ERES support the answer of AFG provided below

21/07/2014

ESMA Consultation on MIFID II

AFG

Draft Answer

Warning *Considering the rather short delay given for answering to the consultation, AFG is reserving its rights to eventually modify or complete its answers on specific points.*

1. Overview

Sirs,

The Association Française de la Gestion financière (AFG)[1] is grateful for the opportunity to answer to the European Security and Market Authority consultation on MIFID II/MIFIR.

Before providing detailed answers to the questionnaire, we wish to draw ESMA' attention to the concerns raised by the Level II proposals in the French asset management industry; we recall that the French asset management market is the third one in Europe with €3 000 billion assets under management and the second one in terms of fund domiciliation (as of 31.12.2013).

The major concern is that the spirit of MIFID II Level 1 would not be respected when it comes to the inducement question.

Specifically, the negative list of criteria (2.15, paragraph 10) set for determining what is not a service enhancement would, if stayed as proposed, end up in an excessive narrowing of service enhancement possibilities. We strongly believe that this negative approach disregards the EU legislator's decision and the principles set out in MIFID II Level 1 regarding payments of inducements linked to service enhancement. (See our full assessment of the issue on our answer to Q81)

As a consequence, the impact on investor protection would be very negative. Indeed, several studies (notably the CFA Institute's report- see annex) show that the proposed model would give rise to a two-tiered distribution system where investors with modest means will be left to manage their savings on their own using a faceless RTO or execution-only platform, while the

wealthy will have exclusive access to high value added advice that is remunerated accordingly.
The median size of the French investor' portfolio is € 20 308 according to AMF (*Observatoire de l'Epargne- June 2014*) which is far from allowing the average investor to pay advisor fees estimated to € xxx the first year. (*simulation in progress).*

Another consequence of reducing investment advice would be the risk for investors to be given a narrower choice of products and the risk of market concentration. An increased systemic risk would also be the unavoidable result.
As an illustration of business concentration and reduced offering to clients, a recent study shows that 90% of retail investors in UK are invested in only 10 products (*Source: Study of The Economist Intelligence Unit « Seismic shifts in investment management: How will the industry respond?"June 2014).*

Last but not least, we wish to make a special case on the way ESMA intends to submit the economic and financial research ("research") to inducement rules. We would like to stress out the risk of scarcity and maybe disappearance of research providers (especially for SME's) that would result from ESMA' requirement (chapter 2.15). We're pointing out the risk of putting investment firms back into dependence from rating agencies. Moreover, passive management (in no need of research) would prevail in investors' portfolios, worsening both the risk of concentration and the systemic risk.

In conclusion, we would like to stress that re-enforcing ex-post controls and sanctions where investment advice is not properly delivered would be much preferable that the proposed "quasi" ban on inducements for non-independent advice.

We're also pointing out that some detailed implementations are better off in the hands of the national regulators who are in a capacity of adapting to the particular features of local markets (e.g., position 2013-10 of the AMF defining the concept of service enhancement).

That being said, AFG supports the requirements that increase transparency where it enables clients to better understand the investment services he's been provided with.

On a more specific approach, there are some items where we would like to draw ESMA's attention to:

- A non level-playing field between investment services covered by MIFID II and the products covered by the PRIIP/ KID and the UCITS/IAF/ KIID as well as potentially the IMD, notably regarding costs disclosure and unbundling payments for research.
  As such, we advocate that for investment advice on funds and for portfolio management invested in funds, investment firms shouldn't be asked to add any information on the funds that is not already provided in the KID/KIID.
  In order not to create an un-level playing field detrimental to investors and market participants, no rule that cannot be immediately taken on board in PRIPs and IMD should be imposed in MIFID II implementing measures.

- Product governance; there is a risk of confusion in the roles of the manufacturer and the distributor in regard to the sales process towards “indentified target market”; we propose that manufacturers should be in charge of describing the investment objectives matched by each of their products while the distributors should remain the sole responsible for targeting relevant clients and ensuring suitability.

- Same information delivered both to Retail and Professional clients; we find inappropriate to align the content of report for professional clients (both for portfolio management and execution of orders) with those applicable to non-professional clients as professional clients usually requires different and personalized information.

We thank you for your consideration in that matter and we remain at your entire disposal for any further discussion.

Regards,

[1] The Association Française de la Gestion financière (AFG) represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. 600 management companies are based in France. AFG members manage 3,000 billion euros, making the Paris fund industry a leader in Europe for the financial management of collective investments (with 1,500 billion euros managed from France, i.e. 19% of all EU assets managed in the form of investment funds). In the field of collective investment, our industry includes – beside UCITS – the whole range of AIFs, such as: employee savings schemes, regulated hedge funds/funds of hedge funds, private equity funds, real estate funds and socially responsible investment funds. AFG is an active member of the European Fund and Asset Management Association (EFAMA) and of PensionsEurope. AFG is also an active member of the International Investment Funds Association (IIFA).

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?**

Yes.

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?

Yes.

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?

Yes. We generally agree with the proposals. However, we would question whether this level of detail is appropriate for inclusion in a Level 2 Implementing Directive or should much rather be detailed in Level 3 ESMA guidelines.

However, we would query the wording on paragraph 2 of the Draft Technical Advice. It may be preferable to refer, not to "designed to detect any risk of failure", but to "detect any failure by the firm".

Also paragraph 3(iv) of the Draft Technical Advice should "consider complaints as a potential source of relevant information". Also with respect to paragraph 3(iv) of the Draft Technical Advice, there is a risk that this may lead to a blurring of the first and second lines of defence. Managing the complaints process should be clearly within the first line of defence, with compliance acting as a second line function, ensuring that the relevant controls are operating appropriately. This distinction should remain clear in any technical advice provided to the Commission.

We would suggest that the responsibility assigned in paragraph 5(ii) of the Draft Technical Advice is too broad. Compliance Officers should be responsible for "any ***compliance*** reporting required by MiFID II". Also, in paragraph 3(iii), the requirement that the compliance functions should report 'on the implementation and effectiveness of the overall control environment' is too broad. Other control functions, such as risk management, have responsibility, and the requisite expertise, to undertake such reporting. It should be, ultimately, up to the Board to ensure that they have suitable controls, and control functions, to manage and report on the effectiveness of the overall control environment. Compliance is only one part of this structure.

We particularly appreciate, and strongly support, the proportional application of paragraphs 5(iv) and (v) of the Draft Technical Advice.

