European Securities and Markets Authority

Reply form for the ESMA MiFID II/MiFIR Consultation Paper

22 May 2014

European Securities and Markets Authority

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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?

We agree, however clarity in regard to the scope of the application and whether this can be extended to non-EEA firms operating in EEA countries would be beneficial.

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?

We agree that that there is no need to revise the definition of investment advice as per Article 52 of the existing MiFID Implementing Directive. Rather than simply removing the references to distribution channels we would suggest to amend the text as follows: "A recommendation is not a personal recommendation if it is issued exclusively to the public or through distribution channels when the content for the targeted group is deemed general information and is not based on individual personal circumstances."

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?

We agree.

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

The responsibility of "any reporting required by MiFID II" should remain with the business line, with the compliance function continuing to have an oversight role, but this could be clarified in the drafting.

It should be ensured that all technical advice given in the ESMA consultation paper is consistent with the three-lines-of-defence model within the EBA Guidelines on internal governance. Specifically in relation to the complaints handling process, the current wording in proposal 7 (pg 25) suggests that the compliance function should perform an operational role in this context, rather than an oversight role. Monitoring on a "permanent" basis should be undertaken by the business, not the compliance function.

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?

We have arrangements in place that comply with substantial parts of the requirements. However, clarity should be provided as to whether the compliance function must be allocated complaints handling responsibility, or simply maintain oversight of the process, given the requirement for it to maintain independence. In cases of client complaints, this falls within the scope of the first line of defence as the business is the client relationship holder and therefore it is appropriate for the business to take the lead.

To avoid the risk that the presentation of options is seen as advice or an inducement to the client, it would be desirable to develop a common standard for how firms are supposed to describe to a client their options under technical advice point 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.

There is no need to replace Art. 51(3) MiFID Implementing Directive (no. 1 -7 TA), as suggested in the technical advice. New requirements will not foster convergence across the EU, as the proposed non-exhaustive list will mean NCAs can require firms to maintain additional records over and above what is contained in MiFID. The existing MiFID Implementing Regulation helps to avoid goldplating.

Regarding the table of records in point 7 of the technical advice, for professional clients, investment firms should have the flexibility to define general categories and procedures or products/services that are suitable.

It would be helpful to also clarify in the technical advice that the requirements for records to be held in electronic format (point 3), only applies to records created after MiFID coming into force in January 2017, and not on a retrospective basis.

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?

In order to reduce the risk of non-compliance with the rules in relation to telephone recording, further clarification is essential - in particular in relation to when recording should begin.

ESMA should – in collaboration with relevant data protection authorities – define when and to what extent an investment firm shall record telephone conversations related to transactions that relate to the reception, transmission and execution of client orders.

There is a risk that the recording of the entire telephone conversation would infringe current national law and it is against the recent judgment of the European Court of Justice (ECJ). In addition to the principles of data avoidance and data economy in accordance with national law the Directive 95/49/EC also provides that "Member States shall provide that personal data must be: [...] adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;[...]" Recording of a conversation which may involve some "relevant" conversation but also some non-relevant information, breaches this. The recording of all telephone conversations can also affect labour law.

To comply with the obligation of recording telephone conversations in accordance to Article 16 (7), we suggest that the recording requirements should apply to the execution of the order itself. The investment firm should record a summary of the execution of an order and the client shall confirm over the telephone the accuracy of that order.

In regards to ESMA's consideration that a wider scope of internal calls than solely required for market abuse purposes should be subject to the recording requirement, we suggest similar wording is used in the technical advice as the FCA's COBS 11.8 rules i.e. the obligations do not apply to individuals carrying out back office functions as such persons will not normally make relevant conversations in those capacities (COBS 11.8.9(2)), which clearly acknowledges proportionality.

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

We agree that an investment firm should monitor such records where it is necessary to ensure compliance with the requirements; however, this should not extend to the regular monitoring of all records and should only be required where other methods to ensure compliance are not sufficient or available, in compliance with data protection laws. It is possible for an investment firm to check the controls and processes that are in place to allow a firm to comply, without necessarily monitoring the records themselves. The technical advice to the European Commission should make these points clear.

In accordance with the judgment of the ECJ as mentioned above the monitoring must be necessary, appropriate and proportionate within a democratic society for specific public order purposes. That is for example not the case if the Data Retention Directive (2006/24/EC) is prescribed that data shall be stored at least six months without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime (e.g. market abuse). ESMA should specify procedures as to who within an investment firm should be authorised to access and subsequently monitor any data retained within the telephone record. Furthermore, MiFID II does not require the data in question to be retained within the European Union and we would welcome further clarity on this.

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?

Additional items are not necessary. The recording of written notes or meeting minutes of face-to-face conversations should be to provide an "order receipt" for the client with important order data (e.g. type of order, execution venue, etc).

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

Clients should not be required to sign the record of face-to-face conversations. There is the risk that this may pressurise the client, and once the client has signed, they give up protection which they may benefit from at a later stage if they choose to challenge for example, the accuracy of a given transaction.

After execution of an order the customer receives a settlement note of the securities (with the information about the execution) which they can compare with the "order receipt", to ensure the accuracy of the transaction.

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

Generally, yes, however please refer to our answers to other questions in this section.

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?

Direct costs will relate to the upgrading or development and introduction of new systems or system capabilities. There will be additional costs for organising and using different systems and equipment and associated costs with training of employees. Other costs will include storage capabilities as the retention period is extended. Records will also need regular maintenance, testing and backing up.

In addition, the legal uncertainties outlined in the answers to the preceding questions will increase operational and legal risk.

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.

The proposed distributor requirements should apply to the primary market. Sales on the secondary market are governed by the suitability, appropriateness and execution only provisions within MiFID. It is unclear how the distributor requirements would interact with these requirements and the primary market requirements would risk being duplicated by large numbers of secondary market distributors. This would be difficult to enforce and complicated to implement for limited additional policy benefit/consumer protection compared with the existing MiFID protections and the requirements on primary market distributors. Secondary market products are fundamentally different from primary market products and it would be difficult to see how these requirements could be applied to secondary markets in the way described in the consultation paper.

Obligations such as these would place high costs on secondary market distributors, increasing costs for consumers. Additional requirements/burdens on secondary market distribution may reduce the ability for retail customers to participate in markets which are of significant value for the real economy.

Under Point 9 of the technical advice, it is not clear what is meant by "product". Additionally, the requirement for manufacturers to undertake scenario analysis (paragraph 9) will be difficult in many cases. We note that there are very specific aspects to consider (e.g. commercial viability, market environment deterioration, firm financial deterioration, high demand putting a strain on firm resources/ product dynamics, counterparty risk) and significant flexibility would be required for firms to tailor the information to the specific circumstances. The requirement should apply a possibility "where appropriate and possible to provide a scenario". Furthermore, ESMA should make it clear that the obligation to undertake a scenario analysis should not apply in reverse enquiry situations, only when products are 'actively' marketed.

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?

Distributors are under certain obligations when they distribute products manufactured by a third party, whether they are an EU or non-EU firm. There are likely to be a number of ways for the EU firm to obtain the information required. While this is likely to take the form of a written agreement, specifying the nature of the agreement at the EU level is likely to undermine the flexibility of arrangements, increase the costs of provision and potentially restrict product variety. EU investment firms should have the flexibility to decide on terms, and accept or reject as necessary.

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?

Manufacturers will already have a much deeper and better knowledge of what will happen to their products due to the monitoring obligations contained in these proposals, so the proposal to require distributors to periodically inform manufacturers would likely be duplicative and unnecessary.

Whilst it is good practice for the distributor to inform the manufacturer about their experience with a product (particularly any essential defaults it identifies that may pose a risk to consumer protection), we do not believe the circumstances and the information to be provided by the distributor should be mandated. The ability for a distributor to inform the manufacturer about their experience with the product could be outside of its control. The distributor may not monitor the after performance of a product (e.g. the product is no longer in the client's portfolio), or there may no longer be a relationship between the distributor and the manufacturer, or the distributor and the client.

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)?

Manufacturers should only be obliged to take action where such a situation risks leading to consumer detriment – however, this may not always be the case. For example, a scenario where a product has been acquired by an investor, who "does not comply" with the target market does not necessarily mean that the product is not in the best interest of that clients individual circumstances. Only when there is a threat to investor protection should action be taken, and this could include (i) reviewing the manufacturer/distributor relationship and/or undertaking commercial sanctions such as restricting the dealings with the counterparty; or (ii) regulatory escalation.

