_1>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_1>

### 2.2. Investment advice and the use of distribution channels

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

<ESMA\_QUESTION\_2>

No, the EBF does not agree that this change is appropriate. We agree that the current text: "A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public" could be misinterpreted. However the removal of "through distribution channels" may unintentionally widen the scope of personal recommendations.

Internet and web-based applications, mail and other distribution channels are also an important way to distribute general recommendations. It must therefore be avoided that these type of activities (web-based applications, mail and other distribution) could fall under a future regime which will wrongly consider them investment advice. An amendment of the definition should therefore focus on the nature of the recommendation and not on the channel used to provide it. A clarification could be made by stating that when advice is widely disseminated with no indication that the recommendation is 'personal' then it should not be considered as a personal recommendation. Thus general recommendations usually provided nowadays through distribution channels such as the internet to the public or specific client constituencies of an entity will remain outside the scope of investment advice.

That would be the way to address the main problem: when a recommendation is personal or general irrespectively of the distribution channel. In that sense, EBF proposes the following definition of investment advice which would be keeping Implementing Directive Article 52 wording except last paragraph:

"A recommendation is not a personal recommendation if it is issued to the public or to a group of persons considering their characteristics as a group without personal adaptation to its members considering the personal characteristics of each of its members"

With this wording:



- Personal recommendations made through distribution channels as internet will be captured by the definition of investment advice achieving the goal defined by ESMA on its Consultation Paper;
- General recommendations made (normally through distribution channels) to the public or to specific client areas of an entity (to private banking clients, to all export/import entities, to every professional client, etc.) will be left outside the scope of investment advice, increasing the legal certainty to the entities providing such general recommendations.

<ESMA\_QUESTION\_2>

### **2.3. Compliance function**

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

<ESMA\_QUESTION\_3>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_3>

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

<ESMA\_QUESTION\_4>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_4>

### **2.4. Complaints-handling**

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

<ESMA\_QUESTION\_5>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_5>

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

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

<ESMA\_QUESTION\_6>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_6>



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

<ESMA\_QUESTION\_7>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_7>

## **2.6. Recording of telephone conversations and electronic communications**

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

<ESMA\_QUESTION\_8>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_8>

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

<ESMA\_QUESTION\_9>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_9>

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

<ESMA\_QUESTION\_10>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_10>

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

<ESMA\_QUESTION\_11>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_11>

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

<ESMA\_QUESTION\_12>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_12>

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

<ESMA\_QUESTION\_13>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_13>

## 2.7. Product governance

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

<ESMA\_QUESTION\_14>

No. The EBF would like to recall that the Product Governance Rules are aimed at implementing the so-called Know your Merchandise Principle so as to avoid mis-selling of your products. Whilst a product provider is able to exert a certain amount of influence on the primary market (i.e. by appointing distributors and by putting in place restrictions and guidelines as to who those distributors can sell to), a product provider has no means of control over the secondary market (and any suggestion that they do rather goes against the nature of a transferable security). Product providers cannot influence the further distribution on a secondary market beyond what they can do on the first level at the primary market, i.e. set out in the design for what type of clients the product is intended, etc. It is then the obligation of the further distributors to ensure that obligations are passed on in the distributor chain.

For this reason, the Federation suggests to limit the application of such rules to the Primary Market products only where the relationship with issuers/products providers (in one word, manufacturers) can be actually established and managed by distributors. Irrespective of this, it should be made clear what range of products the requirements are relevant for. Some instruments will not require the same level of detailed review / information exchange / other arrangements. Therefore, any new requirement should be subject to the principle of proportionality and reasonableness.

Furthermore, the requirement to undertake such distributor responsibilities should not apply in case of client initiated "Execution Only"-transactions. ESMA should confirm and specify in its proposed technical advice that Execution only services and transactions are excluded from these requirements.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

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

No, if this implies the mandatory appointment of a dedicated officer whose position does not already exist or if this implies the establishment of entirely new and separate functions which are not already part of the current compliance organisation of an investment firm.

We believe that the regulatory regime already in place and further strengthened in MiFID2 is sufficient to safeguard client assets. Mandating the establishment of a new distinct function would unnecessarily add regulatory burden and staff costs for smaller firms but also larger investment firms which operate in a less complex regulatory environment.

The EBF however welcomes that point 2 in the draft technical advice allows investment firms to decide the arrangements with regards to proportionality. A possible improvement of point 2 could be to replace “the compliance officer” with “the relevant compliance officer(-s) (or the compliance function)” in order to better reflect that several persons may be involved. Investment firms are also committed at ensuring a



constant dialogue within financial institutions between the different departments involved in the safeguarding of clients' financial instruments and funds.

The EBF furthermore makes the observation that (i) MiFID I implementing directive 2006/73/EC article 20 already requires yearly report by external auditors firms arrangements in this respect; and (ii) the root causes of many recent client asset safeguarding failures have been in the failure of the firm to effectively ingrain and incorporate their client asset obligations into the day-to-day business operations.

Finally, the EBF would recommend to keep definitions as clear as possible. Key concepts like "client instruments" and "funds" should be clearly defined by referring to MiFID level 1 legislation and other EU laws where relevant. These concepts should be used with consistency and the creation of new ambiguous categories, such as "client assets", should be avoided at the most.

<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>

If it does not yet exist, the creation of a separate function that would largely duplicate the tasks of other functions (e.g. compliance or network management) may prove to be unnecessarily costly and of little added-value.

<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>

Despite the fact that most civil laws at national level already protect clients from excessive collateralization, the EBF would like to make the following comments:

We do not believe that further provisions pertaining to TTCAs with non-retail clients should be introduced in MiFID2 level 2 measures. TTCA are already dealt with by the Directive on Financial Collateral Arrangements (Directive 2002/47/EC) whose scope provides a comprehensive framework for the recognition and enforcement of ownership rights in collateral arrangements between non-retail counterparties. We are concerned by the risk of fragmentation and partial overlaps if these are also covered in MiFID2 level 2 measures.

We would also like to mention that TTCAs are commonly used in a different context than described in the Draft Technical Advice (TA). TTCAs are mainly used in connection with repurchase agreements (so-called 'repos') and margining. Repos serve the purpose of securing treasury activities and liquidity management. Margining is required in order to collateralize derivatives transactions and to fulfil clearing obligations, thus they meet legal requirements. Such TTCA transactions also need to be legally executed by title transfer, i.e. transfer of ownership, and they always have a strong connection between the client's liability and the value of the client's financial instrument which serves as collateral. We would therefore welcome clarification in the TA that TTCAs are not deemed inappropriate when they are used for repo transactions or in connection with the collateralization of derivatives transactions (margining). This should be at least the case when such transactions are concluded under a standard master agreement or under the internal rules of a trading venue. This is particularly necessary in view of the fact that regulatory developments may extend clearing and/or margin requirements and request certain haircuts on collateral which might be problematic with regard to 3.ii TA.

MIFID2 already provides in its Article 16 paragraph 11 sub-para 2 the right for Members States to take additional measures to the provision set out in Article 16 paragraph 10 in certain exceptional circumstances. Such measures should be disclosed to the European Commission and should be proportionate and

justified. We think that the proposal to introduce quasi suitability test for professional clients in level 2 rules is not at all compatible with the primary legislation.

Professional clients and eligible counterparties should not be submitted to any suitability tests, precisely because they are professional. Also, the proposed criteria for suitability are inadequate in the context of high volume business involving volatile markets, daily yet unpredictable margin calls, changing volumes in clearing and settlement.

Imposing at this stage general new requirements when concluding TTCA with non-retail clients would limit investment firms' options for managing and mitigating their credit risk to non-retail clients and is likely to lead to an increase in the cost of credit provided to such clients. In particular, collateral transferred in this way is often used by the investment firms to lower the cost of funding obtained in support of client activities. Any such change would amount to a fetter on the ability of professional clients to negotiate their assets and liabilities as they see appropriate. For instance ICMA recently issued a report that explained the crucial need for collateral fluidity<sup>1</sup>.

Finally, the EBF believes that the prohibition on the use of TTCA for retail clients is not inappropriate except where the client agrees that the asset remains in TTCA as part of their client agreement (this may be to secure lower funding costs and narrower spreads). Instead, we suggest focusing on the drafting of proposals regarding compulsory information when non-retail clients enter into transactions involving provision of collateral, as this could be reinforced.

<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>

*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?*

The EBF believes that this matter should be governed by the principle of freedom of contract. The reason for prohibiting investment firms to conclude TTCA with retail clients is that a retail client should not be exposed to the risk of losing his claim of re-delivery of the financial instrument which could serve as collateral in a very broad way in case of an insolvency of the investment firm<sup>2</sup>. Only in cases where such a concern arises, it seems reasonable to consider the appropriateness of the use of TTCA.

However, there are also specific transactions where these concerns do not materialize. In repo and derivatives margining transactions, the use of TTCA collateral is limited and strictly related to the transaction. It is important that no additional limitations are applied as these might have negative impacts on the proper functioning of these markets.

*Do you agree with the proposal to place high-level requirements on firms to consider the appropriateness of TTCA?*

No, there is no need to introduce any specific high-level requirements to that end. High level requirements already exist through the duty for investment firms to act honestly and in good faith, and to provide information that is clear, fair and not misleading, independently of the type of client they are dealing with. The EBF believes that, further to these principles, investment firms should be left to handle TTCAs with professional clients on commercial grounds. Given that article 16 (10) of MiFID2 already prohibits TTCA for retail clients, we do not find it appropriate to assume that TTCA is used in order to circumvent MiFID.

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<sup>1</sup>“Collateral is the new cash: the systemic risks of inhibiting collateral fluidity” An initiative of the European Repo Council April 2014

<sup>2</sup> See Recital 52 of MiFID2.



*Should risk disclosures be required in this area?*

The EBF asserts that TTCA is not inherently damaging to clients, but risks and exposures should be laid out clearly to clients so they can make an informed decision whether to proceed with that product. However, the Federation believes that the level 2 regulation is not the appropriate place to regulate this aspect, especially when considering that the parties concerned are not within the retail category and are thus in a position to assess themselves any proposed arrangements and to undertake their own risk assessment.