We would, finally, note that due to the wide range of investment management firms under MiFID, and the variety of ways in which they operate, it may be useful if ESMA advice were to reflect the fact that compliance functions take a range of different operational structures. Indeed, they will often outsource what may be viewed as compliance activities to other functions, such as internal or external auditors, compliance consultancies, risk functions etc. The acceptability of this should be explicitly recognised, as long as the compliance function has ultimate control and responsibility for these activities, under the board.

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

Given our comments to Q3, we do not believe that there are further areas of the Level 2 requirements concerning the compliance function that should be updated, improved or revised.

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?

Our membership already has such arrangements in place on the basis of relevant provisions in the UCITS Directive[1].

Nonetheless, we would like to point out that paragraph 3 of the Draft Technical Advice considers that complaints handling should be directly carried out by the compliance function. As this would mean operational involvement of the compliance function, this could negatively impacts its independency and should therefore be deleted. Nonetheless, it appears reasonable that information on complaints and complaints-handling by investment firms shall be provided alternatively to the NCA or the ADR entity, in case of such entity being regarded as competent under national law.

Additionally, we would like to point out that the current Article 10 of the MiFID Implementing Directive applies only to retail and potential retail clients. In order to keep this important measure of proportionality, we would highly suggest that ESMA's draft technical guidance should only apply to retail clients (and potential retail clients), as professional clients are in a much better position to look out for their own interests.

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

[1] Cf. Article 6 of Directive 2010/43/EU (UCITS Implementing Directive).

records that could be added to the minimum list for the purposes of MiFID II, MiFIR, MAD or MAR.

No, we would refrain from implementing an obligatory minimum list as proposed table in the draft technical advice, as we believe that several requirements of record-keeping should remain subject to the contracts between investment service provider, its clients and counterparts.

We also believe that additional records should not be mentioned in the list. The list is a comprehensive enumeration of records to be kept by investment firms which should enable the NCAs to assess investment firm's compliance with the markets regulation in MiFID, MiFIR and MAD/MAR.

In addition, we would suggest that ESMA amends some of the requirements of allocation. First, it should be clarified that in case of aggregated transactions, the content should comprise "the intended basis of allocation **to the individual client"**.

...

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

While we acknowledge that implementing a minimum list or enlarging the current requirements on record-keeping could help firms to track their record-keeping obligations and would promote harmonisation of MiFID implementation, we currently cannot envisage any specific benefits. For this reason it is very hard for us to quantify potential additional costs and /or benefits at this stage.

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?

We do not see any further measures that investment firms could implement to reduce an alleged risk of non-compliance.

ESMA should clarify that investment firms are allowed to forbid that orders are received or transmitted through telephone in order to avoid costly storage of telephone recordings. In such a case, the investment firm should be exempt from the recording requirements relating to telephone conversations.

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

We would like to ask for further clarity of ESMA's proposal on the periodic monitoring of records.

It should be clarified that an investment firm's risk-based monitoring programme means that the firm should be taking a risk-based sample of all transaction records that is proportionate and appropriate to the size and organisation of the firm, and the nature, scale complexity and risk profile of the relevant business or product.

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?

We would suggest that ESMA should clarify paragraph 9(v) of its Draft Technical Advice, as it is unclear what other relevant information about the transaction should be included. This wording is in our view to broad and could cover a range of information which will not serve the purpose of such records. ESMA should therefore replace the wording with the wording "**details of the order from the client including amount and type of financial instrument.**"[2] This would meet the purpose behind the recording requirement.

...

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

...

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

No.

MiFID II Article 16(7) paragraph 9 states that the "records […] shall be kept for a period of five years and, where requested by the competent authority, for a period of up to seven years."

In this context we would ask ESMA to clarify that the intention of this is that where a competent authority has specific reasons for requiring one specific set of records to be kept they can ask the firm to retain them for a further two years. It should be clear that this provision does not allow competent authorities to extend the standard retention period to seven years for all such records.

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?

With regards to additional costs and impacts, we would like to make the following remarks:

- Given the uncertainty over the scope of this requirement we would suggest that ESMA takes steps to clarify this, **particularly regarding portfolio managers**, as Article 16(7) of MiFID II applies this record keeping requirement to transactions concluded when dealing on own account, and the provision of client order services that relate to the reception, transmission and execution of client orders.
- In section 2.21 on best execution of its consultation paper ESMA clearly differentiates between execution, management or reception and transmission of orders (RTO) and placing orders with a third party for execution.

  Portfolio managers are only associated with the latter of these which does not constitute "execution". The difference between the execution of client orders and the placing of orders with a broker for execution can be seen in Articles 44 and 45 of the MiFID I Level 2 Directive.

[2] See MiFID II Recital 57: "[...] such records should ensure that there is evidence to prove the terms of any orders given by clients and its correspondence with transactions executed by the investment firms, as well as to detect any behaviour that may have relevance in terms of market abuse"

MiFID II Recital 57 of states that "records are needed for all conversations involving a firm's representatives when dealing, or intending to deal, on own account".

There is no indication in the recital that portfolio managers, who act as agent, should be recording their placement of orders with brokers.

In short, portfolio managers place orders with investment firms for execution, this is not a relevant conversation, so need not be recorded.

These other investment firms with whom the order is placed would be providing services to clients and the execution of client orders, so would be recording these conversations. It is not necessary to impose unnecessary, expensive duplication on the industry by requiring portfolio managers to record their telephone conversations as well.

- As already highlighted previously, record keeping and storage is costly and, we would therefore suggest that ESMA should request an impact analysis regarding the costs for recording and storage of phone conversations to ensure that all legal requirements are implemented in a proportionate manner.

…

2.7 "Product Governance" p.39

• 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.

Secondary trading of financial instruments should not be perceived as a distribution channel. The distribution services under MiFID are comprised of investment advice, reception and transmission of orders and dealing on own account. Secondary market trading can only be seen as a means of executing client orders, once the investment decision has been reached. Hence, secondary markets can only be understood as trading venues within the meaning of MiFID II Art. 4(1)(24) for executing orders resulting from distribution services under MiFID, not as distribution service of its own.

With this in mind we believe that the product governance requirements at the distributor's level should therefore be triggered by the provision of a relevant distribution service under MiFID regardless whether the consecutive client order is being executed on the primary or secondary market. Nonetheless, and for the avoidance of doubt, the final technical advice should clarify which investment services qualify as distribution for the purpose of product governance arrangements.

• 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?

