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

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

<ESMA\_QUESTION\_1>

We have no objections as to the proposed cumulative conditions to be fulfilled in order for an investment service to be deemed to be provided in an incidental manner.

However, a number of clarifications would be welcomed in respect of the authorization requirements under MiFID II:

1. With regard to algorithmic trading, it should be clarified i) that if such form of trading is done via a fund, this fund or manager will not be subject to the obligation to obtain an authorisation as an investment firm; and ii) if and to what extent it is expected that a broker will make the relevant obligations in respect of algorithmic trading (e.g. to flag an algorithmic trading order) contractual obligations. It should also be clarified that in case the fund or fund manager is also member or participant of an MTF or a regulated market, the algorithmic trading rules would apply (art. 1.5. MiFID II).
2. With regard to high frequency trading it should be clarified that if such form of trading is done via a fund, this fund or manager will not be subject to the obligation to obtain an authorisation as an investment firm
3. Should post trade transparency reporting to the public be performed by the investment firm that has executed the client order, or by the fund or manager itself? What if that fund or manager would become direct member of a trading venue? Is it in that case subject to the transparency post trade transparency reporting obligation and on what legal basis?
4. Should post transparency reporting to the regulator be done by the investment firm that executed the order on the market, or by the fund or manager itself? What if that fund or manager would be a direct member of the trading venue? Is it in that case subject to the reporting obligation to the regulator and on what legal basis?

<ESMA\_QUESTION\_1>

* 1. Investment advice and the use of distribution channels

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

<ESMA\_QUESTION\_2>

An amendment in the definition of investment advice should be focused on the nature of the recommendation and not on the channel used to provide it. We propose the following clarification to the definition of Article 52, last paragraph of the MiFID I Implementing Directive:

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

This revised wording allows to capture personal recommendations made through distribution channels as internet thus achieving the goal defined by ESMA on its Consultation Paper;

<ESMA\_QUESTION\_2>

* 1. Compliance function

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

<ESMA\_QUESTION\_3>

<ESMA\_QUESTION\_3>

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

<ESMA\_QUESTION\_4>

Yes. Febelfin would welcome further clarification on the scope of the oversight role of compliance with regard to the complaints handling process. It should be clarified that the role of compliance in respect of complaints handling is limited to a verification of the procedural aspects and proper documentation of the process rather than providing advice on the subject matter of the complaint (see also the answer to Q5).

<ESMA\_QUESTION\_4>

* 1. Complaints-handling

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

<ESMA\_QUESTION\_5>

No, not all Febelfin members have in place arrangements that comply with the requirements set out in the draft technical advice.

Firms generally do not apply arrangements as set forth in the proposals relating to complaints handling to professional clients and eligible counterparties. Professional clients and eligible counterparties typically do not expect firms to apply such arrangements to them either.

It would therefore need to be clarified in the draft technical advice that the proposals relating to complaints handling do not apply to professional clients and eligible counterparties.

As to item 2 of the technical advice (p. 24 of the Consultation Paper), Febelfin agrees that investment firms should inform clients (other than professional clients and eligible counterparties) of the fact that they can file a complaint. We also believe clients (other than professional clients and eligible counterparties) should be provided with the details of the complaints handling procedure to follow if they request so. However, the technical advice could be read as implying that firms have an obligation to systematically publish the full details of the complaints handling process. This could be ineffective as it may result in clients receiving too much and non-specific information. It would in our view be advisable to clarify that the obligation to publish the details of the process to be followed when handling a complaint means that investment firms should inform clients of the fact that there is a complaints procedure and where and how they can obtain more details as to the complaints procedure (see item 2 of the technical advice, p. 24 of the Consultation Paper).

As to item 7 of the technical advice (p. 25 of the Consultation Paper), Febelfin believes that most firms have a complaints handling function that operates independently from the compliance function. Obviously, the information collected by the complaints handling is a valuable source of information for the compliance function. This is correctly reflected as such as one of the responsibilities of the compliance officer in the draft technical advice on the compliance function (“*to oversee the operations of the complaints-handling process and consider complaints as a source of relevant information in the context of its general monitoring responsibilities*” (see item 3, iv, on p. 21 of the Consultation Paper).

However, requiring that the compliance function should also analyse complaints and complaints-handling data to ensure that they identify and address any issue goes beyond the role of the compliance offer (as described in in the draft technical advice on the compliance function). This is typically the role of the complaints handling function, and the compliance function should be able to rely on the reports and information provided to him by the complaints handling function, without having to analyze complaints himself.

Finally, given that both the complaints handling function and the compliance function should be able to operate in full independence, Febelfin believes that these two roles should continue to be clearly distinguished.

<ESMA\_QUESTION\_5>

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

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

<ESMA\_QUESTION\_6>

No additional records should be mentioned in the minimum list proposed in the table in the draft technical advice.

In order to ensure a level playing field and to facilitate compliance within firms having cross-border activities, Febelfin would also welcome that the technical advice clarifies that Member States or NCA’s do not have the right to supplement or deviate from the record requirements at the level of the European Union.

Febelfin further believes that the list of records could take the form of ESMA Guidelines, which has the benefit that they can be updated from time to time in a more flexible manner (it being provided that also in that case Member States or NCA’s should not have the right to supplement or deviate from the record requirements at the level of ESMA).

Regarding item 3 of the draft technical advice (p. 27 of the Consultation Paper) (“*These records should be maintained in an electronic format that facilitates the search of information where the nature and volume of records warrants such a format*”), Febelfin prefers to keep the requirements set forth in article 51.2 of MiFID I Implementing Directive as to form and medium for storage. These are clearer and we are not aware of issues that have arisen in respect of these requirements in the past.

Also on item 3 of the draft technical advice (p. 27 of the Consultation Paper), ESMA suggests to record the “*services or activities giving rise to detrimental conflicts of interest*”. Febelfin believes that it will not always be possible to know at the time the financial product is issued whether a potential conflict of interest will be detrimental or not. There are situations where the conflict of interest will never become detrimental and in other unpredictable situations, it may become detrimental. Such recording should be mandatory only if the conflict of interest is manifestly detrimental at the time the financial product is issued.

*E.g.* this is typically the case in case of a bond issue where the lead managers are also lenders of the issuer and the proceeds of the bonds are used to reimburse the loan granted to the issuer by the lead managers. If the loan is reimbursed prior to the redemption of the bonds, the bondholders may be exposed to a risk that the issuer later appears to be unable to reimburse the bond. However, if the issuer redeems the bond at maturity, the potential conflict of interest will never become detrimental to the bondholders.

<ESMA\_QUESTION\_6>

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

<ESMA\_QUESTION\_7>

<ESMA\_QUESTION\_7>

* 1. Recording of telephone conversations and electronic communications

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

<ESMA\_QUESTION\_8>

According to Febelfin, firms should not be required to implement additional measure(s) to reduce the risk of non-compliance with the rules in relation to telephone recording and electronic communications.

In addition, as to the draft technical advice, in order to reduce the risk of non-compliance, it would need to be clarified that the recording obligation is limited to that part of the conversation that covers the reception, transmission and execution of client orders, and does not cover the potential investment advice. Article 16(7) of MiFID II does not require that the investment advice that is part of a telephone conversation is recorded. However, this seems to be contradicted by the requirement that a conversation must be recorded if it relates to the reception of a client order but does not result in the conclusion of an order service.

More guidance is also needed as to the statements in item 7 of section 2.6 of the Consultation Paper (p. 34 of the Consultation Paper) in relation to the recording of internal calls within investment firms and communications within investment firms in the same group that “relate or are intended to result in transactions”. Febelfin is in favor of keeping the regime described in the CESR advice of 29 July 2010.

Finally, Febelfin is concerned that these requirements may be difficult to reconcile with or even conflict with data protection regulations. In order for firms to be able to fully comply with the requirements set forth in the technical advice, the regulatory standards should in our view clearly provide under which conditions the recording of telephone conversations can be deemed to comply with the data protection legislation.