European banks believe that it is important that EU legislation provides a robust and consistent regime for collateral management. In the first place, issues related to collateral belong to the domain of proprietary law. Any such important issue should be dealt with at the level 1 legislation in our opinion. In this respect, the EBF takes note of the recent Commission's proposal for a Regulation on reporting and transparency of securities financing transactions (COM(2014)40 final) which includes conditions for the use of re-hypothecation in its Article 15. According to the Commission's Q&As, the rules in Article 15 cover TTCA. Among the conditions is a requirement to inform the client (counterparty) in writing of the risks with TTCA. The EBF believes that the Securities Financing Transactions Regulation (SFTR) is the right place to address this issue.

<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>

The EBF understands that in several Member States a reasonable link between the client's obligation and the financial instrument or funds is already a requirement under civil law. Therefore, such an additional regulatory requirement is dispensable in these jurisdictions. However, if the TA stipulates such a requirement, clarification will be needed that repos and margining for derivatives transactions are deemed to provide for a reasonable and appropriate link (see our response to Q24). This should be the case at least for standard master agreements and internal rules of trading venues in order not to jeopardize the use of TTCA in the course of future legislation or regulation in respect of clearing obligations and haircutting.

<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>

Wherever standard master agreements and internal rules of trading venues are applied for repos and derivatives, their terms and conditions reflect the interests of the respective parties appropriately. Therefore, an assessment of suitability should and will only take place in respect of the product "repo" or "derivative" which the EBF also deems to be adequate. Should TTCA be used in another context than in the aforementioned transactions, the EBF invites ESMA to read the individual responses of our members and member-banks in order to have a clear picture of the different practices currently in place.

<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>

The EBF believes that securities lending arrangements, including title transfer of the securities lent, must remain possible with retail clients. Especially where the transfer of a financial instrument is the main obligation under an agreement and the financial instrument does not serve as collateral, it cannot be deemed to be a TTCA and should therefore not fall under the ban under Article 16 (10) of MiFID2. Although this should be obvious, the EBF would welcome a clarification in this respect to eliminate any remaining doubt.

For instance, securities lending usually takes place in connection with the underwriting and placing of an equity issue. In order to take stabilization measures, such transactions are concluded with the shareholders of the issuer who can also be retail clients. Not only is this common market practice, it is also mandated by Regulation (EU) No. 596/2014 on Market Abuse (MAR) and Commission Regulation (EC) No. 2273/2003 implementing Directive 2203/6/EC (Market Abuse Implementing Regulation)<sup>3</sup>.

Clarification that securities lending arrangements remain possible would also ensure consistency with MiFID II and the legal approach taken under MAR and the respective implementing regulations.

<ESMA\_QUESTION\_28>

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

<ESMA\_QUESTION\_29>

No, as we do not believe that MiFID level 2 rules are the appropriate place to regulate collateral requirements in respect of securities financing transactions. We would like to remind that the Commission has recently published a proposal for a Regulation on the reporting and transparency of securities financing transactions and we believe that it is important to avoid splitting the rules in different pieces of legislation but rather address them in one single piece. This will ensure a better understanding of these instruments, a tailored collateral framework for SFTs and a proper consultation with the users of these instruments. The process should follow the one in the EMIR where collateral requirements for derivatives transactions are discussed in the derivatives framework (i.e. EMIR).

In addition, this question refers to TA no. 7, where the EBF would welcome some clarification that it can only apply in cases where the investment firm is party to a securities financing transaction (SFT), serves as an agent for the conclusion of an SFT or if there is a tripartite agreement with the external borrower, the client and the investment firm. As a party or agent to an SFT, an investment firm can generally agree on the provision of collateral. In all other cases, it cannot be an obligation for an investment firm to intervene in a collateral process that was bilaterally agreed between the client and a third party/borrower without the involvement of the investment firm. In such cases, the investment firm will only execute the underlying settlement instructions and will often not even have knowledge of the fact that they belong to an SFT transaction.

Regardless of that, the EBF generally believes that existing systems and controls ought to be designed to ensure appropriate collateral at an appropriate level is taken and returned on a timely basis. We would welcome further clarity from ESMA as to what constitutes 'appropriate' collateral however and make aware of the prerequisite of consistency with other pieces of EU regulation (for instance EMIR, SFT Regulation, etc.).

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<sup>3</sup> See Recital 11 Market Abuse Implementing Regulation: "[...] *In this way, stabilisation can contribute to greater confidence of investors and issuers in the financial markets.*"



In conclusion, the EBF believes that there is no need to reinforce the current legal framework. Investment firms undertake overall client risk assessment when entering into commercial relations with them. Part of that assessment, where applicable, is the choice of eligible collateral and methodology to apply haircuts – factors that reflect the risk profile and the risk appetite of the client. Investment firms handle this process on commercial basis, taking into consideration the requirements of the prudential legal framework.

<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>

The EBF believes that the requirements should, in principle, not apply to non-retail clients. For professional clients, standard master agreements for repos, securities lending and derivatives margining already provide appropriate provisions with regard to collateralization.

<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>

As a general rule, European banks take collateral against securities financing transactions and monitor its appropriateness. However, this has a cost that varies according to banks' profile, client relationship and product (and collateral) type.

The EBF invites ESMA to read the individual responses of our members and member-banks for further details and evidence.

<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>

The EBF generally agrees that client's prior consent should be evidenced. However, specific rules for the form of such evidence should be taken into account, for instance the Financial Collateral Directive or the proposal for an SFT Regulation.

However, the concept of "affirmatively executed" is unknown to most European jurisdictions. Therefore, the EBF suggests to delete these words. There is an obvious risk of over-regulation or conflicting regulation, e.g. with the Financial Collateral Directive and the proposed Regulation for Securities Financing Transactions (SFTR).

<ESMA\_QUESTION\_32>

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

<ESMA\_QUESTION\_33>

There would be costs and administrative burdens (and this without any prior cost and benefit analysis).

<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>

It is the EBF's understanding that the following questions target investment firms who are not licensed as credit institutions. Even though credit institutions are not subject to the diversification obligation and intra-group deposit limits, they may be indirectly impacted by these requirements if they have investment firm clients who are not licensed as credit institutions.

Given that the EBF represents banks acting primarily as credit institutions, the Federation has decided not to answer Q34 to Q41. The EBF however invites ESMA to consider the individual comments that some of our members and member-banks may make on the following questions.

<ESMA\_QUESTION\_34>

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

<ESMA\_QUESTION\_35>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_35>

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

<ESMA\_QUESTION\_36>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_36>

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

<ESMA\_QUESTION\_37>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_37>

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

<ESMA\_QUESTION\_38>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_38>

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

<ESMA\_QUESTION\_39>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_39>



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

<ESMA\_QUESTION\_40>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_40>

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

<ESMA\_QUESTION\_41>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_41>

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

<ESMA\_QUESTION\_42>  
As long as safekeeping and custody relationships are concerned, we agree in principle. This should, however, not be commingled with cases in which liens are agreed upon in connection with other legal transactions.  
<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>  
The EBF is not in a position to provide a common answer to this question as the views expressed by our members clearly reflect the existence of different legal systems in the EU. The Federation however invites ESMA to consider the individual comments made by our members and member-banks  
<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>  
In countries where such framework already exists, the costs for the banks would be rather limited. However, banks authorised in jurisdictions where such framework does not exist would face considerable costs of reviewing these third party agreements would be considerable, driven e.g. by the commissioning of legal advice specific to each jurisdiction. The question is also dependent on the custody structure and length of the custody chain. Some flexibility and a transitional period may be necessary 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>  
The EBF does not agree with this proposal. This obligation will require extensive monitoring and review of existing procedures and agreements with third parties, especially for investment firms being active in



multiple jurisdictions. Should the proposal go ahead, appropriate carve-outs need to be provided for in respect of statutory liens over client assets.

<ESMA\_QUESTION\_45>

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

<ESMA\_QUESTION\_46>

No. The EBF believes that a restriction of the option of “other equivalent measures” does neither seem necessary nor appropriate and would be in contradiction with future Article 38 of the CSD Regulation (CSDR). The Federation reminds that it is today’s market practice to rely in certain circumstances on “other equivalent measures” instead of the segregation of accounts, not only in third country jurisdictions but also within the EU. It is important to note that the account segregation is only one amongst several (equally effective) measures to ensure that client financial instruments “are identifiable separately from the financial instruments belonging to the investment firm and from financial instruments belonging to that third party” (according to Art. 16 para. 1 (d) MiFID Implementing Directive). The other equivalent measures need to achieve the same level of protection. As long as this is ensured, a restriction on “other equivalent measures” is not only needless but this would put an onerous, inappropriate burden on the investment firms that make use of this option today.

The EBF believes that the use of omnibus accounts must remain possible, as foreseen by the EU legislation. A compulsory account segregation would not take into account the choice of account structures under Article 38 CSDR according to which both individual client segregation and omnibus segregation is possible. This refers to both central securities depository (CSD) level and CSD participant level. Therefore, the envisaged restriction would not be in line with the primary legislation of the EU under CSDR.

However, a small subset of our members would welcome clarification from ESMA that the ‘specific disclosures’ requirement can be met through the use of a generic segregation disclosure wording, and that specific disclosures per market will not be required for each client. ‘Other equivalent measures’ will need to be used in various markets across numerous jurisdictions, and it will be a considerable compliance cost to have to make specific disclosures. One of the purposes of the EU is to harmonise financial markets in that light they would favour not to allow other equivalent measures to be available within the remit of the EU. However, in order not to jeopardise or restrict cross-border trading other equivalent measures should be considered for third country jurisdictions.

<ESMA\_QUESTION\_46>

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

<ESMA\_QUESTION\_47>

No, there should not be additional requirements. The EBF believes that normal due diligence requirements supported by a legal opinion – as is current practice across most jurisdictions - should be sufficient.

<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>

The EBF believes that costs would be high and application cumbersome where such procedures are not already implemented. This will especially be the case for smaller firms.