Yes, we do agree, bearing in mind that UCITS /FIA are not under MIFID regulation and are subject to their own rules.

• **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?**

No, it would be redundant with current regulation and practice.
Periodical relevant information is interesting on a suitability/product governance point of view. However, it should be pointed out that this duty already exists in the regulation and is well-established on the French market.
It would seem disproportionate to issue specific rules on that topic (detailing the type/level of information to be provided to the manufacturer), and such information should be subject to the decisions of the parties concerned.

• **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)?**

This raises the question to what extent manufacturers can/should be in the position to intervene in the determination of the target client group at the distributor level, if – according to the draft technical advice – distributors are required to set up their own product governance arrangements and to identify target client groups for each distributed product.

In our view, it is preferable to require the product manufacturer to identify, in general terms, the target market of each product. Investment firms distributing products to the end-clients should then take this determination into strong consideration, while still being allowed to sell a product outside the suggested target market where this is in line with the distributor's suitability and appropriateness assessment of its client (e.g. certain more rewarding/riskier products might be added to a client's portfolio to diversify the overall investment portfolio).

In any event, it is of utmost importance that product manufacturers are not considered responsible for any actions taken by distributors in their course of business. Investment firms distributing investment products act in their own capacity by performing investment services under MiFID. They are subject to separate regulatory requirements and to supervision by competent authorities. Hence, product manufacturers becoming aware of deficiencies at the distributor level should be expected to take corrective actions as appropriate, but must not incur responsibility or be held liable for the distributor's shortcomings.

In this context, we would also like to point out that there are no uniform criteria for classifying clients that go beyond the general client categorisation as retail or professional according to Annex II of MiFID. Therefore, the duty to determine the target market for a product should not imply a categorisation below that level in order to avoid inconsistent standards being applied by different distribution channels.

We propose that manufacturers are only asked to describe the investment objectives their products are intended to match.

Lastly, we are uncertain of the advantages to specify groups of investors for whom the product is not compatible, as it is the distributors' ultimate responsibility to ensure suitability of the product.

- **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)?**

The distributor could obviously report this situation to the manufacturer.

The distributor is legally the sole responsible for the distribution process. In the situation where products are not sold as envisaged, the blame cannot be shifted onto the manufacturer, since the latter is not in charge of the final marketing activity toward end-client.

This being said, given that the unwelcomed situation could have impacts on the manufacturer, such as for example, unforeseen redemptions, it makes sense that the distributor keeps the manufacturer informed. Timing and contents should be left to the decision of the parties concerned.

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

No. And we fear that new layers of rules would blur even more the respective responsibilities.

First, as a general comment, rather than detailing in a specific regulation such as MIFID II the rules that should prevail in manufacturer / distributor relationship, it would seem more adequate to refer to the PRIIPs Directive.
This approach would avoid any discrepancies between the PRIIPs Directive and the MIFID II regulation.
From an operational point of view, this would facilitate the implementation by management companies of their various duties towards their clients.

On a more specific approach, we believe that there is a risk of confusion between the responsibilities of manufacturers and distributors.

We disagree with the following detailed requirements:

- DTA.7.8 (page 46): When creating a product, firms should specify an identified target market, i.e. a specific "group of investors" …"at a sufficient granular level" and any group of investors "not compatible" with the product;

We do not agree with this wording.

As previously said in our answer to Q 17, we would like to point out that there are no uniform criteria for classifying clients that go beyond the general client categorisation as retail or professional according to Annex II of MiFID. Therefore, the duty to determine the target market for a product should not imply a categorisation below that level **in order to avoid inconsistent standards being applied by different distribution channels.**

We propose that manufacturers be only asked to describe the investment objectives their products are intended to match such as horizon of investment, risk acceptance, and every other objective criteria.

The distributor should be the sole responsible for targeting client market segment and selecting investors.

Responsibilities need to be clearly separated.

- DTA.9.(page 47): Investment firms should undertake a <u>scenario analysis of their products</u>, with particular tests on "poor investor outcome" scenario and its causes;

  This typically interferes with UCITS/IAF and PRIIPs regulation. Besides, ESMA shouldn't create an un-level playing field between investment services ruled by MIFID and others products ruled by others Directives.

- DTA.11 (page 47): Investment firms should ensure that information given to distributors is of an "adequate standard", i.e. includes information about the "appropriate channel for the product, the product approval process and the target market assessment".
  "…appropriate channel for the product..": it could be a recommendation from manufacturers, not a mandatory indication for the distributors. Distributors should remain in charge of the distribution.
  "…the product approval process…": what does ESMA means? It certainly cannot be the minutes of the meetings leading to the approval of the product; this is internal and confidential information of the manufacturer. Manufacturers do of course communicate all regulatory information about the product (Directive UCITS IV).
- DTA.12.13.14.15 (page 48): Manufacturers should review their products on a regular basis:
  - Identifying crucial events that may affect risk or return of the product (14)
  - Taking appropriate actions when such events occur (15**)**

  This typically interferes with UCITS/IAF and PRIIPs regulation. Besides, ESMA shouldn't create an un-level playing field between investment services ruled by MIFID and others products ruled by others Directives.

- DTA.17 (page 49): Distributors should determine a list of clients whose needs are not compatible with the product but nevertheless could perform suitability tests on these very same clients.

  There is some inconsistency in the existing and proposed rules. A list of "not compatible" clients is useless. Some riskier products might be added to a client's portfolio to diversify the overall investment portfolio, although this client has a low risk profile.

- DTA.21: Distributors should provide manufacturers with "sales information" such as for example, "copies of promotional material and other information to support product review carried out by manufacturers".

French distributors already have the obligation to communicate their promotional material to the manufacturers for validation.
The relevance of passing sales information to the manufacturers should be left to the agreement of the parties concerned. (see our answer to Q.16)

- DTA.27: The intermediate distributor must ensure that relevant information is passed both ways (i and ii) and “apply the product governance obligations for manufacturers, as relevant, in relation to the service they provide.”(iii)

The obligations included in (iii) are ambiguous as the exact role of the intermediate distributor.

• **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.**
No
• **Q21. For investment firms responding to this consultation, what costs would you incur in order to meet these requirements, either as distributors or manufacturers?**

The costs incurred are difficult to assess in such short notice but it is safe to say that they would be high.
They would impact product manufacturers as well as distributors and, as a result, returns to clients.