Furthermore, in the context of portfolio management or investment advice, the regulatory framework needs to take into consideration the fact that a single investment might not fall within the target market, but at a portfolio level, the client's best interest has been met. An advisor should not be obliged to consider a single investment only, but the instrument in the context of the client's portfolio (when applicable).

In any event, it is important that product manufacturers are not considered responsible for actions taken by distributors in their course of business. They are subject to separate regulatory requirements and to supervision by competent authorities.

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)?

It is equally possible that the manufacturer has misjudged the intended target market (either as an over or under estimate). Generally, distributors should take action where they deem this could lead to consumer detriment. The specific actions that might need to be taken will depend on the circumstances at hand and should not be prescribed in advance.

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.

The Consultation Paper does not provide sufficient guidance as to how the target market of clients for each product should be determined. We would welcome further clarification in order to enable manufacturers and distributors to comply with the new obligations and to reduce legal uncertainty.

For example, the paper notes that a potential target market shall be determined on a "theoretical basis" due to the absence of a direct relationship with clients. However, it is also stated that the Target Market shall be specified at a sufficiently granular level. This, and the reference in the Consultation Paper to factors to be considered by distributors, i.e. risks, costs and complexity (No. 17, 25, 26, pg. 47), which are the same as those considered in a suitability test, lead to more, not less uncertainty. As stated in the ESMA opinion on structured retail products (ESMA/2014/332) the target market determination should not be mixed with the suitability requirements. It could also be clarified that the target market can be specified at a less granular level for non-retail clients than for retail clients.

The proposal requires further clarification in the following areas:

- Manufacturers are only able to determine the target market primarily with product related criteria, on a high-level basis. This is in contrast to the assessment of suitability or appropriateness that are undertaken in relation to the specificities of each client. Unambiguous and consistent criteria, which could be understood by all market participants should be provided, and would reduce liability risks relative to qualitative criteria;

- The lack of specification is likely to lead to different approaches by firm and by country, leading to uneven outcomes for consumers and legal uncertainty for firms; and

- As manufacturers do not generally restrict the distribution of their products to only one distributor, neither the manufacturer can provide consistent and unambiguous criteria to the various distributors, nor can the distributors assume the criteria of the manufacturer without interpretation/translation into their own classification system. Distributors cannot simply take "specific" criteria of the manufacturer. A distributor must be able to review products of its own accord and then categorise them in line with its own system/definitions pursuant to client information received.

Therefore, manufacturers should set product related target market descriptions based on the following criteria:

- underlying asset class and market expectations;
- experience and/or knowledge; and
- specific product features such as jurisdiction, currency, maturity

The target market defined by the manufacturer should be a high-level framework which gives guidance to distributors.

Distributors, in their direct client facing role, should judge target market in the context of suitability, appropriateness and execution only, judging for example whether the product is intended for retail clients with "low" or "medium" risk appetite or is intended for clients with an investment objective "conservative", "growth" etc.

Clarity should be provided by ESMA that the requirements to identify a target market for a product do not override the appropriateness and suitability requirements. They should clearly be distinct from these criteria. The requirement to identify the “needs, characteristics and objectives” is not possible to do on a product basis, as required by the product governance requirements, compared to appropriateness and suitability which are undertaken on an individual basis.

The proposed requirement on distributors to review the investment products they “provide”, “offer” or “market” should also be clarified. The words “provide”, “offer” and “market” are different and should not be used interchangeably in the technical advice. This should be consistent with the distinction in Chapter 2.14 (bullet point 20). Any obligation on the distributor under the product governance proposal should only apply where the distributor provides investment advice. Should ESMA deem this to be insufficient, it should at least be made clear that the obligations do not apply where the distributor only passively provides execution of order services, or in cases of reverse enquiries.

Regarding the technical advice point 27 (pg 50), clarity should be provided on what is understood by the “final” distributor. There may be examples when a transaction is concluded by a firm, but they are purely providing execution services. However, the client has appointed a licensed investment advisor or discretionary portfolio manager. The distributor obligations should not apply to an investment firm in such a case. We would suggest that similar wording to that in Article 26 of MiFID II (provision of services through the medium of another investment firm) could be included in the technical advice, clarifying where the responsibility lies.

Point 3 for product manufacturers (pg 46) also requires clarity. An analysis of any potential conflicts arising from the described scenario would be extremely difficult for a firm to do in a systematic manner. The role a product plays, and the strategy a firm employs by utilising a product for a particular purpose, will vary over time depending on various factors (market conditions etc). A product would not be designed for the sole purpose of taking a position opposite to the client, in the knowledge that the client may be adversely affected.

Finally, UCITS and AIFs are governed by separate regulation and only fund managers offering ancillary investment services are bound by the MiFID regime. The reference on page 46 no. 17 is therefore misleading.

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.

We would welcome more clarity around existing proposals before we would be in a position to suggest further requirements.

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?

We agree.

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?

We are concerned about the proposal to restrict the use of TTCAs for both professional clients and eligible counterparties. Prime brokerage relationships utilise TTCA and the client will typically provide a contractual right to use client assets i.e. for the beneficial ownership of assets to be transferred to the prime broker. The services provided by the prime broker are provided on an ongoing basis throughout the term of the agreement (i.e. on the basis of a 'running account') rather than as a series of individual transactions and obligations. Therefore it is important that the collateral arrangements secure the prime broker's actual as well as future, contingent or prospective exposure to the client.

Due to the broad range of services provided as part of the prime brokerage, it is difficult to determine at the outset what the client's liability could be. For example it could be necessary to pay out to a third party following a failure to pay or deliver. Even if the existence or likelihood of exposure to the client at a particular moment is low, this is not the same as there being no risk at all.

We are therefore concerned about the scope of 3(iii) of the proposal, and encourage ESMA to clarify that agreements around the use of TTCA between prime brokers and clients would not be considered indiscriminate.

In addition, we would welcome clarification that repo transactions, securities lending (and TTCA arrangements in prime brokerage services) and other transactions including TTCA (e.g. margins for derivative clearing contracts) which are arranged by using standard agreements, do not constitute an indiscriminate use of TTCA and that requirements as outlined in (4) and (5) of the technical advice (appropriateness of the TTCA and risk disclosure to clients) are fulfilled.

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?

We agree. The question remains open as to how the investment firm may demonstrate the appropriateness of TTCA in all situations. TTCAs could be agreed between a client and their custodian, also between counterparties where neither party is acting as the custodian of the other. If the counterparty is not the custodian at the same time, then the custodian only receives the instruction to transfer the respective securities to a third party, however the custodian is not aware about the underlying transaction. The custodian would not be in a position to check the appropriateness of the TTCA; this should be the responsibility of the two counterparties.

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?

We agree, but note in connection with certain services such as prime brokerage, it is not appropriate to consider obligations on an individual transaction basis, but rather in the broader context of that transaction. Additional cost and liabilities can arise in connection with a particular 'obligation' (for example third party claims arising from the action or failure of the client to act). As such, we would suggest that the technical advice should consider the fact that in the prime brokerage context, the obligations and potential liabilities of a client could exceed the liabilities of those arising pursuant to a single transaction, so the amount of instruments or funds subject to TTCA should have a reasonable link to *all* obligations arising in connection with the client's prime brokerage agreement, including any future, prospective or contingent liability.

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?

No. We would welcome clarification that securities lending transactions remain possible, i.e. the lending of securities is not a TTCA in the meaning of article 16(10) of MiFID II. A client with a securities portfolio should be able to lend their securities to a borrower, and this needs to be done via title transfer otherwise the borrower cannot fully dispose of the securities (e.g. use the securities to settle a delivery). In the case of securities collateral, which is transferred from the borrower to the lender, we appreciate that in the case of retail clients this could be done via an alternative legal mechanism i.e. security interest or pledge.

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?

We agree. Any requirements should be in line with the existing standard market agreements for securities financing transactions to ensure that all clients receive the same fair level of protection and oversight.

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?

We agree that these should apply to retail clients only.

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?

Agent lenders often take collateral, on behalf of their clients, from financial institutions, including investment firms. In some cases, depending on the underlying securities, tri-party custodians (among others) may be appointed as sub-custodians and to manage the process of ensuring transactions are sufficiently collateralised (in accordance with the parties instructions). Any regulation should make a clear distinction between investment firms trading from their own book with clients and those which are providing a service to such clients on a custodial or agent basis.

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?

For retail clients the express prior consent has to be evidenced on a transaction basis but we do not believe this is necessary for professional clients and eligible counterpartiess; here the authorisation can be given on a one-off basis, as is possible e.g. under German Custody Law (article 16). Otherwise STP-processes such as, for example, T2S Auto-Collateralisation and T2S Client Collateralisation transactions would not be feasible with regards to non-retail client assets.