<ESMA\_QUESTION\_8>

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

<ESMA\_QUESTION\_9>

ESMA\_QUESTION\_9>

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

<ESMA\_QUESTION\_10>

No. Febelfin is of the opinion that written minutes of face-to-face client conversations should remain optional. This would be fully in line with art. 16 (7), 6 1 of MiFID II. Should ESMA nevertheless propose to impose written minutes, then the required content of such written minutes should be limited to the relevant order information as stated under item 9 of the technical advice (p. 37 of the Consultation Paper). Moreover, it is already market practice in the event of face-to-face contacts that the placement of an order is documented by way of signature by the client of an order subscription form specifying the terms of the order. Minutes should therefore not come on top of this.

We also believe it should be clarified that the scope of the obligation to record orders by using written minutes or notes (item 9 of the technical advice, p. 37 of the Consultation Paper) is limited to transactions concluded when dealing for own account and the provision of client order services, and not to other services. The title of the technical advice is confusing in this respect (“*Face to face conversations*”) and should be clarified as follows: “*Recording of transactions concluded during face-to-face conversations when dealing for own account or in the context of client order services*”.

<ESMA\_QUESTION\_10>

##### Should clients be required to sign these minutes or notes?

<ESMA\_QUESTION\_11>

No. Febelfin believes that investment firms and their clients should be able to freely decide if and to what extent they sign minutes and whether or not they need to have the additional legal certainty of signed minutes, taking into account the potential legal constraints in respect of civil evidence and data protection.

Clients should not be required to sign minutes or notes. Under Belgian law, merchants are free to select and use the means of proof which they believe to be appropriate. This was intended to allow parties to enter into commercial and financial transactions in a flexible manner. Belgian case law awards evidential value to non-signed minutes. The proposals would limit the means of evidence which parties are allowed to use under Belgian law to evidence their contractual arrangements. In most cases, the services requested by the clients do not provide for time to organize this and in some cases such a requirement could even conflict with best execution requirements. In any event, the requirement to have minutes signed would require important changes to existing systems and procedures and comes with additional costs that are not proportionate. It should also be allowed to have such face-to-face meetings recorded in the same way as telephone conversations (subject to the same conditions and restrictions as telephone conversations).

As to the content requirements of the meeting minutes (item 9 of the technical advice, p. 37 of the Consultation Paper), we acknowledge that it is in the interest of the investment firm to be complete on the essential elements of the transaction in order to avoid any repudation of the order or transaction afterwards. However, we are not convinced of the added value of the items “location of the meeting” and “initiator of the meeting”.

<ESMA\_QUESTION\_11>

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

<ESMA\_QUESTION\_12>

<ESMA\_QUESTION\_12>

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

<ESMA\_QUESTION\_13>

<ESMA\_QUESTION\_13>

* 1. Product governance

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

<ESMA\_QUESTION\_14>

The scope of application of the product governance rules should be carefully reviewed. In particular, more guidance is needed in order to allow to properly distinguish “distributors” from “manufacturers”. While it may be possible to apply some of proposed guidelines when manufacturing / structuring financial instruments (typically structured notes, certificates, funds) issued or promoted by an investment firm or an entity within the group of the investment firm (e.g. an SPV), it is not possible to do so for financial instruments (typically shares, corporate bonds) that are issued by a third party and which are only underwritten or placed by an investment firm (or possibly even through a chain of distributors). We would expect that in the latter case, the investment firm is not a “manufacturer” (as in that case the firm has little to no control on the product characteristics).

It should therefore in any event be clarified that a firm that is part of the syndicate placing products issued on the primary market (e.g. as lead manager) cannot not be considered as a manufacturer if the issuer is not an entity related to the firm. When a firm simply places products as part of a syndicate, it does not create, develop or design investment products.

The benefit of extending the scope of this requirement to the secondary market also seems to be limited. This would increase costs and risks for “distributors”. As the obligations to provide access to the secondary market become more stringent, there is a significant risk that access to this market will become more and more difficult for retail investors. This will limit funding opportunities for companies, especially SME’s. This will also limit the use of open architecture models for investment services and therefore does not seem to be in line with the principles underlying MiFID II.

Also, it is questionable to assimilate a secondary market activity with a “distribution” activity. An investor is generally buying or selling a financial instrument on the secondary market at his own initiative (by placing an order or requesting a quote,…), possibly following an advice upon a suitability assessment by an investment firm.

As the description of the product and the related risks are included in a prospectus (which is for debt instruments and equity only valid for only one year), it should be considered that the product governance requirements for distributors may be complicated by the fact that most corporate issuers will be reluctant to update their prospectus on a yearly basis. Corporate issuers will also be reluctant to authorize the use of their prospectus by a distributor on the secondary market (as they would need to assume the responsibility of keeping the prospectus up to date until the maturity of the products). Overly strict product governance requirements would limit the access to the secondary markets for retail investors, although in most cases the products involved are standard and not complex. Again, this could restrict funding possibilities for companies, especially SME’s.

<ESMA\_QUESTION\_14>

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

<ESMA\_QUESTION\_15>

No. However, we do believe that the protection of the investors should not be jeopardized by the fact that the manufacturer is a non MiFID firm or a third country firm. Febelfin agrees that it would be appropriate that non MiFID firms or third country firms should provide some form of written confirmation to distributors that the manufacturer has provided the initial distributor with all relevant product information and that responsibility of the manufacturer should be clearly identified. However, the scope and form of such confirmation should be left to the contractual freedom of the manufacturer and the distributor.

<ESMA\_QUESTION\_15>

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

<ESMA\_QUESTION\_16>

No, Febelfin does not believe that the cost to comply with such a requirement would be proportionate. A requirement for distributors to actively and periodically inform manufacturers about their experience with the product would be extremely burdensome for distributors, especially for firms with an open architecture model. This would significantly increase the cost of investment services, especially for retail investors. Distributors may be subject to different product monitoring requirements or have different product monitoring procedures.

Such a requirement could also be construed as limiting the manufacturer’s own product governance obligations. Febelfin believes that an investor’s interests will be better served if the distributor and the manufacturer each have their own obligations in terms of product governance. As set forth in the mandate of the Commission, there should be “sufficient clarity regarding the respective obligations of the investment firms when acting as manufacturer, distributor or both”. A requirement for distributors to periodically inform the manufacturer about their experience could create ambiguity as to the roles of each of the manufacturer and the distributor.

Also, the concept of “sales information” (p. 45, §16 of the Consultation Paper) is not specified and creates uncertainty as to its scope, and, accordingly, compliance risks. This requirement would also entail additional burdens for open architecture models, which seems to be contradictory with the stated ambition to promote independent investment advice and offer investors access to a wide range of products. In any event, such a requirement would need to be limited to situations where the distributor is actually aware of a material default regarding a product that has been actively promoted by the distributor.

<ESMA\_QUESTION\_16>

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

<ESMA\_QUESTION\_17>

See answer to question 16, and the comment as to the definition of manufacturer in the answer to question 14. While manufacturers should know the initial distributors they deal with and should be comfortable with the fact that those distributors will comply with the selling restrictions / agreed target market, a manufacturer cannot reasonably ensure a comprehensive and permanent monitoring of the way a product is sold by distributors. If a manufacturer becomes actually aware of the fact that selling restrictions are not complied with, he should have no other obligation than to notify the distributor of the fact that the selling restrictions / target market restrictions are not observed and that appropriate measures should be taken to remedy the situation. While a manufacturer may decide to inform a regulator of the fact that a product is not sold as envisaged, it would not be proportionate in terms of monitoring and compliance costs to make this an obligation for the manufacturer.

<ESMA\_QUESTION\_17>

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

<ESMA\_QUESTION\_18>

See answer to question 16. If there has been a material misjudgment creating a material risk for the original target market, the distributor should adjust the target market accordingly and refrain from further distributing the product to the target market (or the relevant parts of the target market) for which the product is no longer appropriate as soon as reasonably practicable.

According to the ESMA proposals, the manufacturer has to use its best efforts to identify events that would affect the potential risk or return expectations of the product and, when such an event occurs, firms should consider the impact and take appropriate action.