We can anticipate that the requirements would have cost impact <u>on many business units such as:</u>
- Information system
- Organization of the Controls of 1st and 2nd level
- Reporting
- Client service

These costs would eventually reflect on prices charged to the client and impact returns.

2.8. Safeguarding of client assets p.52

N/A

2.9. Conflicts of interest p.70

To be completed (Cf RG et position AMF)

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.

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.

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.

2.10. Underwriting and placing – conflicts of interest and provision of information to clients p.75

To be completed (Cf Position AMF 2012-08)

2.11. Remuneration p.88

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

In general, we agree with the proposed scope of the remuneration requirements. However, we would like to seize the opportunity to emphasise once again that remuneration requirements under different EU Directives must allow investment firms and other financial entities to make sound and reasonable remuneration arrangements for their employees. In particular, investment managers rendering management services under the UCITS Directive, AIFMD and MiFID must be able to remunerate their staff in a consistent manner and in accordance with one internal remuneration policy.

As regards the details of the draft technical advice, ESMA's approach to governance is not fully compatible with the CRD IV and AIFMD rules insofar as it requires the management body to consult the compliance function before approving the firm's remuneration policy. Under CRD IV and AIFMD the responsibility for design and approval of the remuneration policy rests with the management body after taking advice from the remuneration committee if such committee has been established by the firm. Hence, in order to align the internal processes, ESMA should at least accept advice from the remuneration committee set up under other EU Directives as equivalent to the involvement of the compliance function under MiFID.

Consequently, the wording of para. 4 of the draft technical advice could be modified as follows:

"The design of the firm's remuneration policy should be approved by the management body of the firm after taking advice from the compliance ***function or where relevant, from the remuneration committee***."

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

We agree that the remuneration structure must not favour the interests of the firm or its staff against the interests of any clients and therefore should be based on criteria reflecting compliance with the applicable regulations, too. There is, however, no need to overemphasise these criteria, as currently proposed by ESMA.

2.12 “Fair, clear and not misleading information” p.91

Q 65 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?

Yes with the exception of the prospectus and annual/semi-annual reports that are subject to their own specific rules.

It should be highlighted that regarding the asset management industry, information contained in the Key Investor Information Document (KIID) is already defined both regarding the content, the language and the lay-out. As an example, the KIID must be translated into the host state's official languages

However, translation of the main prospectus as well as annual/semi-annual reports are not mandatory.

The prospectus is a legal text where every word has been written with a high degree of precision and accurateness; the prospectus is the prime document for rights and obligations and therefore potential claims. Translation is not desirable and hasn’t been asked in the previous product Directives.

As an example, the UCITS IV Directive did not address the issue of local translation of the KIID containing a cross-reference to the main prospectus not translated. It appears that practitioners who wish to use main prospectus cross-references may wish to consider making the cross-referenced part of the entire prospectus available in the same language as the KIID. Whether that is achieved by the full translation of the prospectus or by the translation of the relevant section and its publication on the Internet or in a supplementary document is a matter for the practitioner to decide in its sole discretion.

Regarding up to date information, we agree that solely information sent to clients should be up to date. However, it is impossible to always maintain the entire accessible information up to date (website as an example).

Q 66 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?

No we do not agree.

We believe that a generic illustration should be sufficient to inform the investor about the functioning of financial instruments, as it is unclear to us whether there are any benefits for a client’s understanding when presenting him with several future performance indications instead of one. Any indication must from the outset be fair, clear and not misleading. We think that showing two different figures is more likely to confuse potential investors than help them.

If future performance should be provided under different performance scenarios, we would recommend to clearly stating the basis of those scenarios in order to avoid discrepancies on the methodology used by practitioners. Indeed, in the absence of precise criteria to ascertain future scenarios, information provided to clients will in fact be misleading.

Furthermore, we would like to point out that “structured UCITS” are already under the obligation to display in their KIDs performance scenarios illustrating possible future performance in line with the relevant CESR Guidelines[3]. The presentation standards stipulated therein should be regarded as adequate for the purpose of client information under MiFID II.

Q 67 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 support the proposed general principles for information to professional clients, but see definitely no need to impose further requirements in this respect. We especially think it is unnecessary to require a fair and prominent warning every time potential benefits are referenced in a document aimed at professional clients. In our view, the existing requirement in the MiFID Implementing Directive, for a warning where potential benefits are emphasised, is sufficient, even for retail clients. We agree that important items, statements or warnings should not be disguised, and that material information should be up-to-date relevant to the method of communication used. We do not believe any of the other requirements for retail clients should be extended to professionals, bearing in mind their status and likely knowledge and experience.

2.13. “Information to clients about investment advice and financial instruments” p.94

Q. 68 Do you agree with the objective of the above proposals to clarify the distinction between independent and non-independent advice for investors?

No. We do not agree.
ESMA writes that *”investment firms should provide a description of the types of financial instruments considered, the total number of financial instruments and providers analysed per each type of instrument according to the scope of the service”.*

MIFID II Level 1 has already provided a definition of independence by banning the reception of inducements for independent advisors. This should speak for itself and no further criteria should be added.

Further, providing long lists of financial universes and instruments would not be effective. The width of a universe is not a sufficient criteria for delivering a suitable advice.
Besides the type and number of financial instruments varies periodically along with new products, new product manufacturers and new type of clients. Each list would need to be updated on a permanent basis.

[3] Cf. CESR Guidelines on selection and presentation of performance scenarios in the Key Investor Information document (KII) for structured UCITS dd. 20 December 2010 (CESR/10-1318).

Our proposal would be to go for simplicity and transparency;

- The investment firm specifies (if any) (a) its “close-links” or its “control relationships” with other entities and (b) the % of financial instruments and/or products under review issued and/or manufactured by these entities.

- The investment firm informs the client on whether the specific product it recommends is issued or manufactured by a “close” or “related” entity.

- The investment firm informs the client on whether he receives commissions on the product it recommends.

- The investment firm informs the client on its selection process of the product it recommends.

We think that this act of transparency would provide investor the trust and the protection he’s expecting.

Q. 69 Do you agree with the proposal to further specify information provided to clients about financial instruments and their risks?

No we do not agree.
As a general comment, rather than detailing in a separate regulation the complete set of information to be provided to clients, it would seem more adequate to refer to the PRIIPs Directive, the scope of which ascribes the rules contemplated by the ESMA.

This approach would avoid any discrepancies between the PRIIPs Directive and the MIFID II regulation and ensure a level-playing field.

From an operational point of view, this would facilitate the implementation by management companies of their various duties towards their clients.