We suggest the following drafting in paragraph 8: "Where a client gives its consent on an on-going basis, then further consent is not required in respect of individual transactions".

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?

We agree in principle that firms that are not licensed as credit institutions should be required to consider diversification when placing client money, however it must be ensured that this obligation does not override the importance of ensuring availability or the quality of the third party entity. Monies should not be placed at greater risk for the benefit of diversification.

ESMA may consider that the diversification requirements can be waived if this is a result of a client requesting their monies to be placed within an intra-group entity.

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?

We agree that for investment firms not being licensed credit institutions, an intra-group limit should be imposed for depositing client funds due to the exposure to concentration and contagion risk. However, we recommend to carefully analyse the adequate cap for the ratio of client funds. Any imposed cap should not unnecessarily decrease the overall liquidity of the intra-group credit institution since this is likely to result in increased costs to clients.

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?

We would recommend a specific de minimus threshold value of client funds as of which the cap ratio requirements apply in order to avoid disproportionate costs for smaller investment firms. There is likely to be little client benefit by imposing mandatory diversification of small client fund amounts across multiple banks.

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

There would be costs to determine the daily free cash and the movement of the cash to another non-group credit institution as part of the diversification requirement and increased operational risk.

Several factors need to be considered: to calculate the free liquidity, the required cash liquidity to prefund the overnight settlement cycle needs to be taken into account. Often clients have overdrafts in other currencies that would need to be considered, so the additional benefit to the client would be small compared to the costs for the diversification of their funds.

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?

Firms could face a large increase in costs and a reduction in efficiency that could have direct impact on the service to clients. It may also result in funds being placed with lower quality counterparties as the need for diversification requires additional institutions to be utilised.

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?

This depends on the size of the current intra-group funding activities and the ability to gain new clients as a result of the diversification requirement.

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?

We agree. We would however like to highlight that German custodian banks when depositing client securities with a third party (e.g. a foreign sub-custodian/CSD) are required to receive confirmation from that third party (i.e. foreign sub-custodian) that a lien on the securities which are safe kept by the third party are restricted to those cases in which they are directly related to the purchase and safekeeping of these securities ("Three-Point-Declaration").

Liens on client securities held in custody by the custodian bank in case of non-fulfilment of the client's obligations towards the custodian bank (e.g. cash credit for settlement) which are generally part of custody agreements should not be covered by the proposed standard. This kind of lien agreement is necessary to mitigate the custodian's risk exposure towards its clients or alternatively clients have to provide upfront collateral by way of legal title transfer.

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?

We do not agree to this proposal because this should be part of the sub-custody agreement with the third party and/or be included in the "Three-Point-Declaration". A separate disclosure or risk warning should not be required.

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?

As mentioned under question 42 the costs for banks would be limited where such a framework already exists. However, banks authorised in jurisdictions without such a framework would face the considerable initial costs of reviewing all existing third party agreements (e.g. for legal opinions for each jurisdiction). The amount of cost is also dependent on the custody chain and the number of involved intermediaries.

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?

We agree. This is already the case today. Any lien or security interest on client's assets is part of the custody agreement or agency lending agreement. No additional record is necessary.

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?

In the EU and other third country jurisdictions, account segregation is one of several measures to ensure that client financial instruments are separated from other client assets and proprietary assets of the investment firm as outlined in Article 16 (1d) of the Mifid Implementing Directive. The other equivalent measures need to achieve the same level of protection. Investment firms chose different setups depositing proprietary assets and client assets with a third party sub-custodian/CSD, i.e. segregated accounts or omnibus accounts depending on the business and operational needs or on client demand. The use of omnibus accounts must remain possible in consistency with EU legislation. Mandatory 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.

Any potential change of article 16 (1) Mifid I Implementing Directive should consider the entire custody chain and the respective level in the custody chain and should be in line with the requirements of article 38 CSDR (individual segregation and omnibus accounts), article 39 EMIR (clearing segregation) and AIFMD (depository needs to segregate proprietary assets from funds assets in the books of the custodian.

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?

Existing due diligence requirements, which are current practice today, should be sufficient.

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

There should not be an additional cost as investment firms and custodian banks already today disclose this to the client.

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:

Such measures already exist today on settlement level to comply with the requirements of the custody laws in some countries, by means segregated securities accounts or by an upfront securities provision check on the client's securities account (in case of omnibus accounts). This ensures that the client has the necessary securities for settlement of his delivery instruction. Many custodian banks offer auto-borrowing/fails coverage facilities in case clients cannot fulfil their delivery obligations on the intended settlement date. The settlement discipline regime of CSDR will introduce measures (daily fails penalty, buy-in regime) to ensure timely settlement of instructions.

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?

We agree.

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

We agree.

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.

Yes, this is good practice. However, with regards to Point 3 of the technical advice, the ability to disclose a conflict to clients in "sufficient detail" or include "a specific description of the conflict" may in some situations be constrained due to bank secrecy/handling of PSI regulations. ESMA should take this into account in developing final advice.

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.

No. Under Article 22 of the MiFID Implementing Directive firms must identify circumstances that may give rise to a conflict of interest. Whilst the examples in Article 21 provide a flavour on circumstances in which a conflict may be potentially detrimental to a client, to include further additional situations may lead firms to place too much reliance on the situations described and not force firms to consider wider circumstances where conflicts may arise. We suggest that MiFID II clarifies that these circumstances are not seen to be exhaustive and firms retain the obligation to identify all conflicts of interest.

The wording in point 3 (pg 73) still leaves it open as to what kind of information should be explained to the client which is exposed to the conflict. It is unclear why the existing disclosure obligations are insufficient.

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.

We agree.

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.

We agree.

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?

We have concerns with some of the assumptions in the analysis within this chapter of the CP, and the technical advice which follows. Our specific comments on the technical advice proposed are listed below, the detailed reasoning follows:

- Point 3: it should be clarified to only apply 'where relevant' given that a placement is not necessarily related to financing transactions of the client;

- Point 3(v): it should not be required from a conflicts of interest perspective to name the individuals involved in pricing and allocation;

- Point 5: With regard to stabilisation, while we do not object to explain to an issuer client how stabilisation is working, stabilisation within the framework provided by Commission Regulation (EC) No. 2273/2003 implementing Directive 2003/6/EC does not actually result in a conflict of interest;

- Point 12 & 19: it should be clear that where conflicts cannot be managed MiFID II does not require to refrain from an engagement. Rather the firm shall disclose to the client the nature and/or sources of conflicts and the steps taken to mitigate the risks resulting from it so that the client can take an informed decision whether or not to mandate that firm. It does not require to refrain from a mandate of the client wished the firm to act despite the disclosed conflict;

- Point 14: refraining from acting as arranger for the securities offering does not appear required. In our view such a requirement would be disproportionate given the MiFID II requirements. Even if a conflict of interest existed, the solution provided by MiFID – if organisational arrangements are not sufficient - is to disclose that conflict so that the client can make an informed decision whether or not it intends to engage the firm that has also been acting as its lender (and they may have good reasons to do so); and

- Point 16: should be deleted. Lenders are customarily bound by confidentiality obligations be it as a matter of statute or as a result of confidentiality agreements, the execution of which is required by the borrower. As a result a lender is obliged to treat the information received in connection with its lending relationship to a company confidentially and may only use that information for the purpose of the lending relationship. It would be impossible to share that information with other divisions or even other entities in the lender's group for other purposes, such as the provision of underwriting services.

Comments on the analysis

The description of the process of forming a syndicate for the purpose of underwriting and placing (point 10 (pg. 78) does not fully reflect current market circumstances. It is rarely at the lead manager's discretion to form its own syndicate. Rather, underwriting mandates are usually granted on the basis of a competitive selection process. This often also applies to co-manager roles. In addition, even if there is no bidding process, the syndicate is mostly formed by the issuer or a selling shareholder, at least with their consent. In many cases, the issuer will insist on its own lenders to play a significant role in an underwriting syndicate. If lead managers propose or select individual syndicate members the proposal or selection is mostly driven by transactional considerations such as inviting a bank with a strong presence in a certain country or achieving better access to that market.