<ESMA\_QUESTION\_48>



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

<ESMA\_QUESTION\_49>

The measures set out in the draft Technical Advice (TA) no. 18 seem appropriate to counter the concern that third party securities could be used in connection with a delivery from omnibus accounts. The EBF would, however, like to suggest re-ordering the enumeration of measures in a logical and chronological order:

- i. the close monitoring, by the investment firm, of its projected ability to deliver on the settlement date and the putting in place remedial measures if this cannot be done;
- ii. the close monitoring and prompt requesting of undelivered securities outstanding on the settlement day and beyond [it is the EBF's view that investment firms should not be required to take any other step that go beyond the settlement day unless already foreseen under the settlement discipline rules in the CSD Regulation (CSDR)]; and
- iii. the conclusion of agreements with clients on measures to be taken by the investment firm in case the client does not have the provision on its account on the settlement date (e.g. borrowing of the corresponding securities on behalf of the client or unwinding the position).

<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>

Yes, adequate measures and close monitoring are already in place.

<ESMA\_QUESTION\_50>

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

<ESMA\_QUESTION\_51>

Yes, we agree in principle with Q51, however we do not agree with the TA. Investment firms are required to hold necessary information in order to properly run their business and not for the purpose of enabling insolvency practitioners and relevant authorities to get access to such information.

<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>

Yes, although only the main principles could be stated in the legislation and in line with FSB or IOSCO recommendations.

<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>

To our knowledge, European banks and investment firms generally do maintain such information.

The EBF would however like to stress that information to be produced in very short delays to national competent authorities and insolvency practitioners is currently under discussion in the FSB and CPSS-IOSCO working groups. We would therefore recommend to wait for the publication of the final reports of the working groups to consider their proposals and thus ensure homogeneity throughout the chain of custody at international level in respect of the information to be communicated.

<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>

No, the EBF does not agree with ESMA's proposal. While European Banks already review the conflict of interest policy, the requirement of an **annual** review of one's Conflict of interest (COI) policy is too rigid and unpractical. Reviews of the COI policy already take place where a change in the investment firm's organization, governance model, and management services has a relevant impact on the firm's COI management and policies. The EBF therefore proposes not to include a fix mandatory frequency (annually) but rather to change the COI policy when a new relevant occurs that needs to be reflected in the COI and leave some discretion to the firm provided that they comply with the principles of the COI policy.

Additionally, ESMA does not ask to stakeholders whether we agree with the detailed information to be disclosed to clients which is an important aspect of the draft technical advice. Item 3 of the technical advice does not clarify to which type of client this disclosure should be made. The EBF therefore believes there should not be an obligation to use a durable medium when providing information to professional clients or eligible counterparties. For such clients the means of distributing information should be more flexible.

ESMA also proposes to require investment firms to include within the disclosure a description of the risks to the client that arise as a result of the conflict. In EBF's opinion, the requirement to disclose the risks considerable differs from Article 23 (2) of the MiFID II which requires investment firms to "clearly disclose to the client the general nature and/or sources of conflicts of interest and the steps taken to mitigate those risks before undertaking business on its behalf" but not the disclose the risks.

Concerning the 'last resort nature' of disclosure of conflicts, Article 23 of MiFID II recognizes the need for disclosures to manage conflicts and rightly articulates the need for greater detail in the disclosures being made. Article 23 itself does not mention that disclosure should be considered as a last resort measure.

The EBF therefore considers that there are and there will be cases where the disclosure of conflict should continue to be allowed. For instance, clients intending to raise capital from the market may need to delay the issue in order to ensure that its timing matches the market's appetite for an issue. Under these circumstances, an integrated investment bank may be able to offer interim financing facilities (eg: bridge loans) to enable the client to time the issue appropriately for success. In such a scenario, although lending related conflicts exist, this can be managed through appropriate systems and controls such as information barriers and appropriate disclosures, as the interests of all parties i.e. the investment bank, the client and the market overall, are all aligned.

<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>  
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<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>

Yes, the EBF believes that the definitions within Article 24, supported by the relevant provision of Directive 2003/125/EC and 2004/39/EC, provide sufficient distinction between investment research and marketing communications, both in terms of published widely distributed research product (i.e. published research report) and also other research products (one on one client communications etc.).

However, Article 24 makes no reference to *sales commentary* which is neither research nor marketing. There are materials which are presented objectively and are not a personal recommendation, but nonetheless are not investment research either. Marketing materials, market commentary and educational materials are often intended to be objective, but do not consider themselves investment research.

The EBF requests, therefore, ESMA to provide through its RTS/ITS specific guidance with respect to sales commentary and what specific criteria are available to distinguish between Research, Sales Commentary and Marketing materials.

<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>  
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<ESMA\_QUESTION\_59>

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

<ESMA\_QUESTION\_60>  
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<ESMA\_QUESTION\_60>

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

<ESMA\_QUESTION\_61>  
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<ESMA\_QUESTION\_61>

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

<ESMA\_QUESTION\_62>  
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<ESMA\_QUESTION\_62>

## **2.11. Remuneration**

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

<ESMA\_QUESTION\_63>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_63>

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

<ESMA\_QUESTION\_64>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_64>

## **2.12. Fair, clear and not misleading information**

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

<ESMA\_QUESTION\_65>

No, the EBF does not fully agree with ESMA's proposal. While the EBF fully supports that the information to clients need to be clear, fair and not misleading rules, the Federation has the below-mentioned concerns.

Given the large number of local languages and the different practices of Member States and NCAs as regards language requirements, the Federation believes that a requirement to have all the documentation always in the same language is neither proportionate nor practicable. Whilst standard banking and contractual documentation will be in a language to which a retail client has agreed, the same as basic product documentation, the underlying documentation may not be in the same language, e.g. as regards prospectuses or fund documentation.

It must also be taken into account that certain product requirements such as the Prospectus Directive do allow use of different languages in certain circumstances. Requiring that this documentation be in the same language would substantially increase the cost, but also impact distribution of financial instruments cross-border within the EEA, e.g. if all the underlying material, such as prospectuses, would have to be translated. This would run counter to the principle of a simple notification procedure.

As regards retail clients, it should therefore be sufficient that the material is provided in languages that the client can understand and is comfortable with.

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

Moreover, we would suggest to amend the par. 2.iii. of the proposed draft technical advice as follows

*"shall be ~~consistently~~ presented in ~~the same~~ a language **consistent that** the client understands throughout all forms of information and marketing materials that are provided to each client".*

<ESMA\_QUESTION\_65>

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

<ESMA\_QUESTION\_66>

No, The EBF suggests that further parameters should be developed in order to ensure consistency and clarity on what is expected, for example the number of scenarios to be produced will likely vary per instrument type and what the expected deviations to be exhibited on the scenarios. Additionally, we would ask to clarify that the proposed performance scenarios have to be based on a 'what if' approach and do not require the use of probabilistic methods (i.e. based on probability simulations).

In addition, the EBF encourages ESMA to draw a clear distinction between equities and non-equities instruments as well as giving recognition to the part liquidity will play when reflecting the nature and risks of specific instruments.

<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>

The EBF does not support that all non-retail clients should be under the same information disclosure requirements as retail clients. Professional clients and eligible counterparties should receive fair, clear and not misleading information as it is already the case under MiFID 1.

Non-retail clients have sufficient knowledge and expertise to appreciate the risks concerning their investments and are able to decide on the level of information they need.

The EBF warns that practical problems will arise from impossibility by professional clients and eligible counterparties from not being able of opting out of the disclosure requirement as proposed under section 2.14 (info on costs and charges) of this CP when the investment product embeds a derivative. This provision read together with section 2.12 of this CP will severely limit the clients' possibilities to opt out from the applicability of the requirements as many of the regular UCITS funds include derivatives for hedging purposes. ESMA should also define what exactly is meant by "embed a derivative" and strongly consider that the suggested regime will leave non-retail clients with no choice in the majority of cases but rather force information disclosures on them whether they want them or not.

<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>

No, the EBF calls on ESMA to clarify that the information regarding broad or restricted analysis should be of a general nature and be provided as a generic description of the investment firms selection process and be allowed to be provided to clients on e.g. the investment firms web site. The proposed requirements to provide information on "own and other" (point 5 of draft technical advice) financial instruments are disproportionate and would imply huge administrative burdens. It should be taken into consideration that some firms offer substantial amounts of different instruments (ISINs) and that the range of products offered is dynamic. Furthermore the proposed regulation on information to clients about investment advice and financial instruments should not apply to eligible counterparties and professional clients as they should have the possibility to opt out. Additionally, ESMA's advice mentions clients without differentiating between retail, professional or eligible counterparties. As outlined above, (see also response to Q67) as regards non-retail clients, the EBF believes it is disproportionate to have to disclose on any advice as independent or non-independent. Firms that may provide advice to professional clients throughout their course of business should be able to inform the professional client at the outset of the relationship or on a periodic basis what type of advice (independent or not) will be provided.

Furthermore, the EBF also considers it as entirely disproportionate in relation to non-retail clients to have to specify why a firm is not independent and effectively how "non-independent" the advice is by virtue of all the disclosures around close-links etc. It can and must be expected from professional clients that in case they would want to have more specific information that they would ask the firm accordingly.

<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>

No, the EBF calls on ESMA to clarify some aspects to avoid legal uncertainty and open wordings that may be subject to miss-interpretation. In particular:

- Point 7: "periodic assessment of suitability" at least annually: it should be clarified what would be the starting point to determine when the review needs to be carried out. Is this the moment as of which the investment advice was initially given? Additionally, firms should also be allowed to provide periodic suitability assessment based on product categories and client categories, in which case it should be sufficient to assess suitability on the basis of one year intervals per asset class.
- Point 8 (scenarios): while we agree in the provision of functioning and performance scenarios of the financial instrument in different market conditions, it should be specified that general scenarios are acceptable with no need to adaptation to the specific amount or economics to be bought by a particular client. The EBF understands that general scenarios comply with the objective of the proposal, but confirmation of this point would be welcome as if that is not the case, entities will face important problems: technical (system developments), administrative (new documents to be provided to the client as many times as the economics change) and practical (final economic terms will not be known many times until the financial instruments is acquired) problems. The scenarios disclosure should ensure consistency with information included in the prospectus. On this regard it must bear in mind that according to the Prospectus Directive performance scenarios are not included within the mandatory information. Therefore information provided by investment firms can include performance scenarios only if they are provided within the relevant prospectus.
- Point 9 (Illiquidity) The investment firm should not try to estimate a time frame for sale of illiquid financial instruments as this could result in client expectations not being fulfilled. It should be sufficient to inform what illiquidity means. Additionally, in the case of disinvestment it should be noted that an estimate of the time frame for the sale of a financial instrument cannot be neither feasible nor accurate because it will depend on the specific conditions in place at the time of disinvestment (e.g. market conditions, market liquidity, client's interest to sell under certain price conditions, etc.) difficult to estimate ex-ante. Therefore we would suggest removing this provision.
- Point 10 (financial instrument composition): clarification would be appreciated regarding what is intended to be provided to clients regarding the "status of the financial instruments". What should be understood as "status"?
- Point 12 (fact sheet): according to Recital 84 of MiFID 2, "(...) nothing in this Directive obliges firms to provide it (information about the investment firms, financial instruments, costs and expenses, etc) either separately or by incorporating the information in a client agreement." In order to be consistent with that wording, a reference to the contract should be added to subparagraph 12, which would read as follows:  
  
"Information on financial instrument may be provided in a standard format such as a product fact sheet or as part of or an annex to the contract."