The term “*appropriate action*” should be clarified. Febelfin believes that appropriate action should consist in providing updated information (based on publicly available information) to the distributors in order to allow distributors to inform their retail client base. Professional investors and eligible counterparties are normally in a position to obtain the relevant information directly on the market. At the same time, it should not be underestimated that such information may be very negatively perceived by a retail investor. Also, under certain circumstances, such requirement may even lead to investment firms having to provide (as a matter of fact) investment advice during the entire life of a product (or the information provided pursuant to such requirement may even be requalified as investment advice). The cost of such service should therefore not be underestimated and may have an unintended effect, in the sense that it will limit the service offer for retail investors.

ESMA also proposes that investment firms undertake a scenario analysis of their products.

Febelfin believes that it would be more proportionate for this obligation to apply only to complex products which have returns involving multiple variables and/or which have partial or no capital protection.

<ESMA\_QUESTION\_18>

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

<ESMA\_QUESTION\_19>

See answer to question 16. It is important to take into account the different possible architectures when proposing rules impacting distribution models. All types of architecture should remain available: open-architecture, guided-architecture, closed architecture.

In the event the product manufacturer differs from the distributor (open-architecture or guided-architecture), the distributor identifies the profile and needs of the client. Manufacturers may not always be in a position to identify a target market for their products as manufacturers do not necessarily know their distributors’ end clients. Also, manufacturers should not be held responsible for actions undertaken by a distributor (and vice-versa).

In addition, responsibilities should be aligned and consistent with the rules on responsibilities as to the KID which are defined under the PRIPS Regulation. Under the PRIPS Regulation, the manufacturer is responsible for the drafting of the KID and the distributor is responsible for the annex.

<ESMA\_QUESTION\_19>

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

<ESMA\_QUESTION\_20>

<ESMA\_QUESTION\_20>

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

<ESMA\_QUESTION\_21>

<ESMA\_QUESTION\_21>

* 1. Safeguarding of client assets

*PRELIMINARY COMMENT: According to article 2,(i) of MiFID II, the directive shall not apply to the depositary of collective investment undertakings. We would welcome that it is expressly stated that this exemption also implies that the rules regarding safeguarding of investors assets (as described in article 16 §8, 9 and 10 of MiFID II) do not apply to depositaries of collective investment undertakings.*

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

<ESMA\_QUESTION\_22>

Paragraph 3.6 of the European Commission request proposes to adopt specific governance arrangements related to the safeguarding of client ownership rights. It does not consider creating additional requirements with regard to the function for the oversight of client assets.

Article 6 of MiFID 1 Implementing Directive already provides the obligation for each investment firm to appoint as a condition to provide investment services a compliance officer.

Creating a new compliance function dedicated to custody services would not present real added value, besides the argument that it would go beyond the power delegated to the European Commission by the MiFID 2 “Level 1” text.

From our viewpoint, the best way to achieve greater transparency and knowledge regarding the situation and location of clients assets is not by creating a new function but by ensuring a constant dialogue between the different departments involved in the safeguarding of clients financial instruments and funds, especially in the large and complex structures.

<ESMA\_QUESTION\_22>

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

<ESMA\_QUESTION\_23>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_23>

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

<ESMA\_QUESTION\_24>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_24>

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

<ESMA\_QUESTION\_25>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_25>

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

<ESMA\_QUESTION\_26>

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<ESMA\_QUESTION\_26>

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

<ESMA\_QUESTION\_27>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_27>

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

<ESMA\_QUESTION\_28>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_28>

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

<ESMA\_QUESTION\_29>

Yes, to the extent that this obligation should only be imposed if (i) the firm is a borrower itself or (ii) if there is a tripartite agreement with the external borrower, the client and the firm. It cannot be an obligation for a firm to intervene in a collateral process that was bilaterally agreed between the client (even retail) and a third party/borrower.

<ESMA\_QUESTION\_29>

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

<ESMA\_QUESTION\_30>

A distinction should continue to be made between professional clients and eligible counterparties on the one hand and retail clients on the other hand.

. <ESMA\_QUESTION\_30>

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

<ESMA\_QUESTION\_31>

.<ESMA\_QUESTION\_31>

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

<ESMA\_QUESTION\_32>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_32>

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

<ESMA\_QUESTION\_33>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_33>

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

<ESMA\_QUESTION\_34>

Febelfin is of the opinion that this would be proportionate only if this requirement is subject to a threshold, also in order to avoid disproportionate costs for smaller investment firms.

If an investment firm is under an obligation to allocate and diversify client funds over several credit institutions, the investment firm might not be able to do so under the same financial conditions. This may increase the cost for the investment firm and ultimately the cost of investment services for the client.

In any event, Febelfin understands that credit institutions will continue to be exempt from this obligation (as set forth in Article 18 (1) of the MiFID Implementing Directive).

<ESMA\_QUESTION\_34>

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

<ESMA\_QUESTION\_35>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_35>

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

<ESMA\_QUESTION\_36>

Febelfin takes note that credit institutions are excluded from this requirement pursuant to article 18 (1) of the MiFID Implementing Directive and that item 41 (p. 59 of the Consultation Paper) should be read as such.

Febelfin is of the opinion that no specific percentage should be set. It should be the decision of the investment firm, obviously observing its due diligence obligations, to determine what measures are needed to safeguard clients’ assets.

An alternative and perhaps more effective approach would be to allow investment firms to take into account their own risk appetite, the relative credit rating of the firm they are diversifying to (relative to other firms), and their own operational experience. It would be a contradictory outcome if a firm were under obligation to place funds at an entity or entities with a worse credit rating than its own merely to meet the diversification requirement.

Another and perhaps simpler alternative approach could be to increase transparency by ensuring that investment firms strictly comply with the current MiFID Implementing Directive which requires that (i) the client must be informed that a firm is holding, or intends to hold, client money with a bank in the same group, (ii) the client money must be moved to a non-group bank if the client so requests, and (iii) that the firm applies due diligence procedure in selecting and monitoring the group banks used which are "at least as rigorous" as the procedures applicable to the selection and monitoring of non-group banks.

<ESMA\_QUESTION\_36>

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

<ESMA\_QUESTION\_37>

See answer to question 34. Febelfin recommends that there should be a *de minimis* threshold to which these requirements apply in order to avoid disproportionate costs for smaller investment firms; there is indeed little benefit to clients by forcing the diversification of small amounts of funds across multiple banks. For instance, where an investment firm is operating a client money bank account to support transactions carried out in a non-G20 currency, it would not make sense to be subject to a diversification requirement.

<ESMA\_QUESTION\_37>

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

<ESMA\_QUESTION\_38>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_38>

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

<ESMA\_QUESTION\_39>

If an investment firm is under an obligation to deposit client funds outside the group, this may increase the cost for investment firms and ultimately for the client.

This would in any event be proportionate only if this requirement is subject to a threshold, in order to avoid disproportionate costs for smaller investment firms.

.<ESMA\_QUESTION\_39>

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

<ESMA\_QUESTION\_40>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_40>

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

<ESMA\_QUESTION\_41>

See answer to question 39.

<ESMA\_QUESTION\_41>

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

<ESMA\_QUESTION\_42>

Appropriate carve-outs need to be provided for in respect of any statutory liens that may allow a third party to recover costs from client assets that do not relate to those clients.

<ESMA\_QUESTION\_42>

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

<ESMA\_QUESTION\_43>

Appropriate carve-outs need to be provided for in respect of statutory liens that may allow a third party to recover costs from client assets that do not relate to those clients.

<ESMA\_QUESTION\_43>

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

<ESMA\_QUESTION\_44>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_44>

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

<ESMA\_QUESTION\_45>

To the extent that such a requirement goes beyond the disclosure that is required in financial statements under accounting laws, such an obligation could require extensive monitoring and a significant review of existing procedures and agreements with third parties, especially for investment firms being active in multiple jurisdictions. Appropriate carve-outs need to be provided for in respect of statutory liens over client assets.

<ESMA\_QUESTION\_45>

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

<ESMA\_QUESTION\_46>

<ESMA\_QUESTION\_46>

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

<ESMA\_QUESTION\_47>

<ESMA\_QUESTION\_47>

##### What would be the on-going costs of making disclosures to clients when relying on ‘other equivalent measures’?

<ESMA\_QUESTION\_48>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_48>

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

<ESMA\_QUESTION\_49>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_49>

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

<ESMA\_QUESTION\_50>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_50>

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

<ESMA\_QUESTION\_51>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_51>

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

<ESMA\_QUESTION\_52>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_52>

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

<ESMA\_QUESTION\_53>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_53>

* 1. Conflicts of interest

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

<ESMA\_QUESTION\_54>

Febelfin does not object to the requirement to review the conflicts of interest procedure at least annually. Most firms already review their conflict of interest management and policies whenever there is a significant change in the investment firm’s organization, governance model, management or services.