In the chapter "Advising to undertake an offering" (p. 79) the discussion of financing alternatives in point 16 item (i) does not sufficiently take into consideration that different financing alternatives are primarily selected by the issuer on the basis of its specific financing needs. In particular, lending is not necessarily more beneficial to the issuer (contrary to what is indicated in item (i)). Often issuers wish to reduce their lending exposure to become more independent from typical restrictions in debt documentation (such as financial covenants or negative pledge) or collateral requirements. An equity raising may also be considered by the issuer to reduce its leverage, improve its credit rating or extend its overall financing capacity (e.g. in the context of an acquisition), especially if the availability of debt financing on acceptable terms is limited. In these cases the issuer may have an interest to involve its previous lenders also as underwriters because they are more familiar with the issuer's business than other institutions and they may be able to execute an offering more quickly as they can perform a more targeted and structured due diligence.

Point 3 of the draft technical advice appears to assume that underwriting or placing is always combined with corporate finance advice and that the reason for an issuer to effect a placement is always the financing of its undertaking. A placement of existing securities in the secondary markets (which is also part of "underwriting and placing" as defined in point 5 of ESMA's analysis p77) is not necessarily related to financing considerations of the client (i.e. the holder of the securities to be placed). Hence, the requirements related to financing in point 3 (iii) may not be relevant in the case of secondary placements.

MiFID clearly makes a distinction between underwriting and placing, (Annex 1, section A item (7)) and corporate finance advice (Annex 1 section B (3)). The definition of corporate finance advice does not comprise advice on the underwriting securities offers. Underwriting does not necessarily comprise of an advisory role with regard to the pricing, especially if the firm makes explicit disclosure towards the client to that effect. Underwriting and placing mandates are often granted on the basis of a bidding process, during which again, no advisory element is involved. Both of the practices show that advice is not necessarily combined with advice on the pricing of the securities and hence the points listed in technical advice 3 do not all seem relevant for the services of underwriting and placing.

Also, we do not believe it is necessary from a conflicts of interest perspective to name the individuals involved in advice on pricing and allotment and it does not appear realistic to assume (as in point 16 item (iii)) that a financial institution would recommend an equity raising just to achieve league table credit. This short-term success would result in a long-term loss of trust and confidence by clients if the pursuit of such a strategy became apparent.

In point 16 item "iv" there is a comment that an issuer will be (overly) dependent on its long-term corporate banker and thus be in a weak position to independently select underwriters. We do not believe that this scenario is very common. Investment banking mandates are usually granted on the basis of a competitive selection process where even a long-standing lender cannot assume being retained as a lead manager. Most issuers also have ongoing relationships with more than just one reputable bank and mandates, especially for equity raisings, are usually granted on a case by case basis. Only for debt issuance programs (DIPs) an exemption applies, but only at first sight. While it is true that issuers tend to stick to the same arranger for many years, there is also a number of examples where arrangerships have changed and there is a significant number of competitors who can perform that function. In addition, the arrangership function does not mean that a manager role for a drawdown (i.e. the actual issuance of securities) under a program will be awarded. Conversely, we have seen an increasing fluctuation among managers under DIP draw-downs in recent years.

In points 18 et seq. (pg. 80) it is rightly stated that the interests of the various parties of the underwriting business are complex and that it cannot be assumed that the one party is interested in achieving a high and the other in achieving a low price. That said it cannot be assumed that the issuer only has an interest in maximising the offer price. Rather, also the issuer (and not only investors) is interested in a positive aftermarket performance of the placed securities. Achieving the highest possible placement price with a subsequent decline in the aftermarket would result in the issuer's securities to come under scrutiny and the chances of a successful follow-on placement (including the issuer's ability to raise further capital) being negatively affected. Also, when securities can be freely allocated, the issuer has an interest in achieving an allocation to a well-balanced mix of long and short-term oriented investors to ensure sufficient trading in the class of securities while avoiding too high volatilities.

It would also not be in the interest of an underwriting firm if any of its underwriting engagements were regarded as not successful. This applies both to the assessment by issuer and by clients. Otherwise a negative perception of an underwriting transaction by other market participants (especially issuers and shareholders, but also investors) would affect the underwriting firm's ability to be mandated for further offerings and to place securities with investors in the future. Hence, the underwriting firm has a strong interest to achieve a balanced placement price that allows for a reasonable investor mix, a positive aftermarket performance and to maximise proceeds without overly compromising the foregoing aspects.

We do not agree that the interest of investment firms in an "overpricing" described in point 22(iii), p80 is a valid consideration as the pricing of debt instruments is more complex than just the fixing of one offer price. Rather the "price" of debt instruments consists of a combination of several parameters such as term, interest rate, agio or disagio (i.e. premium or discount on the nominal amount). The correlation between different instruments of the same issuer can also only exist to the extent the conditions of the instruments are comparable. Given different terms and features of those instruments this is rarely the case. Technical Advice point 4 should take these points into consideration.

Regarding the description of potential conflicts of interest in the placing of securities, it is assumed in point 26(iii), p81, that the investment firm may favour its own interests over those of its investment clients by being selective and unclear in the information it provides about the issue. We disagree with that assumption. There are detailed disclosure requirements (in particular those under the Prospectus Directive 2003/71/EC) ensuring that investors receive the appropriate information.

Point 26(iv) appears to imply that it is in the issuer client's interest to have its securities allocated primarily to long-term investors whereas investment firms favour active traders with a view to own future trading commissions. There is indeed an interest to ensure that there is an active and liquid trading in the relevant securities. However, this is also in the issuer's interest. If securities were only allocated to long-term investors this would not be the case. Rather, despite a potentially high market capitalisation, the trading would be thin, small orders would be sufficient to lead to unpredictable volatility and, as a result, the execution of future placements, including in particular further equity raisings (in which the issuer may have a vital interest) difficult. Hence, issuers aim at achieving a balanced investor mix. Also, a high volatility in the after-market is not in the investment firms' interest as well since in this case the transaction would hardly be perceived as a success. Accordingly, the interests of the issuer and the investment firm are generally aligned rather than diverging.

The section on "Lending/Provision of Credit" (points 36 et seq., p83) is based on assumptions which do not fully reflect current market reality and the legitimate interests of the parties involved. As a consequence, with regards to technical advice point 14, we do not believe that a repayment of a loan by using the proceeds of a securities issue necessarily present a conflict of interest. The sentence "…should consider whether in such circumstances it would be appropriate to refrain from acting as arrangers for the securities offering…" seems too strong. Firstly, repaying a loan using proceeds generated by a debt or equity issue can make sense to the issuer for many reasons from an economic perspective. The issuer may use an opportunity to refinance itself at more favourable conditions than under the existing loan, reduce its dependence from lenders, free up its assets from being used as collateral (and thus the issuer's disposition over such assets being restricted) or, in the case of an equity offering, improve its leverage ratio and credit rating. From an investment firm's perspective a requirement to refrain from engaging in underwriting business with their borrower clients would mean they would have to opt for either engaging in lending or underwriting business. This would restrict issuers both in their selection of underwriters for securities issuances. It may also reduce the availability of lending as the number of potential lenders would be reduced and their willingness to provide loan financing would be limited.

Even if a conflict did arise, the solution provided by MiFID is to disclose the conflict so that the client can make an informed decision whether or not they intend to engage the firm who has also been acting as its lender. Hence, refraining from acting as arranger for the securities offering seems disproportionate given the Level 1 requirements, and the fact that an issuer should be free to choose its lender for the underwriting function.

However, as already outlined above (see the comments on point 16 item "I"), the issuer may even have an interest to involve its lenders also as underwriters as they have a closer relations with, and thus better knowledge about, the issuer and its business than other institutions that had no interaction with the issuer previously. The issuer may also wish to choose a lender investment firm as underwriter for reasons of confidentiality if it does not want to share firm-specific information with additional investment firms prematurely.

As regards point 36(i) and (ii), we wish to point out that the level of information to be provided to investment clients is addressed and regulated by the Prospectus Directive and Prospectus Regulation No 809/2004. Investment firms do not only have a regulatory obligation to comply with these disclosure requirements (and issuers are subject to the same requirements). Moreover, providing incomplete information to investors or to make insufficient inquiries if the issuer would also expose the investment firm to civil, administrative or even criminal liability (as set out in detail in ESMA's report of May 30, 2013 (ref. ESMA/2013/619 *Comparison of liability regimes in member States in relation to the Prospectus Directive*). In addition, in the case of such incomplete disclosure the investment firm would suffer reputational damage that could to affect its ability to provide underwriting services in the future. Hence, the investment firm has an own interest in providing complete and accurate information to investment clients and to conduct appropriate inquiries (so-called due diligence reviews) on the issuer.

Regarding point 37 of ESMA's analysis and technical advice point 16, we would point out that lenders are generally bound by confidentiality obligations. A lender is obliged to treat the information received in connection with its lending relationship to a company confidentially and may only use that information for the purpose of the lending relationship. It would not be possible to share this information with other divisions or other entities in the lender's group for purposes such as the provision of underwriting services.