<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>

The EBF believes important clarifications should be made regarding the information requirements under MiFID 2:

1.- First of all, it is extremely important to determine which information should be provided to a client in the case of legislation overlapping. There are several pieces of legislation that deals with disclosure to retail clients (MiFID 2, PRIIPs, and Prospectus Directive). In some cases they may apply to the same situations and there is no conflict rule to determine which one shall be applicable to provide with pre-trade information to the client or if the entity should provide it following each of them (with the consequent operational and administrative cost for the entity and excess of documentation for the client). For instance, cost disclosure will also be covered under the PRIIPs' Key information Document and it should be clearly stated in the level 2 rules that if an investment firms provides the KID to a client the MiFID2 requirement on cost disclosure is already fulfilled. Clarity regarding this point would be beneficial for both clients and entities and also duplicating the disclosure requirements should absolutely be avoided. **ESMA needs to be clear which requirements will apply in which scenarios.**

2.- In line with point 1, it should be noted that the great quantity of information that investment firms must provide to their clients may have a detrimental effect, as clients may lose the focus about what is relevant and what is not, making this information process a mere administrative process without positive effects.

3.- Finally, disclosure requirement included in the Level 2 rules should be expressly identified as a "numerus clausus" obligations. A clear definition and limit of the obligations will provide to the market and investment firms legal certainty as no new obligations may be imposed in the future base on interpretations of NCAs.

<ESMA\_QUESTION\_70>

## **2.14. Information to clients on costs and charges**

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

<ESMA\_QUESTION\_71>

No, the EBF does not agree. The EBF has concerns with the scope of ESMA's proposal. While the EBF generally understands this approach to be taken with retail clients, does not support the automatic extension of this provision to professional and eligible counterparties which in any case will be given fair, clear and non-misleading information.



The EBF recalls that professional clients and eligible counterparties - due to their knowledge and experience - are sufficiently informed on the types of costs and fees commonly connected to the intended transactions and therefore in a position to ask for the relevant information.

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

If the opt-in approach is not available for Eligible counterparties because of the scope of the Mifid II, Level 1 in Article 30.1, the EBF advocates that there is a need for a tailor made application for professionals and ECP including less detailed info requirements and the possibility to provide additional information only on request.

As a consequence it should be sufficient to provide them with the appropriate amount of information about costs and fees upon the clients' request, as described in Article 24 (4) (c) MiFID II). Finally the proposed measure is disproportionate as it comes at the expense of a substantial advantage in trade with professional clients and eligible counterparties – the higher speed, at which the business can be carried out due to the greater knowledge and experience of the parties. This is also stipulated in the current rules on best execution (Article 44 (3) Implementing Directive) whereas the price is only playing a predominate role with regard to retail clients.

<ESMA\_QUESTION\_71>

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

<ESMA\_QUESTION\_72>

No, EBF does not agree.

While the Federation supports that clients receive information about costs and its impact on their investment, it is of great importance that too excessive requirements are not put on firms and that the information requirements are proportionately calibrated both in relation to how disclosures shall be made (generic vs. personalised information) and to the extension of the disclosure requirements to types of clients (retail vs. non-retail clients).

The EBF has concerns over the scope and applicability, in particular:

- Point 33 in page 105 of CP requires a level of cost disclosure that may be difficult to achieve for certain collective investment schemes. In the case of a firm that advises a client to investment in a collective fund, in particular where there has been portfolio activity, it can be difficult to allocate out costs associated with the fund. Allowance should be made for necessary approximation associated with such disclosures and guidance provided for this.
- Point 12 of the draft advice - In order to not introduce overly costly requirements on investment firms, there needs to be large room for firms to use standardised models for how to calculate the costs incurred by the clients and a possibility to generalise the information at the point of sale disclosure, not only concerning the costs related to the financial instruments but also the costs related to the investment and/or ancillary services. Even in the situation with several client segments, as pointed out by ESMA, it should be sufficient with generic information on the costs for the various segments as long as the adviser points out to the client, if the client should not already know which segment he or she is included in, the service level applicable to that particular client and the costs connected thereto.
- ESMA's proposal (point 59 page 112) that firms shall disclose the cumulative effect of costs on the return of a product is of particular concern. By way of example, firms do not know for how long the

client will actually hold a product which makes such estimations very difficult to work with and unreliable per se. Further, when considering the suitability requirement to assess whether an alternative instrument, less complex and with lower costs, would better meet the client's profile, there is no corresponding requirement to show the cumulative effect of costs on return on that alternative product. The cumulative disclosure requirement would not be of value for the client in this context as it cannot be compared with the alternative product to be assessed. Neither does it make sense to incorporate such a cumulative disclosure requirement for the alternative product to be assessed; as such an exercise would be equally unreliable as the first one and would generate additional costs which in the end would be borne by the client paying for the advice.

- Finally, a majority of EBF members suggest clarifying point n. 6 of the draft technical standard (third party-payment) and propose maintaining a distinction between third party-payments received by investment firms and costs and charges to be paid by the client. To regard inducements as part of the costs of the services provided can be misleading for the client, therefore, it is proposed to disclose both inducements and cost to client, but inducements shall not be regarded as a part of the costs of the service provided.

<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>

No, the EBF does not fully agree. The EBF calls on ESMA to determine the scope and definition of "continuing relationship", as there could be a single but long duration product in place, versus a continuing relationship with on-going advice provided including financial reviews.

However, providing post-sale information to all clients regardless of the obligation to monitor the client's portfolio would be disproportionate. From a civil law perspective post-sale information could give reason to cautionary obligation that would cause additional liabilities and costs for the firms.

<ESMA\_QUESTION\_73>

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

<ESMA\_QUESTION\_74>

No, mark ups embedded in the transaction price are to be considered profit margin and do not fall under costs and charges for the clients. Therefore, disclosure to clients should not be required.

The EBF notes that the concept of mark-up embedded in transaction prices should be clarified, since mark up, in the sense of profit margins, are not necessarily similar to costs such as broker commissions.

The difference between buy and sell prices reflects many possible realities that must be considered, namely the fact that marks up, in some circumstances, may be due to differences in liquidity of financial instruments (proxy by bid-ask spreads for example) and not necessarily costs and charges. It is also important to consider the time differences between the buying and selling moments. It would not be reasonable to consider, for example, that the difference between the price a financial instrument was purchased, in a transaction for own account, a month ago and the price the investment firm charges to client (a month later) is a cost to the investor.

In addition, the EBF would like to stress that most of the cost-elements mentioned in Annex 2.14.1 are available in different forms in prospectuses, on web-sites and in annual reports and accounts. Requiring the individual investment firms to retrieve this information from various sources would

create the risk that the information which is being disclosed on the same product will most likely vary from one investment firm to another. Consequently, it must be ensured that the information disclosed should be information based on a methodology and on cost elements defined in a common European legislative framework and produced by the product manufacturer.

It is essential that the requirements on cost disclosures on MiFID level 2 are directly based upon the requirements on cost disclosure in the UCITS - key investor information document and the upcoming key information documents for PRIIPs. This approach will ensure that the same cost elements form part of the information on costs and charges disclosed to the investor from both the product manufacturer and the investment firm.

<ESMA\_QUESTION\_74>

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

<ESMA\_QUESTION\_75>

Yes. Generic disclosure of costs and charges certainly makes sense from a consistency standpoint and should apply to costs and charges for financial instruments as well as for the investment / ancillary service provided by the firm.

Furthermore it should be made clear that only instruments where the distributor has an actual agreement in regard to the distribution is included in the obligation to present pre-sale information. For instance when the distributor (e.g. a bank) has an agreement with (e.g. a UCITS fund) to distribute units to the banks clients. If the ESMA advice is to be understood in a way that any security/fund that clients can buy in the bank's website or buy through execution only should apply the proposed provision– then the bank would need to narrow down the range of securities/funds that clients could buy in the bank because it would not be possible for the bank to obtain all the information needed on any security/fund.

<ESMA\_QUESTION\_75>

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

<ESMA\_QUESTION\_76>

In respect of the funds business (see also response to Q72):

- (i) It is practically impossible to display the cumulative effect of costs as costs are dependent upon the holding period of the financial instrument. For example: it would not be possible to define the cumulative effect of a recurrent management fee on an investment in an open fund. Even for a closed-end fund this would be difficult as the investor can always step out before the term. So the sole available approach is a presentation of the costs on aggregated yearly basis.
- (ii) An ex ante illustration is possible for financial instruments with a fixed return. Future returns are not provided for open-ended funds. Should we include in the presentation of historic returns, costs and if so, which costs? Costs related with the manufacturing of the product could be provided in the KID / KIID. But what about costs related with the distribution, custody fees, arbitration fees
- (iii) What about fees that may fluctuate on a permanent basis, e.g. for fund of funds. How could this be disclose ex-ante to the investor?

The EBF encourages ESMA to take into account that not all investors are investing in one single financial instrument and that not all costs or charges can be broken down to the level of an individual investment. Investors often have a dynamic portfolio with mixed products, different expiry dates, different types of fees, etc. Also different/ multiple services may be provided, etc. Require-

ments to allocate costs and charges (exact amounts) to a specific service or investment may require considerable IT investments and operational developments, which are not proportionate to the additional protection they offer to investors.