As to item 3 of the technical advice in respect of section 2.9 (p. 73 of the Consultation Paper), additional guidance would be welcomed on the appropriate level of detail that needs to be observed in case of a specific conflict of interest needs to be disclosed to retail clients.

Also, §3 of the background of the technical advice in respect of section 2.9 (p. 71 of the Consultation Paper) does not clarify to which type of client the proposed disclosure requirements apply. In our view, there should be no obligation to use a durable medium when providing information to professional clients or eligible counterparties. Those clients should be free to agree with the firm on the most appropriate way to distribute this information.

<ESMA\_QUESTION\_54>

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

<ESMA\_QUESTION\_55>

As to inducements, Febelfin is in favor of an obligation for firms to include and disclose a non-exhaustive list of minor non-monetary benefits (which could be further defined in level 3 ESMA Guidelines) in their conflicts of interest policy rather than requiring a disclosure at the service level (see also our answers to the questions under Section 2.14 and Section 2.15 of the Consultation Paper).

We believe that a requirement for investment firms to disclose in their conflicts of interest policy a list of minor non-monetary benefits which they believe to be acceptable and compatible with their duty to act in the client’s best interest would be a transparent and more effective alternative for disclosures at services level as favored by ESMA.

<ESMA\_QUESTION\_55>

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

<ESMA\_QUESTION\_56>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_56>

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

<ESMA\_QUESTION\_57>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_57>

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

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

<ESMA\_QUESTION\_58>

No additional requirements should be included. However, as to conflicts of interest related to previous lending or credit to the issuer by the investment entity or a group entity, it should not be required as a general rule that an investment firm should consider refraining from acting as arranger in a securities offering.

Existing conflicts of interest procedures already deal with the risk of conflicts of interest related to the fact that a credit or an investment by entities related to the investment firm may be repaid with the proceeds of an offering. It is not inappropriate to act as arranger for the securities offering, provided that any potential conflicts of interest are properly disclosed to clients and are otherwise properly managed through the existing conflicts of interest procedures. As part of the loan syndicate, the investment firm may have better access to the information that is needed to make an assessment of the creditworthiness of the issuer.

The fact that an investment firm is directly or indirectly (through related entities) part of a credit loan syndicate may therefore be beneficial from the point of view of investor protection, provided that this information is properly shared between the relevant entities.

. <ESMA\_QUESTION\_58>

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

<ESMA\_QUESTION\_59>

<ESMA\_QUESTION\_59>

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

<ESMA\_QUESTION\_60>

<ESMA\_QUESTION\_60>

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

<ESMA\_QUESTION\_61>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_61>

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

<ESMA\_QUESTION\_62>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_62>

* 1. Remuneration

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

<ESMA\_QUESTION\_63>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_63>

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

<ESMA\_QUESTION\_64>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_64>

* 1. Fair, clear and not misleading information

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

<ESMA\_QUESTION\_65>

The mandate of the European Commission does not require ESMA to provide advice on language requirements. There is no evidence that the simple fact that information is provided in different languages prevents a firm from providing information in a fair, clear and non-misleading manner

In certain countries, local laws provide for specific and strict language requirements. However, such language requirements are generally limited to well defined types of information (such as a prospectus). A requirement to generally provide information consistently in one language would require investment firms in those countries to translate materials that are not required to be translated under local laws.

This proposal also does not take into account that in some countries more than one official language may be used, and that retail clients may be used to receiving information in different languages. Finally, distributors sometimes receive marketing materials from third parties which may not be available in a particular language. As a result, there is a risk that such products would only be distributed in countries where common languages are used. The cost impact of such requirement will also be higher for firms being active in countries where less common languages are spoken, thus creating an unlevel playing field. Finally, the requirement may have the effect that information which is not drawn up in a client’s mother tongue is withheld from the client due to the fact that more relevant information is available only in another language.

The use of precontractual documentation on investment services in a different language (English) than the national languages has been upheld by Belgian case law. The understanding by an SME client of marketing and precontractual documentation in English was upheld by a Belgian court, taking into account certain factual circumstances of the SME client.

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

<ESMA\_QUESTION\_65>

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

<ESMA\_QUESTION\_66>

Further parameters should be developed in order to ensure consistency and clarity on what is expected. For example, the number of scenarios to be produced will likely vary per instrument type. It should also be clarified what the expected deviations are which need to be illustrated in the scenarios. Additionally, we would ask to clarify that the proposed performance scenarios have to be based on a ‘what if’ approach.

Such “what if” based scenario’s should illustrate the potential functioning of such (category of) products (taking into account (as the case may be) the underlying position of a hedging product), rather than the potential impact of parameters on the outcome based on a statistical analysis. Note that scenarios may not always be the best way to illustrate possible outcomes for, and potential functioning of, e.g. OTC derivatives (these products are typically not used for investment purposes (return) but rather for hedging purposes (outcome).  We are convinced that this will contribute to a better and proportionate provision of information.

We would like to draw ESMA’s attention to the fact that with regard to the OTC products (derivatives, structured deposits …), it is economically unfeasable to produce for each transaction performance scenario’s that take into account the parameters of the specific transaction, due to the bespoke nature of such products and, as a consequence, due to the operational efforts this would require.  OTC transactions sold to retail clients are generally small, generate very little revenues for banks and will require more capital in the future.

<ESMA\_QUESTION\_66>

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

<ESMA\_QUESTION\_67>

Febelfin agrees that professional clients and eligible counterparties should be entitled to receive fair, clear and not misleading information as it is already the case under MiFID 1. Otherwise, professional clients and eligible counterparties should have the flexibility to agree on the scope of the information obligations and the service level with providers of investment services on a contractual basis, so that these can be adjusted to the client’s needs to the largest possible extent. Febelfin therefore does not believe that the conditions set forth in §4 of the technical advice in section 2.12 of the Consultation Paper should be extended to professional clients and eligible counterparties?

<ESMA\_QUESTION\_67>

* 1. Information to clients about investment advice and financial instruments

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

<ESMA\_QUESTION\_68>

Febelfin believes that it is appropriate to explain upfront the basic characteristics of the advisory service model that the investment firm is offering and, in that context, what it means to offer independent or non-independent advice. Such an explanation should focus on the distinguishing factors of the selection process and criteria. Absolute numbers per type of financial instruments on providers etc. are not an appropriate indication for the client and in particular the retail client to make a qualitative assessment of the service offered.

It should therefore be clarified that the information to be provided regarding the broad or restricted nature of the analysis of different types of financial instrument (item 3-5 of the technical advice on p. 97 of the Consultation Paper) can consist of a generic description of the investment firm’s selection process, and that it is sufficient that this information is provided to clients through the investment firm’s web site.

We also believe that the currently proposed requirements to provide information on the proportion of a firm’s “own financial instruments” and that of related entities versus financial instruments of third parties (item 5 of draft technical advice on p. 97 of the Consultation Paper) are not balanced and will entail considerable administrative burdens and related costs with no corresponding benefit for clients, especially for firms that do not provide independent advice. It would in our view be more proportionate that this obligation is limited to independent advice, and applies only if the range of own products (including products of other entities of the same group) considered exceeds a certain threshold. Given that the range of products offered is dynamic and varies over time, it should also be avoided that clients need to be informed of changes in the range of financial instruments that the firms consider on a continuous basis. A generic disclosure through a firm’s website would be a practical solution to avoid a significant increase of the cost of investment services.

In any event, it would not be proportionate that the proposals on information to clients about investment advice and financial instruments apply to eligible counterparties and professional clients. These should have a right to opt out of these information requirements and be allowed to agree contractually on the level of disclosure that is needed.