The statements in point 39 (p83 et seq.) do not seem in line with the general principles set out in Art. 23 MiFID II, under which conflicts of interest identified by the required identification process need to firstly be prevented or managed to not adversely affect the interest of its client. The organisational or administrative measures to be taken to that effect according to Art. 16(3) are manifold as can be seen, for example, from the non-exhaustive list in Art. 22(3) of the MiFiD Implementing Directive, including, procedures to prevent or control the exchange of information and separate supervision of relevant persons. The approach taken here, for situations where organisational or administrative arrangements to prevent conflicts of interest from adversely affecting the interests of its client are not sufficient to ensure that client interests are not damaged, does not appear consistent with MiFID II Level 1. Article 23(2) of MiFID II states that in such a situation the firm shall 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. It does not require firms to refrain from an engagement. Given this, a limitation of a firm's activities appears to be required only in exceptional circumstances and as a last resort. Technical advice point 14 should be amended to that effect as it should not be in conflict with the Level 1 Directive.

Furthermore, one would assume that if a client decides on an informed basis that they wish to engage a firm despite the disclosed conflict of interest, such a decision would technically be permitted under MiFID.

A restriction of activities or a prevention from an engagement is not provided for in the Level 1 Directive. Therefore this can only be the last resort if other measures (including disclosure) are not sufficient to appropriately manage a conflict. More specifically, a situation where an investment firm is engaged by several clients who are competitors to one another client only in rare circumstances creates a conflict that triggers a requirement to abstain from the one or the other engagement. Of course this has to be analysed on a case by case basis by using exactly those procedures as are required under article 23(2) of MiFID II.

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?

The relevance of hedging in the context of underwriting and placing is overstated.

Stabilisation, over-allotment and greenshoe options cannot be perceived as part of a hedging strategy or as being contrary to the issuer client's interest. Moreover, stabilisation, over-allotment and greenshoe options are expressly allowed and granted a safe-harbour under Regulation (EC) No 2273/2003. That regulation states in recital 11:

"Stabilisation transactions mainly have the effect of providing support for the price of an offering of relevant securities during a limited time period if they come under selling pressure, thus alleviating sales pressure generated by short term investors and maintaining an orderly market in the relevant securities. This is in the interest of those investors having subscribed or purchased those relevant securities in the context of a significant distribution, ***and of issuers****. In this way, stabilisation can contribute to greater confidence of investors* ***and issuers*** *in the financial markets."*

In practice, issuer clients regularly request that the transaction documentation for a securities offering provides that stabilisation (etc.) can be effected. Further, the fact that stabilisation and over-allotment may be effected and a greenshoe option is granted as well as the mechanics thereof have to be disclosed in detail, as required under Regulation (EC) No 2273/2003; actual stabilisation transactions have to be disclosed to the relevant regulator and to the public as well.

The Market Abuse Regulation (EU) No 596/2014 does not change the approach taken towards stabilisation, over-allotment and greenshoe options. They are still regarded as legitimate and thus exempt, in certain circumstances, from the prohibitions against market abuse (see Recital 11 and Art. 5 of MAR). Hence stabilisation, over-allotment and greenshoe options should not be regarded as critical from a conflicts of interest perspective.

Short selling is not necessarily suitable to effectively hedge underwriting risks as it may negatively affect the market price of the underwritten securities. This will lead to a negative market perception of the transaction as a whole and thus increase the related market and execution risks. Such a transaction would also have a negative impact on the investment firm's reputation, especially in terms of execution capacity. In addition, short sales (if any) can only be effected after the underwritten transaction has been publicly announced as they could otherwise constitute prohibited insider dealing.

Notwithstanding the above, the hedging of underwriting risks as such does not appear illegitimate as it reduces the market risk exposure of the underwriting investment firm and therefore is beneficial for such firm's own stability and risk management. If disclosure were to be required to that effect, it should be limited to the fact that hedging of the underwriting risk may be effected and to the extent it actually could affect the issuer's own interests (which is unlikely, for example, if hedging is done via an index-related transaction). This, on the one hand, takes into account the flexibility necessary for an underwriting firm to flexibly manage its own risk position. On the other hand, further details of a hedging strategy do not provide additional value to the issuer client in terms of protecting its own interests. Also, details of hedging transactions may, for a third party such as the issuer, constitute inside information as defined under the MAR and we do not think that disclosure of such level of details of a hedging strategy could be deemed as "lawful" disclosure.

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

We have implemented a conflicts of interest policy and further organisational arrangements to identify and manage conflicts of interest as required under MiFID and the related delegated acts and implementing measures. These also cover potential conflicts of interest that may result from underwriting and placing.

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

Certain assumptions apparently underlying the CP do not correspond to the actual economic interests of market participants and current market conditions:

- As regards the obligation of investment firms to develop allocation policies (points 28 et seq. p81 and draft technical advice no. 9 on p86), it is not entirely clear whether investment firms are envisaged to develop a single overarching allocation policy only, customised allocation policies for each individual transaction or both.

- We agree with the general statement of point 39 on p83 et seq. that the investment firm should have in place a centralised process to identify all potential underwriting and placing operations of the firm and keep a record of this information. We also agree that this process should identify all the potential conflicts of interest arising from other activities of the firm and implement appropriate management procedures.

- We do not agree that in the cases listed in point 39(i) and (ii), p84, the only way to manage the conflict would be for the investment firm to not engage in the operation as this does not conform with the three-stage approach outlined in Art. 23 (1) and (2) of MiFID II according to which refraining from undertaking business should be an ultima ratio measure to be taken only if conflict of interest prevention/management and conflict of interest disclosure are not sufficient to prevent the conflict of interest from adversely affecting the interests of the investment firm's client.

- As regards the addendum in brackets at the end of point 39 on p84, providing services to competitors is quite common to major financial institutions and, provided appropriate confidentiality arrangements are met, should not create an unmanageable conflict of interest per se. Especially depending on the timing of the respective placements, this does not in itself create a conflict of interest. If the analysis of the proposed engagements reveals such a conflict, various measures may be appropriate to sufficiently manage such conflict so that a prohibition to act for a competitor of an existing client is not generally required.

2.11. Remuneration

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

We agree.

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

The proposals concerning variable remuneration appear to go beyond the recently published ESMA guidelines and in some member states rules (e.g. in Germany, BaFin BT 8 MaComp). The proposal "*Remuneration and similar incentives may be partly based on commercial criteria, but <u>should be principally based</u> on criteria reflecting compliance with the applicable regulations, the fair treatment of clients…*" suggests that commercial factors should only play a subordinate role in determining the size of the variable compensation. This contradicts the argument that variable compensation should be able to act as a natural hedge during economic downturns and hence provide stability in regard to a prudential banking point of view.

We would welcome clarity as to whether the existing guidelines on tied agents still apply following the submission of this advice. Given how recently they were published, this approach would be preferable.

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?

We agree.

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?

If a firm is providing information on future performance of a product, the conditions on which this information should be based should not be mandated in the technical advice. The requirement for firms to provide information on product performance in different market conditions could mislead clients if not applied carefully. ESMA should allow flexibility for firms to tailor this requirement to the specifics of the product, and allow such information in certain cases to be provided in the form of a narrative (as is proposed under the advice on information on the cumulative impact on returns p112 para 59 of the CP).

We would also like to refer to Art. 8 (3)(b) and (c) of the PRIIPs Regulation. Should a KID under this Regulation be available, clients will have sufficient information and therefore, there should be no requirement to provide further information. In case of a UCITS fund, the appropriate KIID under the UCITS Directive should be sufficient.

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?

We agree that information to professional clients should be fair, clear and not misleading. We do not believe, however, that any of the additional conditions proposed for retail clients should also be extended to professional clients. The experience under MiFID I shows that professional clients have specific needs and expectations with respect to information. Professional clients typically request what they deem to be important and appropriate.

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?

We agree in principle, however we do not believe it is feasible or useful to provide a client with too much detail on the types or number of financial instruments and providers analysed per each type of instrument. Rather a more generic description of the steps taken to produce the recommendation should be provided. Alternatively, the information could be made available to clients on request.

Furthermore, we disagree with the obligation to disclose how advice qualifies as independent or not as this mixes the requirements and the legal consequences of the type of advice. We however agree with disclosing the general features and requirements as set out on Level 1 (e.g. no third party payments may be accepted and retained in the case of independent investment advice). It could make sense to disclose regardless of the type of advice provided whether or not the range of products included in the advice is limited to in-house products only.