Finally, ESMA should also determine what exactly is meant in the MiFID II Level I Directive (Article 24.4 (c), paragraph 2) by “costs not caused by the occurrence of the underlying market risk”. If a client buys a share, the price of the share is dependent of the evolution in the financial markets (the market risk). European Banks understand that this is not a cost. However, it would be useful to provide a number of examples of costs not caused by the occurrence of the underlying market risk.

<ESMA\_QUESTION\_76>

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

<ESMA\_QUESTION\_77>

In order to permit the comparison of information for similar products, the requirements should as much as possible be standardised with uniform growth assumptions. Cumulative fee illustrations should not cover very long periods and distorted impressions in real time should be avoided (importance of accompanying clarifying wording).

We consider it overall more important to explain / prescribe of all costs and not so much an illustration because of the difficulty to distinguish one-off fee versus cumulative costs. What is the added-value of an illustration considering the obligation to provide in good time a detailed overview of all costs and charges? Furthermore, to illustrate the exact effect of cost and charges on the return on investment for a given client, one should consider that client’s particular situation (costs effectively paid, possible discounts, custody fees, etc.)

<ESMA\_QUESTION\_77>

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

<ESMA\_QUESTION\_78>

The EBF members have identified that there will be significant IT and systems development costs in order to comply with this proposal, particularly if exemptions are not available for professional clients and Eligible Counterparties. It is not possible to foreseen the exact quantity at this point.

<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>

No, the EBF does not agree with the proposed exhaustive list for the reasons presented below. As already envisaged for the list of circumstances and situations to be considered by NCAs in assessing the so-called ‘quality enhancement test’, the EBF believes that a non-exhaustive list better fits the purpose to fulfil the obligation to accept only those non-monetary benefits which can be qualified as minor due to the extreme variability of the potential cases to be assessed.

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

In addition, the EBF strongly disagrees with ESMA's analysis as regards research. Many benefits in fact provide higher quality services to clients. This is the case in particular for investment research. The EBF does not agree with ESMA's assumption that it is common practice that firms can obtain higher value of research from a broker when agreeing to higher execution rates, or that firms direct order flow or "churn" client portfolio's in order to obtain more valuable research services. This would be hard to reconcile with a firm's best execution obligations and their duty to properly manage conflicts of interest.

Moreover, investment research is not an inducement but a service that is costly to develop and adds value to investors. Investment research helps portfolio and fund managers to make their investment decisions more effective and allocate efficiently investors' money.

If remained unchanged, ESMA's proposal would have the following unintended consequences:

- that the quality of investment services and information provided to investors is actually reduced by the fact that firms no longer can accept investment research reports from brokers
- firms may also be forced to rely on less diversified research or even exclusively on their own research.
- it may also create an unlevel playing field as it would put Europe at a major competitive disadvantage compared to the US. Indeed, using external research paid for by commissions as before, the US industry will be able to face lower costs and charge lower fees than their European counterparts
- managers would probably decide to increase their investment outside of Europe, in contrast with investors' interest.
- It will be detrimental to SMEs whereas their participation in the European growth requires facilitating their access to market funding. Independent brokers and research houses that still exist on the equity markets could disappear, restricting further the universe of professionals covering SMEs. This will result in further concentration of the dealers industry, with less coverage of mid/small cap companies and a concentration of the asset management industry;

If ESMA nevertheless were to consider that an exhaustive list should be proposed, acceptable minor non-monetary benefits should also include software and/or electronic devices which are used to inform clients about the service provided (e.g. a multimedia software or device to calculate and then report the portfolio's performance).

<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>

No, the EBF disagrees with the proposed approach.

In particular, Point n.7, paragraph iii (ex-post disclosure) should be clarified. The EBF would point out that the provision to inform clients, at least once a year, on individual basis about the actual

amount of payments or non-monetary benefits received could be very expensive and without any relevant benefit for clients.

According to MiFID provisions, clients are informed ex-ante on inducements and non-monetary benefits acceptable. Calculating ex post the values on inducements and non-monetary benefits, on individual basis, would be onerous and misleading for the client. Moreover, monetary benefits are often not linear and cannot necessarily be allocated to a well-defined service or client. Certain commissions are subject to materiality thresholds, and do not depend on the service provided to an individual client but rather on a global level of services with no link to the services provided to clients individually.

The EBF does not agree that article 24.4 (c ) second subparagraph of the Mifid II Level I Directive provides for sufficient legal basis to require in level 2 rules an obligation to provide each client with (i) the exact amount of the inducement received ex post (other than on request) and (ii) the total actual amount of inducements (payments and non-monetary benefits) on an annual basis as long as on-going inducements are received (extensive interpretation of the “where applicable” language by ESMA – see item 34 of the Consultation Paper – page 106 for the item on cost and charges in this respect). In other words, we consider that ESMA exceeds its mandate in this area.

The rules regarding third party payments or inducements are defined in article 24.9 of the Mifid II Level I Directive. Where art. 24.9. of the Mifid II Level I Directive recognizes that the method for calculating the amount of the third party payments may be provided ex ante in case the amount cannot be ascertained, it cannot follow from article 24.4 (c ) the Mifid II Level I Directive that third party payments are costs to be disclosed ex ante at the point of sale in order to allow the client prior to the provision of the service to calculate the total cost of the investment (see item 25 and 26 (page 104) of the body text of the Consultation Paper on information to clients on cost and charges in combination with item 6 and 7 ii of the technical advice on the topic - page 123).

If ESMA still considers that ex-post disclosure shall be the solution, we would suggest providing a generic disclosure, on aggregate basis, through distribution channels such as investment firm's web site or e-mails. Moreover, having to disclose all minor non – monetary benefits in detail would be disproportionate as they have already been tested as not being detrimental to the interests of the relevant investor. Consequently it should be clarified that the disclosure could be made in general and generic terms.

Finally, EBF recommends allowing firms a certain degree of discretion on setting up their internal procedures for disclosure of monetary and non-monetary benefits provided of course that they comply with the general principles.

<ESMA\_QUESTION\_80>

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

<ESMA\_QUESTION\_81>

No, the EBF does not agree with ESMA's analysis on this issue.



The negative definition of quality enhancement circumstances advanced by ESMA (in particular item 10 (i) on p. 124 of the Consultation Paper) is of such a nature that an effective remuneration of non-independent advice through inducements becomes practically impossible.

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

While the EBF welcomes paragraph 11 of the technical advice on inducements. It should however be made explicit that besides the access to a wider product range or the provision of advice on an ongoing basis, the access to and support of a distribution net should be recognised as relevant quality enhancement criterion in itself. Otherwise one would ignore the characteristics of a widespread distribution model in Continental Europe in which the producer remunerates its distributors in exchange for the access to a distributor's client's network.

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

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

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

<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>

At this earlier stage, the EBF highlights that an impact analysis - including costs - is not feasible.

However, we point out that the new requirements for which compliance costs can be foreseeable are:

- the proposed *ex-post* disclosure regarding the exact amount of the received inducement where firms are unable to ascertain on an *ex-ante* basis the amount of any received payment/benefit;
- the ban of third party inducements when the independent investment advice and the portfolio management services are provided.

To this respect, considerable higher costs will be related to the compliance with the latter requirement due to the need to review the remuneration models adopted so far, both for firms providing the portfolio management service and for firms which will decide to implement the independent advice model.



<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>  
<ESMA\_QUESTION\_83>

No, the EBF does not fully agree with ESMA's approach as further clarifications presented below are needed in order to make this provision workable.

The EBF believes that the **quality of the advice** will be determined by the capability of the investment products recommended to meet the investment needs and objectives of the client, irrespective of whether these instruments are issued by the investment firm itself or not.

The assessment of "*investment needs and objectives*" is a task to be done on an individual client basis, so it will be very problematic for firms to clearly define upfront what range of products may be capable of meeting the investment needs and objectives of their clients' universe. Therefore, to ensure the quality of the advice, the selection and comparison process should be conducted on an individual client basis, which will considerably increase the cost of the independent advice.

In EBF's opinion, ESMA made a broad interpretation of the article 24(4) of MiFID II wording "*a sufficient range of financial instruments*". ESMA stipulates that "*the number and variety of financial instruments considered comprises a substantial part of financial instruments available on the market*".

- Firstly, the term "*substantial*" is not clear and could be misunderstood by the investment firms. No practical recommendation is provided in ESMA's technical advice and this could hamper the establishment of uniform rules in financial markets.
- Secondly, it is important to define the **relevant market** to be assessed. In practice, an investment firm should consider only products and markets that are authorized in the country where the advice is provided. We consider that the expression "*financial instruments available on the market*" should be clarified in order to exclude financial instruments and markets that the investor could not access, because they are not authorized or, due to the inexistence of practical arrangements, they are not accessible. This will be the case of the majority of products not admitted to trade in secondary markets.
- Thirdly, the ESMA's advice assumes that banks and other firms can access without restrictions to all the (European) market. Unfortunately, in reality this is not the case. The range of financial instruments that a bank is able to distribute or sell will be determined by the number of contractual agreements concluded with the product providers and his capacity to fulfil other technical requirements (to ensure, for example, the settlement). So, to comprise a substantial part of financial instruments available on the market, there are only two solutions:
  - a) The bank has the capacity to establish contractual agreements with a substantial part of product providers and access, directly or indirectly, secondary markets across European union; or
  - b) The bank recommends products regardless of his capacity to ensure that the client can effectively subscribe or buy the product.



The business model of the majority of EU banks is incompatible with the option b), so they will only recommend products that the investor can subscribe or buy through the bank. If the bank has a limited access to product providers or secondary markets, in practice, **it will not be capable of providing independent advice.**

- ESMA advice (1.v) specifies that “*the criteria for comparing the various financial instruments should include all relevant aspects such as risks, costs and complexity as well as the characteristics of the investment firm’s clients, and should ensure that neither the selection of the instruments that may be recommended nor the recommendations that are made to client are biased*”. The EBF considers that:
  - Related with the criteria proposed, the risk should be taken in conjunction with the return (risk-return comparison).
  - Regarding the criteria “*characteristics of the investment firm’s clients*”, since the advice will be determined by the investment needs and objectives of the individual client, we don’t see the convenience of that criterion.
  - the criteria for comparing the various financial instruments should also include the availability of the product itself in the investor country of residence (because it can be difficult (or even impossible) to the investor to have access to the product) and the accessibility to information regarding the features of the product (price, risks, etc) in a language understandable by the investor (for example, if the investor only speaks Italian, recommend a product with a prospectus only in German would be inadequate). These criteria should as well consider applicable selling restrictions.