A number of technical clarifications would also be welcomed:

* As to Article 24 (4 (a) (ii) the MiFID II Level I Directive (see also page 97 of the Consultation Paper, draft technical standard number 4, last sentence): it should be clarified that the basis of the selection process used by the investment firm to recommend instruments should only be provided in the case of independent advice (this last element is missing in the draft), as it is correctly stated on page 95, 5, ii, last part of the Consultation Paper.
* As to Article 24 (11) of the MiFID II Level I Directive: with respect to a service that is offered together with another service or product as part of a package or as a condition for the same agreement or package: the technical advice should clarify that this is limited to the combination of a service and a product, not to the combination of products.
* As to Article 24 (4) (b) of the MiFID II Level I Directive (see also page 98 n° 10 of the Consultation Paper): “where a financial instrument is composed of two or more different financial instruments or services, the investment firm shall provide an adequate description of the legal nature and status of the instrument, the components and the way of interaction of the risks of both components”. The technical advice should clarify in more detail when a financial instrument should be considered as being composed of two or more different financial instruments or services, especially in a dealing room environment.

<ESMA\_QUESTION\_68>

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

<ESMA\_QUESTION\_69>

Febelfin requests ESMA to clarify some aspects to avoid legal uncertainty. In particular:

* Point 4 (p. 97 of the Consultation Paper): ESMA should clarify what typology of financial instruments should be used and which criteria should be used to distinguish financial instruments (nature of the instruments (e.g. shares versus bonds), geographical areas, activities of the issues, risk profile,.).
* Point 6 (p. 97 of the Consultation Paper): it should be clarified that where investment advice includes a periodic assessment of suitability, the investment firm is allowed to carry out the periodic assessment of suitability based exclusively on the information as to the client’s financial situation and objectives previously collected (at the time the initial investment advice was given), without being required to update the previously collected information as to the client’s financial situation and objectives at the time the periodic assessment occurs (subject to the overriding duty not to rely on information which is manifestly incorrect). It should also be clarified that firms are allowed to carry out a periodic assessment of suitability on the basis of product categories and client categories (subject to proper disclosure to the clients), and that it is not necessarily required that the periodic suitability assessment occurs on the basis of individual products and clients.
* Point 7 (p. 97-98 of the Consultation Paper) (periodic assessment of suitability at least annually): it should be clarified what would be the starting point to determine when the review needs to be carried out. Is this the moment as of which the investment advice was given? It would also be useful to clarify that firms can carry out a periodic suitability assessment based on product categories and client categories, in which case it should be sufficient to assess suitability on the basis of annual intervals per product.
* Point 8 (p. 98 of the Consultation Paper) (scenarios): it should be specified that general scenarios are acceptable with no need to adapt this to the specific amount or economics to be bought by a particular client. We understand that general scenarios comply with the objective of the proposal, but confirmation of this point would be welcome to avoid compliance risks.
* Point 9 (p. 98 of the Consultation Paper) (Illiquidity): an investment firm should not be required to estimate a time frame for the sale of illiquid financial instruments. It should be sufficient to inform what illiquidity means. Additionally, in the case of disinvestment it should be noted that an estimate of the time frame for the sale of a financial instrument will often not be reliable it will depend on the specific conditions in place at the time of disinvestment (e.g. market conditions, market liquidity, client’s risk and loss appetite , etc.).
* Point 10 (p. 98 of the Consultation Paper) (financial instrument composition): it should be clarified what information needs to be provided to client regarding the “status of the financial instruments”.
* Point 11 (p. 98 of the Consultation Paper) (detail about the guarantor and the guarantee): while the disclosure of specific information about guarantor and the guarantee is justified, the distributor should be in a position to fully rely on the information provided by the product manufacturer / issuer of the product. In other words, the distributor should not be subject to any own due diligence or investigation duty in this respect

However, we would suggest providing more detailed guidance on what information should be disclosed to enable the retail client or potential retail client to make a fair assessment of the guarantee, for example:

* a) information about the **guarantor** could cover: the identity and address of the legal entity providing, the country where it is located and the relationship with the issuer (if any);
* b) information about the **guarantee** could cover: summary information about the circumstances under which the guarantee can be triggered, the amount of the coverage (full or partial) and whether it is contingent on any counterparty performance .

<ESMA\_QUESTION\_69>

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

<ESMA\_QUESTION\_70>

Febelfin would welcome that the technical advice is more explicit as to the information requirements that apply in case of legislation overlapping. There are several pieces of legislation that deal with disclosure and information obligations to retail clients (MiFID 2, PRIPs, and Prospectus Directive, UCITS, IMD, EMIR (post trade)). In some cases they may apply to the same situations and there is no conflict rule to determine which regulations apply. The technical advice should favor the quality of information disclosure rather than the quantity of disclosure. More clarity on which rules apply in which case and on how the various pieces of legislation interact with each other will contribute to better compliance.

Febelfin is also of the opinion that any disclosure requirements should be harmonized to the largest possible extent and that the room for interpretation and additional requirements by Member States and NCA’s should be limited as much as possible.

<ESMA\_QUESTION\_70>

* 1. Information to clients on costs and charges

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

<ESMA\_QUESTION\_71>

Obviously, most professional clients and eligible counterparties are sensitive to the costs and charges associated to investment services and entitled to adequate disclosure of information on costs and charges.

Considering the sophisticated nature of these clients, Febelfin is in favor of a limited application of the costs and charges requirements for professionals and eligible counterparties. The requirements for these categories of clients should be much less prescriptive than for retail clients, and to a large extent based on what the investment firm and the relevant client actually agree on (so defined within the contractual sphere). This principle should apply irrespective of the nature of the service offered (advice, portfolio management, investment services re embedded derivatives, other services).

Professional clients and eligible counterparties are more concerned about the quality of the services they receive than about the detail of the upfront disclosure on costs and charges at the point of sale. This is specifically the case when the service is not subject to standard tariffs.

Hence, and as stated above, it would be more proportionate to leave professional clients and eligible counterparties the choiceto freely determine if and how information on costs and charges needs to be disclosed, irrespective of the nature of the service offered. This would avoid that the quality of service is negatively impacted by information obligations which the client does not deem to be appropriate and to gear the disclosure obligations to the client’s needs. This should also be the case when the services of investment advice and discretionary portfolio management are provided or when, irrespective of the investment service provided, the financial instruments concerned embed a derivative.

If professional clients or eligible counterparties want to benefit from the additional protection reserved to retail clients, they can always request - either on a general form or on a trade-by-trade basis - to be treated as retail clients. As a consequence it should be sufficient to provide them with the appropriate amount of information about costs and fees upon the clients request (opt-in), as described in Article 24 (4) (c) MiFID II).

<ESMA\_QUESTION\_71>

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

<ESMA\_QUESTION\_72>

Febelfin supports a proportionate disclosure of costs and charges and agrees that appropriate information should be provided in good time to clients on costs and associated charges relating to the investment services and the financial instrument. However, Febelfin does not agree with the current scope of the point of sale information requirements as they have several effects which will not add to better investor information:

1. Adequate disclosure does not require the level of detail that is currently proposed. Most clients want to understand the global level of cost and charges they need to pay for investment service or products. As to full detail of all costs, clients can request a breakdown on request, as it is the case under MiFID I. The current proposals will be extremely complicated to apply in practice and require monitoring and compliance efforts for which it is questionable whether they are justified by an increase in investor protection. This is certainly the case if they apply to professional clients and eligible counterparties. This will ultimately increase the price of investment services, while it is highly uncertain that this will result in corresponding benefits for clients.
2. Febelfin does not oppose to proper disclosure of costs and charges and inducements. However, Febelfin is convinced that most retail clients do not object to an investment firm receiving third party payments (such as commissions) in respect of the service they provide, provided that the fact that the investment firm receives third party payments is properly disclosed to clients and any potential conflicts of interest are properly managed.

Disclosing inducements as part of the costs and charges of a service or a product is confusing. The effect of treating third party payments in the same way as costs is likely to be that for reasons of transparency investment firms will prefer to pass on the inducements to their clients and that clients will pay higher commissions directly to the investment firm in return. This will ultimately increase the cost of investment services, in particular for retail clients. There is no evidence that retail clients are willing to pay for this.