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.

2.14. “Information to clients on costs and charges” p.99

- **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?**

No.
We do not agree with the principle of applying the same information to professional and non-professional clients.

We believe that information to professional clients should remain tailored to their specific needs. Information as well as investment services provided to professional clients are mostly based on bilateral agreements, with costs and charges being an important part of each agreement.
It is of course always possible for a professional client to opt for a non-professional categorization and therefore to receive retail type information.

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

We do agree on the need to information at point of sale when recommending or marketing financial instruments (3.i) and when providing investment service requiring providing a KID/KIID to the client (3.ii).

When recommending, marketing, advising financial instruments, we agree on the need to provide on ex-ante basis investment service costs (i.e. investment advice, entry-fee…).

But investment firms shouldn't be asked to add any information about the financial instrument itself that is not already provided by the product manufacturer and/or disclosed in the KID/KIID.

ESMA shouldn't create an un-level playing field between investment services ruled by MIFID and others products ruled by others Directives.

Client should not get two different sets of information on the same product depending on whether he founds the product on the internet or he discusses the product with his investment advisor.

Example: transactions costs are not included in KID/KIID and cannot possibly be disclosed ex-ante (nor ex-post) by the investment service provider.

Distributor of funds or financial instruments cannot disclose more information that the product manufacturer itself, should it be on ex-ante or ex-post basis.

As far as portfolio management and investment advice are concerned, it is more appropriate to deliver costs and charges information on a generic basis rather than on actually incurred costs. The reason is that these two investment services have tailor-made fees depending on the specific financial instruments/portfolio recommended to the client needs and cannot rely on past or current costs.
Moreover, contingent costs related to transactions (marks up embedded in the price, transaction tax …) are also subject to misleading estimation when given on ex-ante basis and shouldn't be included in the scope.

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

Yes, under conditions.
We understand that a continuous relationship should be understood as a portfolio management relationship or a continued advisory relationship between an investment firm and a client (point 32).

We would advise:

- To restrict this requirement to the investment firms which have a direct relationship with the client
- To leave investment firms and their client deciding on the option of an annual cost reporting, offered as a service enhancement.
- To consider post-sale information as a service enhancement

- **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.**

  In order to facilitate the reading of our answer, we have recalled below the detailed costs and charges listed by ESMA.

  Costs charged for investment services: portfolio management, investment advice, execution, reception/transmission...

Costs and associated charges charged for the investment service(s)	
Cost items to be disclosed	**Examples**
One-off charges related to the provision of an investment service	Deposit fee, termination fee and switching costs.
On-going related to the provision of an investment service charge	Management fee, advisory fee, custodian fee.
All costs related to transactions initiated in the course of the provision of an investment service	Broker commissions, entry- and exit charges paid to the fund manager, platform fees, marks up embedded in the transaction price, stamp duty, transactions tax and foreign exchange costs.
Any charges that are related to ancillary services	Research costs. Custody costs.

Costs and associated charges related to the financial instrument	
Cost items to be disclosed	**Examples**
One-off charges	Front-loaded management fee, structuring fee, distribution fee
On-going charges	Management fee, performance fee, service costs, swap fee, securities lending costs and taxes, financing costs.

All costs related to the transactions	Broker commissions, entry- and exit charges paid by the fund, marks up embedded in the transaction price, stamp duty, transactions tax and foreign exchange costs.

a. We are no reservations on disclosing broker commissions (or brokerage fees) but it would be very difficult or impossible for a portfolio manager to carve out some transaction cost items.
Examples: "Swap fee, Securities lending costs and taxes, Marks up embedded in the transaction price, Foreign exchange costs, and stamp duty".
The reason is that these costs are only known by the broker, the portfolio manager chooses the best global price. That's what is key for the performance.

Moreover, this "transaction cost" disclosure, difficult and costly to achieve, is not consistent with the requirements on the KID/KIID; this disclosure would be an additional requirement above the KID/KIID level and would create an unlevel-playing field between investment services and UCITS/IAF funds.

Lastly, we doubt that the retail investor is in a position to fully appreciate detailed transaction costs.

b. As to **research costs**, it would not be possible to itemise them on a specific investment service or specific portfolio, since research includes macroeconomic studies, country or sectorial analysis that are used on a global basis by the investment firm.

The disclosure of too many technical costs would lead the client into perplexity and discomfort. Performance should be the ultimate judge on the quality of the investment service.
Lastly, and very importantly, the transaction costs are already covered in the **"Best execution"** rules of MIFID.

c. **Personalisation of cost** on ex-post disclosure would face very important practical difficulties and could not hence be accurate.

As long as there is more than one investor in a product together with continuing in-flows and out-flows, it is technically impossible to personalise transactions fees.

In order to maintain consistency between investment services and products, we strongly advise not to impose personalisation of costs but to leave it to the decision of the investment firm and its client when it is technically possible.

Such a personalisation, when possible, should be considered as an optional service enhancement.

- **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.**

Yes, we do agree, ex-ante costs should be provided on a generic basis.
Generic basis is to be understood as fee schedule or method of calculating.

It would be very difficult or impossible to disclose ex-ante costs based on real amount when it comes to portfolio management service.
The reason lies with the fact that costs are linked to variable data not known at the point of sale such as market conditions, all types of financial instrument that will be used, size of the investment, turn-over of the portfolio, etc...

Therefore ex-ante costs need to be disclosed on generic basis or on a maximum basis.
<u>And consistency with KID/KIID rules should be considered of the utmost importance.</u>

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

We strongly recommend that the methodology for calculating figures be the same than the methodology implemented in the KID/KIID.
Having two different sets of calculating would be costly and cause confusion for investors as well as creating an unlevel playing field between investments services and UCITS/IAF funds.

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

The display of cumulative costs and charges on an ex-ante basis would be meaningless and alarming for the client if it is not accompanied with cumulative returns over the same period; costs need to be compared to revenues in order to give a comprehensive understanding of an investment.
But calculating cumulative returns on an ex-ante basis needs to rely on market scenarios. There is no common market practice in drawing market scenarios. We would recommend to clearly stating the basis of those scenarios in order to avoid discrepancies on the methodology used by practitioners. Indeed, in the absence of precise criteria to ascertain future scenarios, information provided to clients will in fact be misleading.

Besides, costs and charges of a managed portfolio, varies from one year to another depending on events such as turn-over, type of instrument used, etc...; where it is possible to give an estimation for one year with an acceptable spread of error, the spread is no longer acceptable and would be misleading, leading to non-significant figures when cumulated over several years.