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

We disagree with the proposal to require firms to provide information on product performance in different market conditions as this could mislead clients. Art. 31 of the Implementing Directive only requires information as to the types of financial instruments. Therefore, any form of illustration of performance will likely be misleading as a type of instrument does not have any specific future performance. If this is essential, the requirement should only apply to structured products and it should be explained to the client that performance illustrations across various market conditions are only used to illustrate the functioning of the product, and are not an indicator of likely or actual performance.

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.

No further changes are required.

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?

We agree that the full range of requirements should not apply to professional clients and eligible counterparties. However, the opt-out suggested is too limited in scope (ECPs should be able to opt out from all requirements). Furthermore, it would be important that such an opt-out could be confirmed on a one-off basis via standard terms and conditions. It is generally considered good practice to provide certain information on costs and charges to professional clients and ECPs, allowing them to opt-out of receiving standard information provides a proportionate solution. We suggest that if a professional client or ECP subsequently requests information on costs and charges, this could be provided in a format which is best suited to their needs, and not necessarily the standardised format proposed. It should be clear that if a professional client or ECP does not opt out, they should be able to receive information in a different format.

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

We would welcome clarity on the scope of application. MiFID II requires only disclosing the costs related to the financial instrument when the investment firm recommends or markets financial instruments. Therefore the aim of the wording of Art.24 (4) (c) is to reduce the scope of application to special situations. ESMAs interpretation of the scope application seems too expansive when ESMA understands "general recommendations" and "promoting" as also being covered by the regulation. Therefore "recommendation" should not apply to "general recommendations". It should rather be understood as "personal recommendations". "Marketed" should require an active distribution of the product by the investment firm.

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

We would welcome clarity on what is understood by a "continuing" relationship with a client. A "continuing" relationship requires not solely an ongoing custody or account-relationship between the client and the bank. Otherwise almost every relationship regardless of the number of transactions is based on a continuing relationship. A client may well seek the services of the same firm multiple times, but unless there is a contractual agreement between the parties for the explicit provision of a service on a continued basis, the firm should not be considered as having established such a relationship with the client for the purposes of this requirement.

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.

The proposed costs and charges to be disclosed are appropriate, subject to the manager of the instrument making such costs and charges available. However, we suggest regulating the disclosure of costs of the products within PRIIPS and not within MIFID-Level II. PRIIPS is the right place for this regulation because PRIIPS regulates the duties of the product manufacturer of a product.

For other products, for example investment funds, the on-going costs and charges may not even be available ex-ante (e.g. transaction cost, cost of securities lending etc.) and the attempt to disclose related information may be misleading. We therefore further suggest that ESMA does not change the current practice established under the UCITS Directive

We would welcome clarity on what is meant by "mark ups embedded in the transaction price" (p116 of the CP). The technical advice must take into account the distinction between price and cost. Margin and bid-offer spread should not be disclosed or regarded as a hidden cost. Non-MiFID firms are not required to disclose and hence this would result in a competitive disadvantage to MiFID firms.

If the requirement to disclose margin is maintained, it should only be as an issuer estimated value and only for structured retail products.

We do not agree with ESMA's proposal that aggregated costs and charges should be expressed in one single figure as a cash amount. The proposal is unfeasible in practice due to the fact that costs of a financial instrument depend on the current price of the product. Therefore, we suggest providing a standardised example to explain the mechanism of the cost.

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.

We agree.

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

We are concerned that the requirement to provide an illustration of the cumulative effect could be misleading to clients. Furthermore, distinguishing between one-off fees and cumulative costs for products where there is no fixed maturity seems impractical. Consideration should also be given on how to treat fees that fluctuate on a permanent basis e.g. in the case of fund of funds.

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

There would be significant costs incurred in meeting these requirements, particularly in system developments and costs in materials and communications. Additional resources are also likely in order to develop and produce costs and charges data both at point of sale and on an ongoing basis, particularly with regard to the effects of costs and charges on performance. Investment firms will also need to resource the collection of third party fees and charges where applicable.

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.

We are concerned that the concept of an inducement within the consultation paper is unclear compared to descriptions within previous CESR papers on the topic. As a result of this, the accompanying technical advice presents several concerns. We suggest to ESMA that the technical advice should reaffirm that where there is a payment from a third party which does not induce a sale (tax credits for example) such payments are outside the scope of the obligations. We assume that this is implicit, but the criteria in ESMA's analysis (point 6 pg 119 for example) does not include fees with no inducement characteristics. Conversely, it could be made explicit that it is only where a third party payment does not qualify as a proper fee and could be seen to induce a sale, should the definition of an inducement be met.

We do not believe that research should be considered a benefit that may impair a client's interest and therefore is not an inducement for a portfolio manager. Irrespective of whether or not research is publicly available or tailored to the needs of a specific customer, it is to the benefit of a client's portfolio as outlined above and in fact not to the benefit of a specific portfolio manager.

Currently, there are different methods for how equity research is compensated. For many market participants globally, equity research is paid out of dealing commissions. When paying via dealing commissions there is a segregation of the research and execution components to ensure that any trades are conducted at best execution. This is achieved through a Commission Sharing Agreement (CSA). Based on a CSA, a certain proportion of dealing commission is set aside and subsequently used to compensate also those research providers which had provided valuable research triggering a certain transaction but for best execution reasons were not chosen as execution agent. Implementing this practice across the EU can ensure transparency and appropriate cost management whilst having the benefit of avoiding the likely consequences we have outlined if paying for research out of dealing commissions is largely prohibited.

Even if research was to be considered a non-monetary benefit in line with the Level 1 text, it should be considered to be "minor" and therefore permissible. A minor benefit is defined to be reasonable, proportionate and unlikely to influence the investment firm's behaviour in a way that is detriment to the clients' interests. We disagree with the suggestion that tailored research may give rise to the risk of churning a client's portfolio. Given the potential significant impact of any changes to the treatment of research (see below) such statements should be substantiated with empirical evidence and subject to a full cost-benefit analysis.

The proposals would have potentially significant implications for equity markets, and lead to potential competitive disadvantages for those firms falling under MiFID II and thus undermine a level playing field.

Typically, the smallest companies tend to have less research analysts covering them (those with market capitalisation of less than around €250m may only have just two research analysts covering them at present, compared with the largest firms might have more than twenty). Therefore there is a real risk that research on small & mid-sized companies may decrease.

Reduced research on small companies could cause a significant reduction in attention for these companies, which would result in less trading volume in their shares. The result would be higher cost of capital for these companies due to a significantly reduced number of potential investors. Costs to hold smaller companies shares or debt would rise which would contradict numerous initiatives to promote financing of smaller companies.

Absent an international approach, the consequences of these proposals could materially disadvantage small to mid-sized investment firms in the EU and reduce the range of fund managers available for end customers to choose from. Smaller asset managers, who are typically more dependent on third party research providers to act as a first screen, may be most impacted. Their ability to compete with the larger, more established firms will be significantly impaired whilst barriers to entry may increase. This may ultimately reduce the choice of managers for the end customer.

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?

Regarding non-monetary benefits, a general disclosure prior to investment services to be provided would be sufficient, as any ex-post disclosure would not add any value for the client, due to the fact that non-monetary benefits cannot be expressed in an amount on a pro-rata basis (if at all). Based on current MiFID provisions, clients are informed ex-ante about inducements and non-monetary benefits and MiFID II requires detailed pre-sale disclosures of inducements as well. Calculating ex-post the value of inducements and particularly non-monetary benefits would be costly and disproportionate. If ESMA still consider that an ex-post disclosure is essential, we would suggest providing a generic and general disclosure, on an aggregate basis.

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.

The list of elements defining when the quality enhancement is not met (point 10 of the technical advice) should be exhaustive and clear. An open, conceptual and non-exhaustive list can lead to a de facto ban on other services as inducements, which was not part of the political agreement between the co-legislators.