As a conclusion, the elements set out under 1 (iii) are vague and possibly too large to be applied. This point is vague due to the word substantial and due to the word “market”. For example when selecting a world equity fund, does the investment advisor have to assess more than 3 funds to fulfil the assessment criteria (does the word “market” refer to the world wide equity market? Does “substantial” refer to more than 3 similar financial instruments available within a certain asset category accessible for the particular investor?)

If ESMA cannot clarify the above-mentioned terms, the EBF suggests to allow firms to exercise principle judgment in interpreting what is substantial and what is relevant market.  
<ESMA\_QUESTION\_83>

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

<ESMA\_QUESTION\_84>

The EBF supports ESMA’s proposal that an investment firm could offer both types of advice (independent and non-independent), but the Federation does not see any advantage in separating the services and advisers of the two alternatives. The reason to impose this separation is to keep the client informed, at all stages, about the type of service is being provided. If the objective is to ensure that clients are not confused about the type of advice that they are receiving, this objective will be better achieved through the provision of clear information about the service, including in the contract with the client.

The obligation to provide information, prior to the provision of the service, about the differences between the two types of advice could also help the client to decide between the alternative that best achieve his needs. For example, if the firm presents to the client the features, risks, conflicts

of interest and costs of both types of advice, he can choose what service best fulfils his expectations.

In our opinion, the decision to separate both services and advisors should be a decision of the firm, taken in respect of the business model adopted, and not a mandatory requirement.

Nonetheless, to ensure an adequate level of retail clients protection, the independent investment advice should always be provided subject to a specific contract in which the investment firm and the client agree in the provision of independent advice with exclusion of non-independent advice.

Finally, if a continental market for independent advice positively evolves in the next decade, front office desks, such as the points of sale for independent and not independent investment advices may perhaps be separated based on evidence that the market for this type of advice needs to be improved. In any case, further separation in others desks, such as back office, is not needed. It is learned from practice that these are organizational requirements highly complex, very expensive to implement and manage, and not suitable to solve the problems that could arise when separation is requested within a firm organization.

<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>

The EBF anticipates additional costs associated with the implementation of the selection process of financial instruments available on the market, for example:

- The IT costs to assess a sufficient range of financial instruments available on the market,
- The costs due to the implementation of additional controls and tailored procedures for independent advice services
- Extra internal documentation and record keeping in order to be able to prove that a sufficient range of financial instruments has been assessed
- Product development
- If necessary, transfer of existing clients to new products
- If required, organisational changes due to separation of the organisation into dependent and independent advisers.

The scale of those additional costs will depend on further clarification of these requirements.

Moreover, since independent advice will be more expensive than non-independent advice; this may result in restricted access to advice, particularly for 'mass-market' consumers, which is detrimental to investment firms and to clients, as a whole.

Because the business model of the majority of the banks is based on the recommendation of products that they can offer, possibly most of the banks will decide not to provide independent advice if that implies recommending products they are not able to sell (due to technical or contractual reasons as explained in the response to question 83).

<ESMA\_QUESTION\_85>

## 2.17. Suitability

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

<ESMA\_QUESTION\_86>

No, in EBF's opinion the draft technical advice is excessively detailed and raises the risk to impose too many links to the steps of suitability assessment or raise several uncertainties.

In particular the EBF has the following concerns/request for clarification:

- Item paragraph 1 (iii) (page 133) and paragraph 1 (ix) (page 134) –of the draft technical advice should not include an assessment of all alternative financial instruments that are less complex or with lower costs. Clarification is needed as in most cases, there is no alternative that gives the same result (e.g. high return), but that is less complex/less costly. However, for every client belonging to a certain risk profile, there may be an investment that is less costly and less complex (but giving less return and therefore not meeting return objective of the client).
- The wording in paragraph 2 ii) (page 134) regarding suitability report is not aligned with the wording on level 1. Level 1 uses the phrase “preferences an objectives” while ESMA advice uses the phrase “objectives and personal circumstances”. Any intended distinction should be clarified.
- It should be clarified why par. 1 item xii only applies to “small firms” and not to firms in general.
- the draft provision of paragraph 1 point v (page 133), which claims a complex approach in the practical implementation as it is not clear what could be “analysis of the costs and benefits of the switch, such that they are reasonably able to demonstrate that the benefits of switching are greater than the costs” considering that: i) benefits cannot exclusively identified with expected returns; ii) expected returns often cannot be measured;
- We understand that a firm must specify its advice (it has to explain that (i) the client has sufficient knowledge & experience with respect to the financial instrument that is recommended and (ii) why the advice is within the investment objectives of the client and in accordance with the financial situation of the client). This is not new and it was in MiFID 1. However, in addition, a firm must also specify “how the advice meets **the preferences, objectives and other characteristics** of the retail client”. These are completely new requirements and they are not explained what they mean, and what the difference is with the MiFID 1 previously mentioned criteria.

<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>

Given the need to ensure the implementation of the suitability provisions is proportional to the service provided, the implementing directive should determine to which extent the client's knowledge and experience needs to be assessed with regard to portfolio management services (Article 24 (2) MiFID II). Indeed, investment firms providing portfolio management services must be registered in accordance with MiFID II and therefore qualify as professional investors. Therefore we are of the opinion that clients have sufficient knowledge and experience if they understand the consequences of delegating the investment decision and the principles of the underlying investment strategy. But it is not necessary that they also understand the financial instruments used within the mandate.

Additional, the EBF would like to make one suggestion, with reference to the “Draft Technical Advice” section 1(x) “ where a client is a legal person or a group” and based on experience clarity is necessary as to what extent the suitability assessment should or needs to take cognisance of the wider “legal group” or “connected entities” that the immediate client is part of and can reasonably be assumed to rely on expertise for advice and guidance. Many MiFID transactions in complex products take place with Special Purpose Vehicles ‘SPV’s of larger corporate entities for various reasons e.g. tax. In assessing suitability – risk tolerance and ability to bear loss the investment firm should and should be able to refer to/ rely on / look through to the wider group that it is actually dealing with.

Finally, point 1, paragraph viii, sub-paragraph e, should be clarified to avoid legal uncertainty and open wordings that may be subject to miss-interpretation. In particular, we suggest limiting the scope by requiring that consistency must be ensured only concerning the information included in the investor’s questionnaire.

<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>

It is questionable whether the firm has to document the client’s knowledge and experience with regard to the recommended financial instrument or not. It is more important to document how the characteristics of the relevant financial instrument have been explained to the client and what kind of information and documents (i.e. KIID or KID, prospectus) the client received. Rather than documenting the client’s abstract knowledge and experience with regard to financial instruments it has to be ensured that all relevant documents and information are available to the client in due time before he/she enters into a transaction.

Concerning page 134 of the CP item iii, it states that an investment firm must give an explanation of the “disadvantages of the recommended course of action”.

We see no particular benefit in requiring an explanation of the disadvantages of the recommended course of action, given the elements that should already be covered as part of the suitability assessment. The report should only include elements named in article 25(6) sub 2. This should be part of the recommendation given, if applicable, at the time and not part of the suitability report. An investment advisor must not give a recommendation if the disadvantages are too great for the investor.

<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>

Periodic suitability reports should only be a requirement where investment firm provides a monitoring service according to art 24.4 iii MiFID.

<ESMA\_QUESTION\_89>

## **2.18. Appropriateness**

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

<ESMA\_QUESTION\_90>

The EBF does not agree. In EBF's view the current art 38 of the implementing directive should be confirmed without amendment

It should also be borne in mind that any qualitative distinction between complex and non-complex products will create uncertainty. It is unclear what is understood by the suggested terms "fundamentally alter the nature or risk of the investment". Similarly there is no definition of illiquid instruments for the criteria "no explicit or implicit exit charges that make the investment illiquid".

<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>

No. Knowledge and experience must be assumed for per se Eligible Counter Parties at the very least. It would be impractical for two banks entering into a transaction conducting an appropriateness assessment on behalf of one-another. Appropriateness requirements need to be calibrated correctly depending on the type of client.

<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>

In EBF's opinion, the requirement to enter into a written agreement with professional clients is questionable. According to MiFID, professional clients are presumed to be capable of making their own investment decisions and understanding the risks involved. Additionally, professional clients are allowed to request non-professional treatment and consequently may require a higher level of protection.

For that reason, we do not consider that there is a need to regulate how investment firms contract with their professional clients or to prescribe detailed rules as to the contents of their contracts.

As rightly recognised by ESMA in the consultation paper, in practice relationships between investment firms and professional clients very often result in written agreements, in particular to provide legal certainty. Imposing a legal requirement where there are not market failures would be over-prescriptive. Moreover national laws and contractual practice vary and it would be very difficult to achieve a desirable harmonization across European Union.

If, ESMA nevertheless was to decide to include this requirement at Level 2, we agree that such a requirement should only apply to:

- a) "new" professional clients, and

- b) where the firm and the professional client intend to establish an on-going business relationship.

The potential costs if new requirements were imposed with respect to existing client relationships are considerable high. Firms would be required to review all existing professional relationships and have to propose new agreements to their clients and be prepared to finish the commercial relationship if the client failed or refused to enter into a new contract.

In relation to the services provided, we consider a written client agreement should be necessary for professional clients only for portfolio management services, because this is a service where the manager has discretion to take decisions without prior reference to the client. Concerning other services such as investment advice or execution of client orders, the client is in a position to decide whether or not to take the advice or define the execution.

<ESMA\_QUESTION\_92>

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

<ESMA\_QUESTION\_93>

No, the EBF does not agree with the requirement to impose a written agreement for investment advice where a “continuing business relationship” is in place. Additional guidance must be provided on the scope of “on-going advice” other than in the case the investment firm and the client agreed on the provision of periodic suitability assessments”. Both the terms “ongoing” and “advice” are in this context relevant.