The disclosure of inducements should continue to be subject to a separate regime. While MiFID II requires firms to provide appropriate information on third party payments, MiFID II does not require that third party payments received by investment firms be treated as costs and charges. Treating inducements as costs of the services provided can be misleading and confusing for the client, as they mostly take the form of income received by investment firms. The proposals as to the disclosure of costs and charges should therefore be limited to actual costs and charges, i.e. expenses that are made directly by the client or by the investment firm on behalf of the client.

1. As mentioned in § 21 of section 2.14 (p. 103 of the Consultation Paper), it is important to make a clear distinction between “costs of the instrument”, “charges” and the “price of the instrument”. While these concepts may be easy to distinguish for standard investment products, they may lead to confusion, in particular when applied to OTC derivative products.

The terms of a OTC derivative product depend on several factors, such as the credit valuation adjustment, liquidity valuation adjustment or size of the transaction, and these should not be considered as part of cost and charges. Hence, a clear distinction needs to be made between the price/conditions of a OTC derivative product, e.g. the undertaking to exchange payment streams of e.g. floating and fixed rate, and the actual costs and charges associated to the product.

Also, it is not clear if a “termination fee” needs to be construed as the early termination amount of a OTC derivative product or not. A derivative transaction has a fluctuating market value during its lifetime. The investor in a OTC derivative product will receive or will be required to pay the determined early termination amount when the transaction is ended before maturity. For this reason, the early termination amount is part of the price and the features of the derivative product and should not be treated as costs and charges.

More generally, the technical advice should clarify that contingent liabilities under an OTC derivative product are not part of the costs and charges of such instruments (notwithstanding the fact that information on the contingent liability to which an investor may be exposed should be adequately disclosed). Furthermore, the proposals do not sufficiently take into account that a post trade information obligation regarding derivative products, amongst others on market value, already exists under EMIR.

Article 24.4, (c) second subparagraph of MiFID II only provides that costs and charges in connection with the financial instrument, *which are not caused by the occurrence of underlying market risk*, should be aggregated to allow the client to understand the overall costs of the financial instrument.

There is no requirement under MiFID II for an investment firm to provide this information to investors as part of the costs, and this would need to be confirmed in the technical advice.  Such information would have limited added value for an investor anyway, as its decision to invest depends on the price, and not on the several components of the price.

1. We welcome ESMA’s proposals regarding the appropriate level to provide the information (service level or individual instrument level) and the fact that the choice is left to the investment firm (§ 23 of Section 2.14, p. 103 of the Consultation Paper). However, it would be helpful that this is clarified in the technical advice as well.
2. We do not agree that a firm should take into account the costs charged by another firm even if it “directs” the client to another firm. In our opinion, each firm that is providing a service to a client should be responsible for the disclosure obligations of the services it provides. Requiring that an investment firm that recommends or markets the services provided by another firm to its clients should aggregate the cost of those services with its own cost is not only confusing, but also leads to unfair competition between firms relying on third party services rather than procuring all services in-house.
3. As regards structured retail products: a distinction needs to be made between different types of products
   * (i) packaged products based on collective management of a pool of assets : the charge profile can be simple : recurrent management fee deducted from the performance of the underlying assets and directly charged to the customer on a pro rata basis (the level of costs must be disclosed in order to allow the customer to make the calculation)
   * (ii) defined return products (pay-out formula or fixed return): the key interest for the investor is the promised pay-out. The investor is not interested in knowing the cost of the hedge structure that is already embedded in the price of the product. For these products, one may consider to disclose the upfront selling fee, annual distribution fee and upfront structuring fee.
4. Febelfin also fears that the technical advice requires a level of cost disclosure that may be difficult to achieve for certain collective investment schemes. In the case of a firm that advises a client to invest in a collective investment fund, in particular where there has been portfolio activity, it can be difficult to allocate costs associated with the fund to individual clients.

<ESMA\_QUESTION\_72>

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

<ESMA\_QUESTION\_73>

While Febelfin fully support costs transparency, there is no evidence that the technical advice as to additional post-sale information requirements on costs and charges are justified by better investor protection. Post-sale information requirements should be limited to situations where there is a material deviation between the costs disclosed ex-ante and the costs actually incurred.

As all the cost and charges have already been disclosed due to the new point-of-sale-requirements we think the post-sale disclosure does not add al lot of added value for certain products and services.

We propose therefore as an alternative to take into account for defining the scope of this requirement not the service type or on the type of relationship, but the disclosed information already provided.

* We therefore advocate limiting the post-sale information requirement to costs of products/services that were not disclosed as part of the point-of sale disclosure or costs that were disclosed at point of sale on the basis of proxies, and which need to be adjusted due to the fact that the actual costs was significantly different-.

This would avoid overwhelming the clients with information, while still respecting the requirements on transparency (costs are disclosed at point-of-sale, modifications and new costs post-sale).

Broadly applicable requirements to provide post-sale information on costs and charges on a regular basis during the life of the investment to the client will mainly result in additional administrative and compliance costs for investment firms. This will ultimately increase the price of investment services, while it is highly uncertain that this will result in corresponding benefits for clients.

The fact that the main information is provided on an ex-ante disclosure and only new costs and modifications on ex-post base would be to be in line with MiFID II Level I Directive and the EU Commission mandate.

If this alternative would not be acceptable, Febelfin believes that requirements to provide post-sale information on costs and charges should in any event be proportionate to the nature and intensity of the relationship with the client.

Any post-sale information obligations in respect of costs and charges should be limited to situations where such disclosure can have a significant impact on the way a client deals with future decisions in respect of the investment services / financial instruments to which the costs and charges relate.

As to execution only services and services that can be provided on the basis of an appropriateness test alone, the added value of periodic post sale disclosures for a client is highly questionable. As to investment advice, Febelfin welcomes the fact that no specific periodic post sale reporting obligations in respect of costs and charges would apply to one off advice and that such requirement would only apply in situations where “on-going” advice is provided

However, in all cases where periodic post sale disclosure requirements would be made subject to the existence of a “continuing relationship”, more guidance is needed as to when a “continuing relationship” exists (especially in the context of investment and ancillary services versus one-off services). Further guidance is also required as to when investment advice should be considered as “on-going” investment advice and when a “continuing advisory relationship” is established in situations where a client has not requested a periodic suitability assessment (p. 105 of the Consultation Paper).

In our view, a “continuing relationship” would only be established where the services (such as on-going advice or ongoing “execution only” services) are provided on the basis of a specific contractual arrangement and at the specific request of the client.

Finally, we do not believe that the mere fact that a trading account has been established and is in “active use” is sufficient to demonstrate the existence of a continuing relationship (p. 105 of the Consultation Paper). Moreover, it is unclear what is intended by “active use”.

<ESMA\_QUESTION\_73>

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

<ESMA\_QUESTION\_74>

Mark ups embedded in the transaction price are to be considered profit margin and do not fall under costs and charges for the clients. Therefore, disclosure to clients should not be required.

Requirements on how to disclose costs on UCITS to retail investors are today regulated in the regulation on key investor information for UCITS. Other types of packed investment products will be regulated in the PRIPs regulation. It is crucial that the requirements on cost disclosures under MiFID II are directly based upon the requirements on cost disclosure in the UCITS- key investor information document and the upcoming key investor documents for PRIPs. This approach will ensure that the same cost elements form part of the information on costs and charges disclosed to the investor from both the product manufacturer and the investment firm. This would also ensure that the investor will receive the exact same information on costs and charges regarding a certain investment product (e.g. a fund) no matter whether the client buys the product from a management company (the product manufacturer) or from an investment firm and regardless of whether the securities are held with the investment firm or not.

The examples in the Consultation Paper as to how aggregated costs and charges could be disclosed seem to assume that the average client is investing in one instrument and that the funds invested are “new” funds. However the common situation involves advising on a more diversified portfolio. Therefore, it would be helpful that more complex situations are also illustrated e.g.

1. examples with mixed products
2. examples where the client has an existing portfolio of different products
3. examples where custody fees are included
4. examples with different structures of fees and types of fees

The examples in the Consultation Paper are all related to situations where the client selects an independent adviser. It would also be useful to give examples of situations of non-independent advice, and more exactly:

1. examples where the client receives non paid, ad hoc investment advice
2. examples where advice is given with respect to a fund that pays a management fee to the management company of the fund, whereby the management company distributes a % of the management fee as a distribution fee to the distributing bank
3. examples where the client has a contract for investment advice with a non-independent advisor and pays a yearly one-off fee for this investment advice.