Regarding point 11 of the technical advice (what *is* considered to be quality enhancing and thus acceptable), we suggest including the following examples which are contained within BaFiN's circular 4/2010 (Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency pursuant to Sections 31 et seq. of the Securities Trading Act (Wertpapierhandelsgesetz - WpHG) for Investment Services Enterprises, module AT 8.2):

- Efficient and high-quality infrastructure (e.g. site equipment, maintenance of a widespread branch network, use of IT systems (hardware/software), or provision of communication facilities);

- Human resources (e.g. hiring and remunerating qualified employees in the area of investment advice, customer support, as well as in quality-enhancing functions such as the legal department, compliance function, internal auditing – to the extent that, as far at this can be estimated, the tasks performed by the employees are designed to safeguard or enhance the quality of the services provided to the client within the meaning of section the rules on inducements; granting of special bonuses, insofar as these are linked solely to the achievement of qualitative goals);

- Employee qualifications and information (e.g. qualifications by way of training, provision of continuing professional development materials, use of e-learning systems; information by the provision of financial analyses, product information events, access to third-party information and dissemination systems, other provision of information materials);

- Client information (e.g. preparation, updating and maintenance of product information documents; provision and maintenance of efficient Internet portals with current market data, charts, research material, an events calendar, currency converter, yield calculator, value-at-risk calculator, break-even calculator, commodity unit calculator, interest calculator; client information events on specific market and investment topics); and

- Quality assurance and enhancement processes (e.g. processes to approve and introduce new products and business activities; recording and evaluation of advisory discussion).

We also understand that were any circumstance outlined in point 11 to apply, point 10 cannot apply simultaneously. We would welcome clarity on this in the technical advice.

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.

We agree that both forms of advice (independent and non-independent) could be provided to clients within the same investment firm.

The consultation paper appears to suggest that when providing investment advice on a non-independent basis, firms should also analyse the market and make a statement about the set of products considered. It is unclear what the added benefit of such a requirement is. However, it may be beneficial to ensure firms are required to state whether or not the product range is limited to in-house products only.

It should be made explicit in the technical advice that the phrase "independent advisor" can only be used by those firms meeting the relevant MiFID II requirements. ESMA should also ensure that only such firms are allowed to use this specific terminology.

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?

We suggest that both forms of advice (independent and non-independent) could be provided to different clients within small and medium sized firms. Due to the higher possibility of conflicts of interest arising from the scenario, firms should be able to demonstrate that their conflicts policy is adequate to manage such conflicts, and the client must be informed which type of advice they are receiving.

We agree with ESMA that an investment firm should be able to provide investment advice on an independent basis as well as other investment advice. ESMA should be cautious not to make organisational requirements overly burdensome, as this could disadvantage small firms and small branches of investment firms.

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?

We understand that the requirement for firms to assess whether alternative financial instruments exist that are less complex or with lower costs, refers to the firms' existing offered product range, however, clarity in this regard would be welcome.

The requirement to undertake a full cost benefit analysis of switching costs appears overly burdensome. We suggest that it would be reasonable for firms to be able to justify why the switch is in the best interest of the client, rather than complete a full cost-benefit analysis.

The idea of extending suitability requirements towards a review of less complex or less costly alternative products is not necessarily in the client's best interest and can be difficult to implement in practice. There is no existing guidance or metrics as to how complexity can be measured and hence would be impractical to assess "less" complex products. Furthermore, the implicit suggestion that less complex products are generally more in the client's best interest is not necessarily correct and therefore it extends suitability requirements beyond what is necessary to protect investors' interests.

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?

It should be noted that the proposal for providing a suitability report prior to transacting, under Article 25(6) of MiFID II will not be in the client's best interest in all cases where timeliness is a key factor in completing a transaction and investment firm's communicate with clients in ways other than in a face-to-face situation. This requirement is also unlikely to be compatible with the concept of best execution. We would welcome clarification in the technical advice on how firms should proceed in such situations. ESMA may want to make it explicit that the suitability report should only be provided in advance of the service being provided if this is in the client's best interest i.e. if time is not a key factor in completing a transaction and the investment firm and the client are in a face-to-face situation.

We would welcome clarification on the meaning of "disadvantages of the recommended course of action". This is the same as explicitly restating the risks related to the proposed investment.

Similarly, clarity on "how the recommendation meets the client's objectives, knowledge and experience and financial situation" would be welcome. Does this mean a full description of the suitability check including a causal connection on how the suitability conclusion was reached?

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?

We agree.

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?

Any qualitative distinction between complex and non-complex products will create uncertainty. For example, regarding the suggested term "fundamentally alter the nature or risk of the investment", it is unclear what is understood as the measure for "fundamental". Similarly there is no definition of illiquid instruments for the criteria "no explicit or implicit exit charges that make the investment illiquid".

We disagree with ESMA's conclusion in its analysis that non-UCITS products (i.e. AIFs) should automatically be considered complex. This is not in the spirit of MiFID II. AIFs cover a broad range of products and are not necessarily more complex or risky than UCITS products. There could well be AIFs that do not pass the tests contained in Article 38 of MiFID Implementing Directive, and hence be regarded as complex, but there should not be a blanket assumption that this would be the case for all AIFs. There should remain the option that certain AIFs may well pass the test in Article 38 and be regarded as non-complex.

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?

We do not believe that additional changes are required.

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.

It is considered best practice for firms to enter into a written agreement for professional clients for certain services. However this does not need to be defined in law. The experience shows that professional clients have specific needs and will negotiate agreements in the form and with the content they consider appropriate for their business needs.

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?

Firstly, we would welcome clarity on what is understood by a "continuing business relationship". As in our response to Q73, we believe a "continuing" relationship requires a contractual agreement between the parties for the explicit provision of a service on a continued basis.

Subject to this clarity, we agree. However this agreement should not be a separate legal document but can be a set of Terms and Conditions that have to be accepted by the client. A separate legal agreement would be duplicative of Article 19 of MiFID I in connection with Article 30 and 31 of the Implementing Directive which states that the rights or obligations of clients must be outlined in a durable medium.

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?

We agree. If the custodian providing the services is part of the same legal entity as the investment firm, the custodian will have a custody agreement in place. No additional agreement is required. If the investment firm is providing the custody services directly to the client, then the investment firm should enter into a written custody services agreement with the client.

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?

No additional agreement is required. Depending on the nature of the services requested for the client, there will be an agreement in place. Where, for example, incidental investment advice is provided, a written agreement would be burdensome and has not been necessary or helpful in the past.

2.20. 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?

The experience under MiFID I demonstrates that professional clients have specific needs for their reporting and like to agree on the content of their reports with the investment firm. Therefore, it does not seem feasible to align the content. Should a professional client want to receive a report comparable to a retail client, they can always agree on this with their investment firm. Non-retail clients should be able to request this information, but the provision of the information should not be mandatory.

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)?

A threshold should be agreed with retail clients, but the thresholds should be at the client's discretion rather than multiples of 10%. Clients should be able to decide and agree with their investment firm on an appropriate threshold.

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?

We disagree. As this applies to services other than portfolio management it is considered that the statement of financial instruments is not required to include a market or estimated value as there is no existing obligation on the firm to provide performance information. A fund manager may publish a NAV, but for funds grandfathered or exempted from AIFMD there is no uniform standard and therefore these NAVs might not be comparable, reliable or available at all. The type of mandate should dictate the information that should be provided to clients. It makes sense to provide the client with such periodic information in order to meet its ongoing responsibilities under a portfolio management mandate but for advisory or execution only, there should not be the same obligations.

The requirement would require systems changes that would be disproportionate to the benefits of providing this information in the statement. Information can always be provided should the client choose to review their portfolio with the investment firm.

Furthermore, as regards the requirement to warn about the liquidity of a product, it is not appropriate for the client to determine the liquidity of an asset by the absence of a price on the statement, as there may be other considerations to factor in.

From the perspective of a custodian, several daily statements are generally provided to clients (e.g. statement of holdings, transactions and pending transactions) which allow the clients to reconcile their position. It is not the remit of the custodian to advise a value of a portfolio or whether an instrument is liquid. It is the responsibility of the client or the portfolio manager to value the holdings and to determine whether an instrument is liquid or not.

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?

The costs of system developments and production costs related to this proposal are likely to be disproportionate to the benefits such an approach could afford a client. We consider it sufficient that clients have the right to obtain such information upon request.

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

We recommend that ESMA consider advising the Commission on the electronic provision of client reporting, including access to online tools, which allows for clients to opt out of receiving paper based advices and statements.

2.21. 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?

Point 8 (pg 159), the requirement to provide to retail clients a summary of the best execution policy, with a focus on the total known costs they face, may be counterproductive and induce retail clients to provide their own instruction regarding execution focused on costs only. This requirement appears to contradict the wording on point 32 (pg 157).

Regarding point 12 (pg 160), it should be clarified whether it is still allowed to present execution fees for different venues in other documents without listing all advantages and disadvantages related to execution on each venue.

2.23. 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?

We agree.

2.24. Product intervention

Q107: Do you agree with the criteria proposed?

It is unclear whether one single criterion is sufficient to assume a significant investor protection concern justifying product prohibition or restriction without any further requirements.