The EBF agrees with ESMA proposal to exclude the requirement for a written agreement in the case of one-off investment advice to clients.

The same considerations referred in answer Q92 apply to an advisory relationship between an investment firm and a professional client. The client can decide whether or not to take the advice as a professional, because he has the knowledge and experience to do so. Accordingly, there seems no need to require a written (or equivalent) agreement for the provision of investment advice to professional clients.

<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>

The EBF considers it good practice to use written custody agreements. Whilst the draft technical advice speaks of “a written agreement”, we note that ESMA should make it clear that it is acceptable to cover a product with more than one agreement. For example, for custody services it is usual to have a global agreement governing safekeeping and then an ancillary agreement covering the parameters within which securities lending is carried out. This approach is very typical as firms often on-board clients with a global or general agreement and then cover specific services with specialised contracts.

<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>

The EBF does not consider that there is a need to impose a more specific obligation in relation to the content of client agreements for certain services. The current obligation to specify the “essential rights and obligations” of the investment firm and the client is appropriate.

Given the changing nature of client relationships and business transactions we are not convinced that such granularity would be particularly helpful. Obviously if there is an existing agreement then this will cover the required services. However, especially for professional clients, we do not believe that specific regulatory requirements are required.

<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>

The EBF believes that the distinction between retail and professional clients should not be blurred (the latter requiring a lower level of investor protection).

The EBF proposes that the draft technical advice does not extend this provision to eligible counterparties or professional clients which should be in a position to enter into appropriate agreements with investment firms on the nature and timing of reporting.

The cost of having to provide the same content for both types of investors would be onerous.

<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>

No, the EBF does not fully agree with it.

European Banks agree that thresholds could be agreed between firm and client but not limited to % multiples of the original investment. Such a limit may be impractical in the case of e.g. private equity investments in which a small capital call is made in a given year for example, below a % of initial investment or at an uneven multiple

In addition, the requirement should not be extended to client accounts that include leveraged financial instruments. There is an obvious rationale for loss threshold reporting in the case of portfolio management (clients usually do not constantly monitor their portfolio if they have appointed a discretionary manager) and contingent liability transactions (their loss is not limited to the initial investment, but they may result in an additional payment liability). These specific risks justify to require investment firms to give warnings to clients when loss thresholds are exceeded. By contrast, although leveraged financial instruments may be considered riskier than non-leveraged instrument, they do not bear such additional risk, but rather just a usual investment risk. Furthermore, in practice, it would be extremely difficult to identify leveraged financial instruments, so that it would often be unclear in which cases such threshold reporting would apply. This is particularly true in the event that such instruments are acquired on a non-advised or execution-only basis

<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>

No, the EBF does not fully agree.

European Banks suggest not to include a duty to state the estimated value of financial instruments in cases a market price is not available. It may be very difficult to gather information for a reasonable estimate and the valuation as such can be intricate and costly. Depending on the information quality and on the valuation assumptions, stating an estimated value may be misleading for the client.

Therefore, Article 43 of the MiFID Implementing Directive should be updated to specify that the content of statements is to include the market value of the financial instrument, if any. In the event that no market value is available, the investment firm should state an estimated value, provided that sufficient information for a reasonable valuation is available. Investment firms shall have discretion to determine under which circumstances (e.g. number of affected clients, costs associated with gathering necessary information, reliability of information) it is appropriate to prepare an internal valuation and in which ones they are allowed not to state an estimated value.

<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>

No, the EBF does not agree. The obligation for custodians to value financial instruments on behalf of their clients is a service not currently offered by many custodians. Additionally, many clients have valuation agreements with third party service providers.

In relation to services in which customer assets and funds are passed to a number of markets on a dynamic basis, where they would collateralise client obligations in accordance with the rules and applicable laws of the particular market, the Federation considers again that the obligations may have the undesirable effect of reducing competition. For example, where clearing services are provided to clients, the rules of central counterparties will determine whether funds and financial instruments are lodged at the central counterparty under TTCA or as client assets subject to a security interest. Tracking the status of collateral through the clearing system in circumstances where a client is carrying out cleared business on a number of markets would be onerous and very costly. Additionally, the snapshot information provided would be of limited benefit to clients.

In addition, the value of information on financial instruments that have been subject to TTCA during the reporting period (but are not any more) for investors seems to be limited to very few extreme cases (such as insolvency of an involved party during the reporting period). To address information needs in these rare cases, we consider it sufficient that clients have the right to obtain such information in due course upon request. Therefore, it seems inappropriate to require investment firms to provide details of financial instruments that have been (but are not any more) subject to TTCA during the reporting period.



<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>

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

If the provision to include a list of brokers in its summary best execution policy remains, the EBF suggests that clients should be referred to the respective best execution policies of the brokers used by the investment firm. Only where the best execution policy of the investment firm materially deviates from that policy of its brokers used, such information should be adopted in the RTO/placing policy.

The EBF believes that more clarity needs to be added relating to best execution and clients/investment firms transacting/dealing in derivative instruments particular non-equity e.g. interest rate, FX or other similar types of instrument. MIFID paid particular attention to share/equity classes as opposed to other complex instruments.

Currency exchange by its nature is an intrinsic bi-product of many transactions whose principal purpose is not related to currency. Clients typically expect such implied FX conversions to be handled seamlessly by the financial institutions through whom they are executing their main transaction. It is important that formal best execution requirements are not applied to basic currency exchanges in such a way as to create undue friction, i.e. if the burden of demonstrating that the FX transaction meets formal best execution requirements delays execution of the main transaction in question. Recent proposals to define "FX Spot" to include short dated currency exchanges linked to securities conversions are a significant step in the right direction. Ongoing vigilance and care will be required to ensure, in particular for currency conversions of any tenor that the application of formal best execution rules does not ultimately prove counter-productive in the wider context.

<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>

While some information as proposed by ESMA is already included in most of the current best execution policies used in the market (for retail clients), the EBF is concerned about the level of detail on the best execution policy. In particular related to the relevant information of best execution policies of the (executing) brokers the investment firm uses, as proposed by ESMA will lead to additional administrative work. Current best execution policies or summaries will need to be reviewed and modified and subsequently distributed to clients. This may lead to additional costs which may be hard to quantify in advance, as this depends on the means of distribution and possible local legal requirements which may be applicable

In addition, the EBF would like to mention the following concerns:

- Item 8 of the ESMA draft Technical Advice (TA): level 1 does not require that information on venue fees, clearance and settlement fees need to be disclosed in the execution / RTO policy. ESMA seems to admit this. We do not see the direct interest of links to the execution quality data of the different venues (also a risk of successive changes and required updates of your policy), the principle being that the investment firm makes the choice of what it considers to be the best available execution venues and ultimately bears the burden of proof that it consistently offered best execution.
- Item 9 ESMA A : information regarding inducements / third party payments : it should be clear that ESMA does not require to provide “figures” but that the entity can limit this information to a general statement of the nature of the third party payments received / benefits received and how the enhance the quality of the execution services is met.

One financial institution estimated a cost of <€500,000 annually for their group. If this figure is extrapolate to the whole European Banking sector, the cost is considerable.

<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>

No, the EBF does not fully agree. In EBF's understanding, product intervention regime implies a serious restriction of the free functioning of the markets and the freedom to conduct business. Consequently, such regime should be considered as a last resort mechanism, only to be used in residual and specific cases.

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

-Factors like "degree of complexity", "degree of innovation", or even "size or the notional", have to be clearly defined with quantitative measures rather than subjective criteria that should be taken into account by ESMA, NCA or EBA.

-Intervention criteria should not be based on permitted activities: references to client age, wealth or incomes should be deleted, as there is no restriction to sell depending on the age, wealth or incomes of clients.

-The Consultation paper should not include criteria that investment firms do not have to consider when distributing their products. For example, "core financial objectives", that only should be considered when providing investment advice.

-Some references may be harmful for market stability and may jeopardize the free effective price formation. In particular, we consider that the following may negatively impact the basics of market functioning: (i) "the charges that do not reflect the level of service provided", as that may result in jeopardizing the freedom of price formation: if charges are too high for a product, market will opt for alternative products; or (ii) "the credit worthiness of the issuer or any guarantor", as this is a criterion that could result in the issuer/guarantor being expelled of the market (and again, credit worthiness will already be considered in terms of pricing and conditions of the issuance).

Finally, we understand that when the intervention powers are already introduced in other legislative initiatives (benchmarks, MAR, etc.), they should not give rise to additional enforcement actions.

The EBF would also ask ESMA to integrate a clear procedure of appeal (type fast-track in order to respond to urgency and market conditions) related to the product intervention-measures. As the impact of the interventional powers would be significant, ESMA should determine a specific appeal-procedure attached to these powers so stakeholders can get reliable information on a specific intervention by ESMA.

<ESMA\_QUESTION\_107>



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

<ESMA\_QUESTION\_108>

No. More than new criteria, the EBF understands that quantitative and objective criteria should substitute the one proposed.

<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>

The EBF is concerned over ESMA's proposal to lower the MiFID I liquidity thresholds for equity at a European level. The EBF's members have raised the following concerns:

- The new liquidity thresholds for equity should be analysed in conjunction with other transparency rules affecting equities such as the trading obligation for shares and the new equity waiver regime which may decrease liquidity in certain equity markets. On top of these new equity rules, ESMA's new thresholds imply that a larger number of shares will be deemed liquid with the risk that in reality some of these shares are not actually liquid and hence the effects of this will harm the European markets.
- European markets are based on different models of trading and therefore what would be deemed liquid in one market and perfectly acceptable may have unintended and damaging consequences in other parts of the EU. Due to the diversity of markets within the EU, it is very difficult for European banks to set a one-size fits all approach.
- In addition Tick sizes will be lower for liquid shares and when reduced below a certain level, the incentive for traders to quote is reduced which causes a depth decrease in the order book. This reduction in depth will imply that investors will have to bear an increase in trading costs following the decline in depth throughout the entire order book (market impact). This will harm the possibility and investors willingness to execute orders "on-exchange".

<ESMA\_QUESTION\_109>

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

<ESMA\_QUESTION\_110>

Yes we agree that the free float for depositary receipts should be determined by the number of shares issued in the issuer's home market.