Last but not least, display of cumulative costs (whatever their accuracy) would deter clients from investing in long-term products, even though these long-term products are the most suitable investments for them.

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

The costs incurred are difficult to assess in such short notice but it is safe to say that they would be high.
They would impact product manufacturers as well as distributors, brokers and, as a result, returns to clients.

We can anticipate that the requirements would have huge cost impact <u>on many business units such as:</u>

- Information system

- Accountancy
- Organization of the Controls of 1st and 2nd level
- Reporting
- Client service and claim-handling

These costs would eventually reflect on prices charged to the client and impact returns.

2.15. “The legitimacy of inducements paid to/by a third person” p.118

- **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.**

No, we don’t agree with the proposed exhaustive list of minor non-monetary benefits and with the analysis that investment research is a non-monetary benefit.

Nothing at level 1 mentions that level 2 measures should be developed on research as an inducement. Recital (74) of MiFID II shows that restrictions on inducements are predominantly viewed from the angle of the distribution and placing of financial products to clients, i.e. the purpose is to avoid firms being improperly influenced in their investment decisions by receiving and retaining benefits from product providers and issuers.

It is our surprise to see ESMA extending the application of the inducement rules to research. In doing so, ESMA is saying that investment firms receive or retain the transaction fees (or part of) that are dedicated to research and that investment firms are influenced in their investment decisions at the detriment of the client.
Investment firms don’t receive any part of the transactions fees and therefore cannot be improperly influenced in their investment decisions.

That is indeed often common practice for a portfolio manager to agree higher execution rates to allow them to also obtain higher value research from a broker.
<u>We strongly believe that the current way the research is paid is not against but, on the contrary, in the best interest of clients.</u>
Portfolio management (and execution) is extremely competitive, with performance a key axis of competition. It would be self-defeating in our view for a manager to trade more than the optimal level or at a too high rate, as this would undermine performance. On the contrary, the execution rates reflect an optimal price that enables clients to benefit from competitive transaction fees while in the same time the transaction fees enable the client to benefit from a high-quality and diversified research. In fact, research directly assists the investment manager when making its investment decision and is to the advantage of the client and not to its detriment.

<u>The qualification of any research as a prohibited non-minor benefit will have a huge impact on the current market and was not intended by the EU co-legislator.</u>
ESMA does not provide an impact assessment on the effects of qualifying tailored research as prohibited non-minor benefit. It is our understanding that the effect would lead to a massive increase of costs for active manager mandates in Europe.
If investment management companies will have to re-price the services they offer, they will face competition at least from passive management and in particular, from overseas managers.

Should research be considered as inducement, it would become a scarce commodity, available only to large investment firms. The business model of research would be radically changed and turned into a market where the cost of research would rise due to the lack of financing.

Only large investment firms would be in a position to afford it while smaller actors would need to cut down their research expenses unless they can reflect it to their clients through higher management fees.

Similarly, providers of research on specific financial instruments (e.g. small and mid-caps, asset-backed securities…) may not find enough buyers to sustain their business; as a consequence, specialized research providers would end to disappear for the benefit of large providers or large traditional markets and SME's access to public financing would dry up.

Portfolio managers that are not in a position to finance abundant research would tend to rely on public ratings and therefore increase their dependency on ratings agencies.

Increasing cost of research would also favor passive management and index-linked products (in no need for research). As a result, States or corporates not included in indexes would be penalized for not getting access at a level-playing field to public financing.

Moreover, non-European investment firms still benefiting from an abundant research material would have a competitive advantage over European actors and their European subsidiaries would be able to benefit from it through in-house channels.
ESMA would create a distortion of competition in favor of Non-EU investment firms not subject to these rules.

We propose that research remains exclusively and rightly ruled by the "Best execution" regulation, which provides investors full transparency and protection against conflicts of interests.
In addition, some countries have gone further in tightening these rules by implementing commission sharing agreements, under which cost of research and cost of execution can be split to ensure that each provider is remunerated at the level it should be.

As an illustration of these rules, French asset managers have currently to publish a "Report on Intermediation Fees". The Report gives full transparency on the intermediation fees related to "order reception, transmission and execution services" on the one hand and intermediation fees related to "Investment decision aid and order execution services" on the other hand.

The report also gives an account of the measures implemented to prevent or deal with any potential conflicts of interest in the selection of service providers.
Such Report could be more detailed if need be in order to increase transparency and protection towards Investors in the use of transaction fees.

- **Question 80 : 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?**

No.
<u>Preliminary</u>
Scope of investment services contemplated in the answer: non-independent investment advice.

Regarding non-monetary benefits, financial assessment is random and unreliable, disclosure of amount shouldn't be contemplated.

Allocating non-monetary benefits to an individual client is not possible as it is spread over a full range of investment services and clients.

Regarding monetary benefits, along with our answers to Questions 72 and 75 on chapter "Information on costs and charges", we think that ex-ante information on monetary benefits should be disclosed on a generic basis and stick with the market practice:

- A maximum % of the amount invested as entry fees
- When relevant, an annual % of the amount invested

As for ex-post disclosure, we think that providing an exact amount (7.ii) and personalisation (7.iii) is difficult and costly ; it requires tracing all in/outflows of the client and therefore needs developing specific information systems between custodian and the distributors' client service departments ; the costs will eventually be reflected to clients for a meagre benefit.

We think there's no added value in providing a cash amount to the client as long as the client has received the method of calculating (as a % of the amount invested)

Providing the same display of information (in %) on ex-ante and on ex-post preserves the consistency of the information.

- **Question 81: Do you agree with the non-exhaustive list of circumstances and situations that NCA should consider in determining when the quality enhancement test is not met? Should any other circumstances and/or situations be included on the list? If so, please explain.**

No.
We do not agree with the negative list of circumstances and situations that NCAs should consider when determining whether a quality enhancement test is not met.

The major concern is that the spirit of MIFID II Level 1 would not be respected. The negative list of criteria for determining what is not a service enhancement ends up in an excessive narrowing of service enhancement possibilities.
As such, this negative approach disregards the EU legislator's decision and the principles set out in MIFID II Level 1 regarding payments of inducements linked to service enhancement.
The proposed negative list would leave totally unclear under what condition a payment could be allowed in future.