<ESMA\_QUESTION\_74>

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

<ESMA\_QUESTION\_75>

Yes.

<ESMA\_QUESTION\_75>

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

<ESMA\_QUESTION\_76>

The requirement to provide a break-down of the exact amount of inducements received in relation to an investment service (incl. advice) or ancillary service on an ex-post basis per individual client will give rise to disproportionate higher costs or simply be unfeasible. Such requirement is meant to push back any remuneration model based on inducements rather than an upfront (advisory) fee (see also answers to Questions 71 to 78).

Certain costs fluctuate on a permanent basis. It is also unclear how in those cases costs can be expressed as one single figure, both as a cash amount and as a percentage.

ESMA should also consider that not all investors are investing in one single financial instrument and that not all costs or charges can be broken down to the level of an individual investment. Investors often have a dynamic portfolio with a variety of products, different expiry dates, different types of fees, etc. Requirements to allocate costs and charges (exact amounts) to a specific service or investment will require considerable IT investments and operational developments, which are not proportionate to the additional protection they offer to investors.

ESMA should also clarify what exactly is meant in the MiFID II Level I Directive by “costs not caused by the occurrence of the underlying market risk (see for example §35 of section 2.14, p. 106 of the Consultation Paper). If a client buys a share, the price of the share is dependent of the evolution in the financial markets (the market risk). We understand that this is not a cost. It would be useful to provide a number of examples of costs caused by the occurrence of the underlying market risk.

<ESMA\_QUESTION\_76>

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

<ESMA\_QUESTION\_77>

In order to permit the comparison of information for similar products, the requirements should as much as possible be harmonised and based on uniform growth assumptions Illustrations of the cumulative effect of costs and charges should not cover very long periods and distorted impressions in real time should be avoided (importance of accompanying clarifying wording).

Illustrating the cumulative effect of costs and charges is in many cases potentially misleading for various reasons: i) there are too many variable parameters (the type of product, the duration of the product, liquidity and exit); ii) it may be difficult to distinguish and illustrate one-off costs and cumulative costs; and iii) illustrating the effect of costs is also impacted by a client’s personal situation (costs effectively paid, possible discounts, custody fees, etc.).

Febelfin believes that a number of practical constraints are not being sufficiently taken into account as to the proposals relating to the disclosure of the cumulative effect of costs and charges on return.

1. It is in certain cases practically impossible to display the cumulative effect of costs and charges as costs are dependent upon the holding period of the financial instrument. The same goes for recurrent fees.  Example: The duration of the fund (open-ended or closed-ended) does not necessarily coincide with the holding period of the individual investor in the fund. They can exit at several points in time.
2. An ex ante illustration is possible for financial instruments with a fixed return. Future returns are not provided for open-ended funds, or instruments with a fluctuating value. Costs related with the manufacturing of the product could be provided in the KID / KIID. But what about costs related with the distribution, custody fees, arbitration fees, …?

<ESMA\_QUESTION\_77>

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

<ESMA\_QUESTION\_78>

Febelfin members agree that the current proposals will entail very significant investments and costs relating to the adjustment of marketing materials, client contracts, the development of new selling procedures, adjustments of IT infrastructure, training, compliance and monitoring. This will be even more the case if these requirements also apply to professional clients and eligible counterparties.

<ESMA\_QUESTION\_78>

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

The criteria proposed by ESMA would de facto ban the so-called inducements or commissions even in the case of non-independent advice.

Febelfin fully supports the fact that investment firms should be transparent and properly manage potential conflicts of interest when providing investment services.

Febelfin also shares the concern that clients should be accurately informed about fees and payments received from third parties.

However, Febelfin is of the opinion that the ESMA proposals on inducements do not sufficiently take into account the various business models that exist within the European Union in respect of the provision of investment services, and that the current proposals are unlikely to result in better investor protection.

* The negative definition of quality enhancement circumstances advanced by ESMA (in particular item 10 (i) on p. 124 of the Consultation Paper is of such a nature that an effective remuneration of non-independent advice through inducements becomes practically impossible.
* The model supported by ESMA may give rise to a two-tiered distribution system: mass retail investors will more and more be forced to manage their investments on their own while other investors will have access to value-added advisory services for which they pay accordingly. Retail investors have less access to investment advice, and the service of investment advice becomes more and more reserved for wealthier clients. Retail investors are also encouraged to procure investment services through online platforms. Open architecture models will be less and less used, the number a fund managers will decrease, and products such as ETF’s and trackers will be increasingly offered to clients with less resources. Firms are likely to adjust their business model and to limit their offer to either (expensive) portfolio management services or (more affordable) execution only services.
* Any financial institution with a sustainable business model needs to have recurring revenue streams. If inducements (in particular ongoing inducements) would be prohibited, firms currently offering third party products to their clients are likely to limit their product offer to deposits and basic savings products that can provide a recurring income stream, which is not in the interest of (retail) investors. As an alternative, firms may decide to develop their own products (investment funds), while not necessarily having the same expertise and experience as third parties, which is not in the interest of (retail) investors either.
* Precedents in the UK and the Netherlands show that prohibiting the remuneration of investment services through inducements does not necessarily result in better investor protection. Due to the higher upfront fees that need to be paid by the client, a shift occurs from investment advice to execution only driven business models.
* An “advice gap” is likely to be created due to the fact that the services offer for retail clients will become more and more limited to execution only services, because advisory services become too expensive for retail clients (advisory fees will increase to compensate for the lack of commissions, on top of which clients will need to pay (additional) VAT). Those investors are likely to receive less advice and may invest in products which are not sufficiently known. Firms that will continue to offer investment advice to those clients are also likely to reduce their product offer, which does not contribute to better investor protection.
* For those financial groups with a closed or mixed architecture model, ESMA’s advice indirectly promotes the vertical integration of the distribution channel thus avoiding to a large extent the issue of inducements and their disclosure (income streams being realised through the up streaming of dividends).
* The requirement to provide a break-down of the exact amount of inducements received in relation to an investment service (incl. advice) or ancillary service on an ex-post basis per individual client will give rise to disproportionate higher costs or simply be unfeasible. Such requirement is meant to push back again any remuneration model based on inducements rather than an upfront (advisory) fee.

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

<ESMA\_QUESTION\_79>

Febelfin does not agree with the proposed exhaustive list.

Febelfin is of the opinion that from the perspective of investor protection it would be more proportionate to deal with minor non-monetary benefits through product governance procedures and conflicts of interest policies.

An exhaustive list does not take into account the fact that minor non-monetary benefits may take many forms, while there is no evidence that other forms of minor non-monetary benefits than those listed in the Consultation Paper are necessarily detrimental to the client’s best interests. Also, future evolutions (technological or other) may create new types of minor non-monetary benefits. In case the list of acceptable non-monetary benefits were to be exhaustive, firms would not be allowed to accept such benefits as inducements, even in case those are justified or do not in any respect have an adverse impact on investor protection.

A lot of benefits in fact contribute to better investor protection. This is the case in particular for investment research. Febelfin does not agree with ESMA’s assumption that it is common practice that firms can obtain higher value of research from a broker when agreeing to higher execution rates, or that firms direct order flow or “churn” client portfolio’s in order to obtain more valuable research services. This would be hard to reconcile with a firm’s best execution obligations and its duty to properly manage conflicts of interest.

The proposals as to the treatment of financial research may also have as unintended effect that the quality of investment services and information provided to investors is actually reduced by the fact that firms no longer can accept investment research reports from brokers. Firms may also be forced to rely on less diversified research or even exclusively on their own research.

In addition, the proposals as to the treatment of financial research may also create an unlevel playing field between European firms and third-country firms. It is unlikely that third country brokers providing investment research will lower the fees they charge to European firms only because they cannot accept to receive investment research. As a result, there is a risk that European firms will continue to pay similar fees while not receiving investment research although it may contribute to better investor information. This may result in European firms (and ultimately their clients) paying more for less service. Also, firms that are part of groups being present both within the European Union and outside the European Union may indirectly have access to research through related entities outside the European Union.