<ESMA\_QUESTION\_110>

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

<ESMA\_QUESTION\_111>

Yes, see also question 110.

<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>

Yes, see also question 110.

<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>

No, the EBF does not agree with ESMA's proposed definition of liquidity for ETFs.

<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>

Markets consider certificates like tier 1-bonds and profit participation certificates (Genussscheine) irrespective their legal proximity to equities as bonds. Usually, investors keep these papers until their due date. Furthermore, venue-traded options enabling traders to realize liquidity enhancing arbitrage strategies do not exist. Most banks use their bond account book for these instruments.

For these reasons, such instruments should be treated like bonds and not like equity.

<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>

<ESMA\_QUESTION\_117>

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

<ESMA\_QUESTION\_118>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_118>



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

<ESMA\_QUESTION\_119>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_119>

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

<ESMA\_QUESTION\_120>  
No, the EBF believes the same principles should apply in order to ensure the common financial market. It will be very difficult to keep records of liquid markets/instrument if left to the member state.  
<ESMA\_QUESTION\_120>

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

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

<ESMA\_QUESTION\_121>  
The value of a financial instrument can be determined at any time either on an amortized cost basis or in reference to the short term yield curve. We generally also agree with the maturity criterion of 397 days. However this should be seen as a general rule which also allows exceptions. Repos for example are a common money market instrument however they have a maturity of up to two years. The obligation to mark the instruments as money market instruments ("expressly stated as...") is not in line with market practice.  
<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>  
The EBF fears that at European level, the proposed thresholds are set too low as many investment firms will easily reach the threshold. As already stated in response to Question 109, the EBF encourages ESMA to set the quantitative thresholds with due care as doing this for the first time should be subject to an open mind towards timely recalibration if the thresholds prove to be too low. ESMA should take into account that the thresholds may have a different impact on different EU markets due to the wide diversity of mar-



kets in Europe. Some members have raised concerns regarding SIs' trading in less liquid equities and how SIs' manage their approach to these products, if activity were to suddenly stop.

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

<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>

No, we consider quarterly assessments to be too frequent. The EBF considers the minimum appropriate time frame to be a semi-annual assessment, if not a yearly one.

<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>

The EBF supports that the criteria should be set to enable simplicity of compliance, but also taking account of the characteristics of different non-equity markets and macroeconomic impact.

<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>

*Do you agree with the definition of total trading by the investment firm?*

No, the EBF does not agree. In our view it is necessary to exclude at least the following from the definition of 'total trading by the investment firm':

- inter affiliate trades purely for risk management
- give-ups
- trades arising out of risk mitigation
- trade compression
- repo settles
- OTC clearing flows.

<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>

As far as bonds and structured finance products are concerned, the EBF agrees with ESMA’s approach.

<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>

The EBF believes that the reference to the ISIN code would generally make things easier, considering the increase of complexity of the new framework.

<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>

The EBF considers a quarter year as a relatively short period where trading peaks may occur. The calculation period should therefore be expanded to the last four quarters. We consider stability of this measure as a main issue. Firms should not move in and out of the SI regime from quarter to quarter. Further it is important that also new firms undertaking SI levels of activity are classified as such.

<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>

Due to the fact that there is no practical experience with the SI-regime in bonds we consider it essential to set higher thresholds at first. With increasing experience these higher thresholds should be reduced. Aim must be to capture all market participants concerned. The indicated procedure would take market impact into consideration and would lead to a smooth transition.

<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>

The comparison of own transaction with the EU-market on an ISIN-level would be very sophisticated. For a more proportional approach we propose the implementation of an additional minimum level in absolute numbers which must be crossed. It can be assumed that underneath a specific volume or a specific number of transactions the frequent and systematic criterion won't be met.

<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>

No, the EBF does not fully agree. SFT should not be included in any SI regime. These transactions do not contribute to price formation. ESMA so far only proposes to exclude equity related SFT. The same should apply to non-equity related SFT.

<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>

The EBF agrees with the list of exceptional circumstances. It is essential that this list is non-exhaustive. We disagree with ESMA's understanding concerning the updating and withdrawal of quotes. In our opinion ESMA reinterprets Level 1 and aims to limit the possibility of updating to exceptional circumstances. We reject this approach.

<ESMA\_QUESTION\_138>

### **3.6. Orders considerably exceeding the norm**

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

<ESMA\_QUESTION\_139>

Yes, the EBF agrees.

<ESMA\_QUESTION\_139>

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

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

<ESMA\_QUESTION\_140>

Yes since the quotes from SI's should reflect the prevailing market conditions

<ESMA\_QUESTION\_140>

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



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

<ESMA\_QUESTION\_141>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_141>

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

<ESMA\_QUESTION\_142>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_142>



## 4. Data publication

### 4.1. Access to systematic internalisers' quotes

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

<ESMA\_QUESTION\_143>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_143>

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

<ESMA\_QUESTION\_144>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_144>

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

<ESMA\_QUESTION\_145>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_145>

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

<ESMA\_QUESTION\_146>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_146>

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

<ESMA\_QUESTION\_147>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_147>

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

<ESMA\_QUESTION\_148>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_148>

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

<ESMA\_QUESTION\_149>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_149>



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

<ESMA\_QUESTION\_150>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_150>

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

<ESMA\_QUESTION\_151>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_151>

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

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

<ESMA\_QUESTION\_152>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_152>

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

<ESMA\_QUESTION\_153>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_153>

## **4.3. Reasonable commercial basis (RCB)**

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

<ESMA\_QUESTION\_154>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_154>

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

<ESMA\_QUESTION\_155>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_155>

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

<ESMA\_QUESTION\_156>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_156>

**Q157: What are 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>

The EBF prefers Option 1. Recital 61 and its pre-settings are appropriately considered in Option 1. The criteria in Option 1 are precise and lead to unambiguous categorization. The indications in subparagraph 15 that parameters are relatively easy to circumvent (especially that concerning proximity hosting) are incorrect. The definition of “high frequency algorithmic trading technique” in Art. 4(40)(a) MiFID encloses proximity hosting.

<ESMA\_QUESTION\_167>

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

<ESMA\_QUESTION\_168>

The disadvantage of Option 2 is especially that its parameters are not sharply defined. The proposed medians are not reliable indicators. In order to make stable calculations, hard criteria are needed.

Another disadvantage is that calculations for single trading venues are always dependent on calculations for the whole market. It remains unclear who has to do which calculations when. Further it lacks any indication on reference periods. However, the median can vary strongly dependent on the reference period (minute/second/millisecond). It is inappropriate to classify market participant whose order resting time is marginal under the median as HFTs. The results seem to be quite arbitrary.

<ESMA\_QUESTION\_168>

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

<ESMA\_QUESTION\_169>

We do not see any disadvantages in Option 1.

<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 prefer Option 1.

<ESMA\_QUESTION\_170>

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

<ESMA\_QUESTION\_171>

The idea to consider a high-frequency trader in one market to be a high-frequency trader in every other market as well is odd. Any high-frequency trader should only underlie the HFT regime when

he actually is high-frequency trading. Since the requirements for high-frequency traders can vary between trading venues it can be very important for high-frequency traders to trade non-high frequent on other trading venues.

<ESMA\_QUESTION\_171>

## 5.2. Direct electronic access (DEA)

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

<ESMA\_QUESTION\_172>

Yes. It is crucial that ordinary clients (private and institutional) are not subject to the DEA definition and therefore obliged to comply with MiFID, cf. art. 2 (1) (d). This would harm the well-functioning access for those types of clients.

However, the EBF is concerned with the way the exemption is formulated and linked to technology in the draft advice:

We therefore propose that it is clarified that DEA is categorized by the user being an HFT-trader used for HFT-trading as defined in option 2 at page 233.

We acknowledge that this scope might lead to a requirement for guidelines for other kind of access, but much more limited

<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>

The EBF thinks that there is no other activity that should be covered by the DEA definition. Though the difference between DEA and AOR is subtle, we propose that AOR should not be considered within the DEA definition, because in DEA the order is transmitted directly to the trading venue and in AOR the order is transmitted to the intermediary's infrastructure. AOR does not allow direct access.

<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 the opinion of the EBF, an inclusion is not considered necessary, because the client's trading is intermediated, it is not a direct access.

<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_215>

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

<ESMA\_QUESTION\_216>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_216>

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

<ESMA\_QUESTION\_217>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_217>

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

<ESMA\_QUESTION\_218>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_218>

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

<ESMA\_QUESTION\_219>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_219>

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

<ESMA\_QUESTION\_220>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_220>

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

<ESMA\_QUESTION\_221>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_221>

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

<ESMA\_QUESTION\_222>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_222>

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

<ESMA\_QUESTION\_223>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_223>

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

<ESMA\_QUESTION\_224>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_224>

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

<ESMA\_QUESTION\_225>  
TYPE YOUR TEXT HERE





<ESMA\_QUESTION\_225>

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

<ESMA\_QUESTION\_226>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_226>

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

<ESMA\_QUESTION\_227>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_227>

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

<ESMA\_QUESTION\_228>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_228>

## **7.2. Position reporting thresholds**

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

<ESMA\_QUESTION\_229>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_229>

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

<ESMA\_QUESTION\_230>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_230>

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

<ESMA\_QUESTION\_231>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_231>

## **7.3. Position management powers of ESMA**



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

<ESMA\_QUESTION\_232>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_232>

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

<ESMA\_QUESTION\_233>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_233>

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

<ESMA\_QUESTION\_234>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_234>

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

<ESMA\_QUESTION\_235>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_235>

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

<ESMA\_QUESTION\_236>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_236>

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

<ESMA\_QUESTION\_237>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_237>

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

<ESMA\_QUESTION\_238>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_238>

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

<ESMA\_QUESTION\_239>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_239>



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

<ESMA\_QUESTION\_240>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_240>

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

<ESMA\_QUESTION\_241>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_241>

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

<ESMA\_QUESTION\_242>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_242>

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

<ESMA\_QUESTION\_243>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_243>



## **8. Portfolio compression**

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

<ESMA\_QUESTION\_244>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_244>

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

<ESMA\_QUESTION\_245>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_245>