Regulators are widely empowered with the introduction of product intervention measures. As the impact of the interventional powers could be significant, ESMA should determine a specific appeal-procedure to accompany them to ensure a fair and robust process.

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.

We agree with the proposed thresholds.

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.

We agree.

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.

The number of ETF units issued would not represent the most appropriate figure for trading purposes for the determination of liquidity of an ETF. Unlike equity securities, ETF units can be created upon demand. The ADV of the underlying basket of shares would be a more appropriate representative of an ETF's liquidity.

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.

We do not agree. As acknowledged by ESMA, the analysis does not include OTC data so it not fully reflective of the market. In any case, we think that all ETFs could be characterised as liquid.

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).

We do not agree. Rather than focusing on a specific liquidity threshold to determine if an ETF is considered liquid or not, we would prefer if all ETFs were deemed to be liquid instruments by their very nature and not subject to a liquidity threshold. This is because the liquidity of an ETF is ultimately driven by the liquidity of the underlying basket of securities. This will ensure a simple and consistent application of transparency rules to the ETF market.

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?

We do not agree. Instruments with remaining maturities of less than 397 days should also be included, since in many cases such instruments will trade like those which have maturity of issuance of 397 days or less.

3.3. The definition of systematic internaliser

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?

Yes.

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.

We support thresholds based on volume.

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?

Our only concern is that if assessed on a quarterly basis, there is a risk that activity could rotate between SIs and non-SIs from quarter to quarter. Therefore the thresholds must be calibrated such that the determination of whether a firm is an SI or not is relatively stable over a period of time.

For a first time entry into becoming an SI, one month would not be sufficient.

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.

If the question is suggesting the threshold parameters are set on an asset class level, but applied instrument by instrument (or sub class by sub class) then this would be appropriate. However, if the thresholds were *tested* at the asset class level, then the test would penalise entities offering a broad scope of products over those offering only a limited scope and may not lead to a level playing field.

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.

We would strongly support thresholds based on volume. Regardless of how high or low the SI thresholds are set, they should be set such that there are no cliff edges; to ensure market makers with a similar market shares are either both in the regime or both not.

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.

We agree.

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.

We agree – subject to further refinement of the tables:

For interest rate derivatives, a distinction is needed between in the money and out of the money swaptions so this should be added as an additional sub category.

For commodity derivatives, some of the product types need to have more sub product types under them. For example 'softs' needs to be broken down further into specific commodities such as coffee, cocoa, sugar and orange juice.

For equity derivatives, the categorisation is appropriate, however, it is important that all the sub categories are used otherwise the groupings will be too crude.

Throughout, we would welcome clarity on the treatment of packaged transactions which has proven complex in the US. Issues are created when one instrument in a trade is liquid or subject to the derivatives trading obligation, and another instrument is not.

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?

We agree. The outcome will ultimately depend on the liquidity thresholds themselves, but there may be some products that are deemed liquid but are not subject to the trading obligation.

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?

We agree, although further investigation needs to be completed into the stability of this measure. It is important that new firms undertaking SI levels of activity are classified as such, but firms should not move in and out of the SI regime from quarter to quarter.

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.

Regardless of how high or low the SI thresholds are set, they should be set such that there are no cliff edges to ensure market makers with a similar market shares are either both in the regime or both not.

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?

We agree. This list will need to be updated on an ongoing basis to ensure it remains in line with market developments.

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.

The obligation for an SI which withdraws its quotes to immediately inform its NCA and its clients seems redundant. There would already be a market notice published to notify the market of events described in (i) – (iv). Re criteria (v), it would be unwise to inform the market of this situation as this could cause disruption. We accept that the NCA could be informed of (v), but would argue in any event the withdrawal of quotes can be best observed from the quote feeds rather than via a new information channel.

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?

We agree. The numbers of orders will be unique to each systematic internaliser.

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.

We agree.

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?

The size specific to the instrument (SSI) in the SI regime should only be aligned with the SSI in trading venues if the transparency requirements are equivalent or identical. If they are different, the SSI for SI should be adjusted accordingly – either higher or lower depending on the relative ability to manage risk.

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

The size specific to the instrument (SSI) in the SI regime should only be aligned with the SSI in trading venues if the transparency requirements are equivalent or identical. If they are different, the SSI for SI should be adjusted accordingly.

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?

We agree.

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

We agree with the proposed definition – it does not need to be extended.

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

We agree.

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

No. The publication route should not impact the disclosure requirement and it should remain appropriate to identify the trades as "SI" without revealing the party to the trade.

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

No.

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

We agree with the objective, but the test described seems to include variables that are outside the control of the investment firm. The obligation should be to make reasonable efforts to ensure conformity and absolute prohibition of any activity designed to create differences.

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

We agree.

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?

We agree.

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

We agree.

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?

Yes.

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

No. The draft technical advice appears to be narrower than MiFID I and inconsistent with the mandate ESMA has been given. Paragraph 1 suggests that the only mechanism by which an order can be made public is via a trading venue which is inconsistent with the level 1. Other mechanisms (such as a website) should be included.

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?

We do not agree that disclosure alone is sufficient to ensure that prices are set on a reasonable commercial basis. It is however a prerequisite to establishing if other methods adopted are working.

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

Disclosure which allows comparison across data products and venues should be mandated. This should include unit cost per notional amount traded.

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

Transparency alone will not necessarily guarantee increased competition and choice.

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

The setting of a limit on the share of revenue will be too difficult to monitor and enforce. It may help inform an approach to achieving reasonable commercial terms but alone it will not be enough. Price control via LRIC+ is the only viable option of those presented to ensure effective control.

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

We do not support setting limits. Instead, publication of levels for information and comparative purposes should be used.

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?

We agree.

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?

Yes. This could be part of a solution but it cannot be the entirety of the approach. Validation of published levels by independent assessors should be a requirement.

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.

Price control via Option C supplemented by transparency provided via Options A and B would appear the best approach.

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?

Yes, this would avoid a single user of data incurring multiple charges for using the same data in more than one software application or on two computers.

5. Micro-structural issues

5.1. Algorithmic and high frequency trading (HFT)

Q167: Which would be your preferred option? Why?

We recommend option 1. Option 2 contains significant limitations:

- Option 2 assumes that all EU markets have an equal proportion of HFT activity on them and they do not; and

- It would require firms to constantly assess their HFT status and result in a number of participants falling in and out of the HFT definition – this makes HFT obligations (eg maintenance of raw audit trail) very difficult to implement.

Even for option 1, orders that do not rest on the order book (such as immediate or cancel - IOCs) should be out of scope as these will not contribute to the number of unexecuted orders on the order book.

Furthermore, we disagree with the proposal that a participant should be considered HFT on all venues (para 20). It assumes that participants are carrying out the same activities in an equal fashion on all venues which they generally are not.

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

Option 2 contains significant limitations:

- Option 2 assumes that all EU markets have an equal proportion of HFT activity on them and they do not; and

- It would require firms to constantly assess their HFT status and result in a number of participants falling in and out of the HFT definition – this makes HFT obligations (eg maintenance of raw audit trail) very difficult to implement.

Even for option 1, orders that do not rest on the order book (such as immediate or cancel - IOCs) should be out of scope as these will not contribute to the number of unexecuted orders on the order book.

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.

We prefer option 1.

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

The proposal that if an entity undertakes a HFT strategy on one market that it should be assumed they are undertaking an HFT strategy on all markets is disproportionate and will scope in significantly more activity which is not HFT than an alternative approach might ever miss. An entity should be deemed to be HFT at the venue or connection level.

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?

Yes, clarity is necessary. The scope of Direct Electronic Access (DEA) should be extended from pure Sponsored Access (SA) to cover SA and Direct Market Access (DMA) services, however it should not be extended to include AOR.

DEA should include flow where the client chooses the venue, size, and price limit of the order which, having gone through the broker's mandatory risk controls, is submitted without delay to the trading venue and will be executed in line with these instructions.

Orders which utilise a broker's algorithms, including smart order routing should not be within the scope of DEA. In this instance, the broker maintains discretion in the execution of the order and would determine some combination of the venue, size, time and price of the execution. As such, the proposals around algorithmic trading would apply rather than those pertaining to DEA provision.

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?

AOR should not be considered within the DEA definition. Transactions that utilise a broker's algorithms, including automated order routing, should not be in the scope of DEA. In this instance, the broker maintains discretion in the execution of the order and would determine some combination of the venue, size, time and price of the execution. As such, the proposals around algorithmic trading would apply rather than those pertaining to DEA provision.

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

No.