We believe, to the contrary, that the MiFID II regime calls for a positive list of criteria since the Commission is empowered to adopt delegated acts to ensure that investment firms comply with the principles set out in MiFID II Art. 25.
In particular, these shall include criteria to assess compliance of firms receiving inducements and not criteria for non-compliance. We therefore suggest a non-exhaustive list of positive criteria, which would be in line with the requirement of the Level 1 text and the general decision of the EU legislator that MiFID firms may still receive and pay commission, if these are designed to enhance the quality of the relevant service to the client.

More specifically, we strongly disagree with the criteria in *DTA 10.i: ESMA writes that quality enhancement test is not met when"... fee or commission is used to pay or provide goods or services that are <u>essential for the recipient firm in its ordinary course of business</u>"-*

Commissions shouldn't be submitted to criteria of volume (if that is what ESMA intends in this unclear requirement). Commissions received must be assessed through the criteria established by MIFID I and II level 1, i.e. being disclosed to the client, enhancing the service to the client and not impairing the client's best interest.

In France, AMF has issued clear and demanding positions on inducements and service enhancement (e.g. Position AMF 2013-10) that match the intention of the EU legislator.

DTA 11.:ESMA writes "...it should be understood that a fee, commission or non -monetary benefit could be considered acceptable if it enables the client to receive access to a wider range of suitable financial instruments or the provision of non-independent advice on an on-going basis"

We agree that service enhancement test is met when:

- Giving access to a wider range of suitable financial instruments
- Providing an on-going investment advice
- On a more general approach, providing additional service above MIFID I level

- We would like to propose more examples of service enhancement that could be offered to the client:
  - Giving a periodic suitability assessment, at least annually (in line with the position of AMF 2013-10) (see Suitability reports on 2.18 Suitability)

  - Giving an annual report on costs and charges (along with chapter 2.14 on Costs and Charges, Q/A. 73, we believe that providing an annual report on costs and charges when there is a continuous relationship is a service enhancement)

  - Giving a personalised report on costs and charges when it is technically possible (along with chapter 2.14 on Costs and Charges, Q/A. 74, we believe that providing a personalised report on costs and charges is a service enhancement)

  - Giving a personalised report aggregating all financial instruments and products held by the client

  - Alerting the client on specific thresholds (% of gain or loss) agreed with client (along with chapter 2.20 Reporting to Clients)

MIFID II requirements for investor protection induce heavy costs for investment firms; these costs can be financed either through inducements or through client fees. We believe that inducements remain the best solution and insure the fairest allocation of costs and treatment between clients.

Additionally and very importantly, no new rules should be imposed on funds distributors that would, rightly in our eyes, seem unfit for other competing investment solutions such as insurance-life, bank saving accounts or crowdfunding.

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

Considering the huge economic impact of these requirements, it is more adequate to anticipate that:

- Some investment firms and research providers would face hard time to maintain their business as the balance of their business model will be disrupted (more costs, less revenues)
- Clients will eventually pay higher fees for research and investment advice
- Some public and private entities not covered by research nor included in market indexes would see their source of public financing drying up

2.16. "Investment advice on Independent basis" p.126

• **Question 83: 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.**

No.
MIFID II Level 1 has already provided a definition of independence by banning the reception of inducements for independent advisors. This should speak for itself and no further criteria should be added.
Further, providing long lists of descriptions of financial universes and financial instruments would not be effective.

Indeed, this requirement would lead to long lists sorted out by type of financial instruments and by type of investment advice (one-off advice or on-going advice, global or specific).

Besides the types and numbers of financial instruments varies periodically along with new products, new manufacturers and new clients. Each list would need to be updated on a permanent basis.

Lastly, the width of a universe is not a sufficient criterion for delivering a suitable advice.

Our proposal would be to go for simplicity and transparency;

- The investment firm specifies (if any) (a) its "close-links" or its "control relationships" with other entities and (b) the % of financial instruments and/or products under review issued and/or manufactured by these entities.

- The investment firm informs the client on whether the specific product it recommends is issued or manufactured by a "close" or "related" entity.

- The investment firm informs the client on whether it receives commissions on the product recommended.

- The investment firm informs the client on the selection process of the product it recommends.

  We think that this act of transparency would provide investor the trust and the protection he's expecting.

- **Question 84: 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 ?**

  The contemplated requirement that a relevant person might not provide independent and non-independent advice would put small investment firms in a very difficult position. Such a requirement would clearly not be in line with the proportionality principle.

  In line with the philosophy of the level I Directive, clients should have the choice, on a case by case basis, and in full transparency to have advice on an "independent basis" or not.

- **Question 85: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details**

  Yes.

  Compiling ling lists of financial instruments would induce marketing costs, but most of all, having two separate teams of investment advisors –independent and non-independent- would certainly lead to heavy additional costs that some investment firms will not able to support.

2.17. "Suitability" p.131

- **Q. 86 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?**

  No.
  We do not fully agree with extending the requirements on Suitability.

  ESMA writes in DTA, 1.iii: Investment firms in direct relationship with clients must have procedures and be able to demonstrate that they do fully understand the product they recommend and that they **assess whether alternative financial instruments, less complex or with lower costs,** could meet their client profile.

  We do not agree with this additional requirement; ESMA is interfering in the investment advice process and induces the belief that "simplicity" and "cheapness" are relevant criteria for choosing a financial product, which they are not.
  Indeed, it would (1) induce that passive management is preferable and make the way for ETF over active management which not always in the client's best interest and could increase systemic risk (2) link "complexity" with risk which is not right (innovative management techniques are often risk mitigant) except when complexity means absence of possibility to explain the risk/reward profile of the product.

ESMA writes in DTA.1(v): When providing advice or portfolio management that involves switching investment, the firm should collect the "necessary information on the client's existing investments to undertake an analysis of the costs and benefits of the switch", so they are able to demonstrate the benefit of the switch.

We do not agree with this additional requirement.

Where portfolio management service is provided, the client has given in writing the portfolio manager full mandate to operate transactions and switches any time the portfolio manager finds it appropriate without taking into account other assets the client might hold outside the mandate.
ESMA's requirement creates an obligation which does not stand with the intention of the investor expressed in the portfolio management mandate. The mandate can always be adapted when the client feels like it.

ESMA writes in DTA, 1. (viii.b.c): Investment firms should have robust process to asses both the client's ability to bear losses and the client's risk tolerance.

We agree as long it is well understood that ability to bear losses and risk tolerance is associated with an investment horizon.

ESMA writes in DTA, 3: The "Suitability report" must outlined, when appropriate, the need for **regular assessment** with the client (i.e. when there is a probability that the portfolio deviates from its targeted allocation).

When it comes to portfolio management, we do not agree with the wording of this requirement. Portfolio management service already includes a regular reporting and encounter with the client. But rebalancing portfolio toward its targeted allocation is under the responsibility of the portfolio manager and doesn't need a specific review with the client. Once again, the client can ask for a modification of the mandate when he feels it is needed.

When it comes to investment advice, when the client and the investment firm agree on a periodic review, it should be considered as a service enhancement taking place in an on-going relationship. This position is in line with the AMF Position 2013-10 (§3.2.1) and with our proposal in Question 81, chapter "2.15. "The legitimacy of inducements paid to/by a third person".

- **Q87. Are there any other areas where MiFID Implementing Directive requirements covering the suitability assessment should be updated, improved or revised based on your experiences under MiFID since it was originally implemented?**
  No.
  We think that investment firms should be given space to personalize and improve their suitability assessment adapting it to their type of services and clients.

- **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?**
  No.

We think that investment firms should be given enough space to personalize and improve their suitability report adapting it their type of services and clients.

- **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**

  No.

  We think that investment firms should be given enough space to adapt their suitability report adapting it their type of services and clients.

2.18 "Appropriateness" (p.136)

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 these criteria to be considered non-complex?

ESMA writes in DTA.1 (ii): the instrument is not complex if "*it does not include any explicit or implicit exit charges that have the effect of making the investment illiquid even though technically frequent opportunities to dispose or redeem it would be possible*.
It appears to be broad and confusing to be implemented on a satisfactory manner by the industry.

Notably, the terms "*any explicit or implicit exit charges"* could refer to various situations, such as certain funds beneficiating from specific tax advantages linked to the engagement not to redeem shares/units before a certain period of time.

Based on a literal interpretation of this provision, one could consider that the loss of the tax benefit would constitute an "implicit exist charges". If so, all French life insurance would be deemed complex and we know it is not.

Further, this proposal would require portfolio management companies to process with a "case by case" approach by determining for each product whether it is complex or not, with a significant degree of risk that a same product would be "complex" for a portfolio management company and "not complex" for another one.

This could be avoided by issuing a technical schedule listing all products that must be qualified as "complex".

In addition, ESMA will further increase and worsen the confusion between illiquid products and complex products which was already latent in the level 1 text. One can agree with the idea that illiquid products should not be placed through so-called 'execution only' to retail clients. But the qualification of 'complex' has a very detrimental marketing effect.

If this new criteria is introduced, it will be necessary to change the qualification and to speak either of <u>complex</u> products or of <u>illiquid</u> products.
Structured products as defined in article 36, § 1 of N° 583/2010 EU Regulation should also be qualified as such in order to avoid employing the term complex. In fact, these products are often

much safer than other UCITS as well as very simple to understand with respect to their risk/return profile.

So we propose that products which should not be sold through 'execution only' would be called either:

- complex products (with the meaning of having a risk/return profile difficult to assess at first glance)
- illiquid products
- structured products

…depending on the reason of their exclusion from 'execution only'.

Lastly, we do not agree with the fact that all non-UCITs funds should be considered as 'complex'. In fact many funds which are UCITS-like (so-called '*fonds à vocation générale'* in French) have been qualified as AIF after the enforcement of AIFMD and are neither complex, nor illiquid, nor structured.

In this respect, each national regulator should benefit of some latitude to classify funds which are only sold in its own country.

Q 91 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?

Yes. It is included in our answer to Q.90

2.19 Client agreement p.139

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.

We do not see any reason to impose regulatory requirements relating to the conclusion of service contracts with professional clients. The status of a professional client implies per se higher flexibility in the business relationship with the service provider which should correspond with a measurably lower level of regulatory investor protection.

Professional clients are either financial institutions and large undertakings or other entities/individuals who meet the relevant criteria relating to their financial means and experience and in respect of whom the investment firm is satisfied on the basis of an individual assessment that the client is capable of making investment decisions and understanding the risks involved4. Hence, it should be borne in mind that the assignment of the professional client status on request already involves high hurdles in order to exclude waiving the investor protection standards for the insufficiently experienced or adept clients.

Therefore, it is not appropriate to require professional clients to enter into written agreements with investment firms, let alone to prescribe the formal conditions of such agreements (in paper/other durable medium). Similarly, the content of service agreements with professional clients should be subject to contractual negotiations between the parties and not be bound by

[4] Cf. Annex II Section II(1); third subsection of MiFID II Level 1

protective measures designed for retail clients. In particular, the suggestion to "state the types of financial instruments that may be purchased and sold and the types of transactions that may be undertaken" goes too far in the context of professional portfolio management. The same applies to the underlying reasoning depicted in recital 19 of ESMA's analysis: professional clients do not need regulatory measures enabling them to better understand the nature of the services provided and where appropriate, to seek judicial recourse. **As a consequence, paragraph 2 of the ESMA's draft technical advice should be deleted.**

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?

No. If an investment firm is providing investment advice to clients, it shall be liable if the advice is not conducted properly. Not having in place an agreement, as now proposed by ESMA, could be used as an argument against the client, as the investment firm could deny having provided advice (and therefore not being liable for inaccurate advice). We are of the opinion that the current MiFID II Level 1 text explicitly did not mention such written agreements for this very reason.

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?

Yes

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?

Yes

2.20 Reporting to Clients p.143

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?

No we do not agree.
We find inappropriate to align the content of report for professional clients (both for portfolio management and execution of orders) with those applicable to non-professional clients.
In many cases the format of the reports presented to professional clients are tailored in order to meet their specific requirements. ESMA fails to provide a justification for this suggestion.
In our view, the reporting needs of professional clients are fundamentally different from the standards applicable in relation to retail clients.

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)?

Not on a systematic basis. Such agreement terms on threshold alerts should be left to the parties, based on the objectives of investment of the client or the periodic reporting on his managed portfolio.

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 do agree.
However, it is not always the case that an indicative price means a lack of liquidity (i.e. a share may be suspended for a short time on a regulated market due to a corporate action or market value based on the last available redemption price).

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?

(Applicable to TCC only or also applicable to AM ? if so, no reason to say no… , to be completed)

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

2.21 Best execution

2.22 Client order-handling

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

We are not aware that any changes to the Implementing Directive are required.

2.23 Transactions executed with eligible counterparties

2.24 Product Intervention