There is no legal basis in the MiFID II Level I Directive to treat research as inducements. Pursuant to Annex B of the MiFID II Level I Directive, investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments are an ancillary service, and not merely an inducement. Financial research as an ancillary service is governed by its own legal regime. Financial research was not mentioned in the provisions on inducements of the MIFID I Implementing Directive (Article 26) either. Had it been the intention of the co-legislators to restrict or ban the provision of non-remunerated financial research to firms, this would have been expressly stated as such in the MiFID II Level I Directive. By contrast, while the recitals to the MiFID II Level I Directive which deal with third party payments mention two types of third parties from which benefits should not be accepted (issuers or product providers), they do not mention non remunerated research as a type of benefit that is not acceptable.

Accordingly, the rules on minor non-monetary benefits of MIFID II Level I Directive do not apply to financial research. The Commission’s mandate as to the request for advice on costs and charges and inducements does not mention research at all, and certainly does not provide a basis for treating research as a form of inducements. The Commission did not request ESMA to provide advice as to the treatment of research from the perspective of inducements either.

If ESMA nevertheless were to consider that an exhaustive list should be proposed, acceptable minor non-monetary benefits should also include marketing material relating to the investment service provided, such as brochures or leaflets and software and/or electronic devices which are used to inform clients about the service provided (e.g. a multimedia software or device to calculate and then report the portfolio’s performance). Also, while we believe non remunerated research should not be treated as benefits or inducements, ESMA could consider measures to enhance transparency for the disclosure of the cost for the investor-client if the client pays for research directly through commissions.

<ESMA\_QUESTION\_79>

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

<ESMA\_QUESTION\_80>

We do support the fact that clients are informed ex-ante on the existence of inducements and non-monetary benefits.

However, an obligation to inform clients, at least once a year, on individual basis about the actual amount of payments or non-monetary benefits received would be extremely onerous (not to say even impossible) and could even be misleading for the client.

The ESMA proposals on the disclosure of the aggregate cost of a financial product (without breakdown of the inducements), product governance and remuneration policies are adequate and sufficient measures to avoid the potential risks that third party payments may pose for clients. The additional benefit of a further breakdown of the details of inducements at service / transaction does not outweigh the disadvantages.

We strongly advocate maintaining the present disclosure regime of art. 26.2. of MiFID I, level 2 including the right for the client to receive *ex ante* further details as further interpreted by CESR in its 2007 and 2010 papers. Besides an ex ante explicit disclosure on (i) the type of the services provided, (ii) the characteristics of the third party payments and non-monetary benefits (eventually through the conflicts of interest policy), the firm should provide relevant information on the inducements received (e.g. accurate range in percentage of the level of retrocessions on the total amount of management / structuring fees retained on the return on investment).

We do not agree that article 24.4 (c) second subparagraph of the MiFID II Level I Directive provides for a sufficient legal basis to require in level 2 rules an obligation to provide each client with (i) the exact amount of the inducement received ex post (other than on request) and (ii) the total actual amount of inducements (payments and non-monetary benefits) on an annual basis as long as on-going inducements are received. In other words, we consider that ESMA exceeds its mandate in this area.

The rules regarding third party payments or inducements are defined in article 24.9 of the MiFID II Level I Directive. They are almost a copy of article 26 of the present MiFID I, level 2 but for the option left to the Member States to allow information on inducements in a summary form prior to the provision of the investment service or ancillary service provided the client is entitled to request further details. MiFID II should follow the same logic. Where art. 24.9. of the MiFID II Level I Directive recognizes that the method for calculating the amount of the third party payments may be provided ex ante in case the amount cannot be ascertained, it cannot follow from article 24.4 (c ) the MiFID II Level I Directive that third party payments are costs to be disclosed ex ante at the point of sale in order to allow the client prior to the provision of the service to calculate the total cost of the investment (see § 25 and 26 of the body text of the Consultation Paper on information to clients on cost and charges in combination with item 6 of the technical advice on the topic).

Moreover, the technical advice does not sufficiently take into account certain practical constraints:

1. Retrocessions are often not linear and cannot necessarily be allocated to a well-defined service or client. Certain commissions are subject to materiality thresholds, and do not depend on the service provided to an individual client but rather on a global level of services with no particular link to the services provided to clients individually.
2. Certain commissions are not known sufficiently in advance in order to be able to properly inform clients, or only become known after a certain period of time, so that it is no longer relevant or practical to inform clients ex post.
3. As stated in the answer to Question 72, we do not agree with the proposal that “third party payments received by investment firms in connection with the investment service provided to a client shall be regarded as part of the cost of the service provided to the client”.

Inducements do have their proper disclosure regime distinct of the cost disclosure regime and an assimilation of inducements with costs will lead to double counting, the inducement often being a rebate of the fee (cost) paid to the third party in relation to the investment. Such assimilation would also be misleading for the client.

<ESMA\_QUESTION\_80>

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

<ESMA\_QUESTION\_81>

We do not support the negative definition advanced by ESMA of “enhanced quality” with a non-exhaustive list of benefits that cannot be viewed as enhancing the quality of the service and the corresponing reversal of the burden of proof. The proposals ignore the characteristics of a wide-spread distribution model in Continental Europe including Belgium, France, Germany, in which the producer remunerates its distributors in exchange for the access to a distributor’s client’s network.

As a general rule, if the investment advice or general recommendation is not biased as a result of the receipt of commissions the receipt should be considered as designed to enhance the quality of the investment advice to the client (see recital (39) of the MiFID Implementing Directive).

CESR provided guidance on good and poor practices and recommendations as to when the quality enhancement test is met in 2010 and 2007, based on extensive consultation of market participants. Firms have made significant efforts to take into account and ensure compliance with these recommendations.

In particular, it should be kept in mind that in relation to the distribution of financial instruments (collective investment schemes in particular), CESR recognised that inducements under MiFID would be considered to enhance the quality of the relevant service to the client if an issuer or product provider pays an investment firm for the provision of a distribution network or after sales services. CESR further was in favour of a relevant ex ante information to clients on inducements, and considered that it was adequate from the perspective of investor protection that information on the retrocession of management fees was provided on the basis of comprehensive accurate ranges of retrocession percentages.

Given the fact that the EU legislator reached a compromise that only restricted the use of inducements in the context of independent advice and portfolio management, we believe that the existing framework for inducements, as described in the guidance on good and poor practices and recommendations of CESR, should be preserved for non-independent advice.

This ESMA technical advice on inducements in our opinion ignores the balance reached at the MiFID II Directive and boils down to a de facto ban of inducements.

The proposals may result in an unlevel playing field between firms developing their own product and firms distributing products developed by specialised third parties. This will limit competition between firms and business models and is unlikely to contribute to better investor protection.

In case of a list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met would nevertheless be proposed (which Febelfin would not support), we believe of examples of circumstances and situations where the enhancement test should in any event be deemed to be met should in any event include the following:

* Qualitative and quantitative selection of funds based on a larger funds universe incl. risk due diligence and monitoring
* Access to a personal advisor having received specific additional training (such as product training which goes beyond regulatory requirements);
* Access to a financial planner or tax advisor;
* Invitations for clients to information sessions where product types are explained or general information and analysis is shared about the general economic situation;
* Specific information materials and brochures about economic or regulatory developments that are relevant for a client in relation to the investment service provided;
* Access to a platform where a client has continuous access to its portfolio in addition to regulatory reporting requirements;
* Access to simulation tools that are not directly linked to the sale of products or services (e.g. calculation of pension benefits, calculation of taxes,…);
* IT assistance in case of potential abuse of IT tools or equipment used by a client (in relation to the provision of the relevant investment services) is detected (e.g. a hacked mailbox).)
* On-going suitability assessment;

We welcome the attenuating factors retained in item 11 of the technical advice on inducements. It should however be made explicit that besides the access to a wider product range or the provision of advice on an ongoing basis, the access to a distribution network should be recognised as a relevant quality enhancement criterion in itself.

Without prejudice to the fact Febelfin is opposed to a list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met, more specific comments include the following:

* The wording of §10 ii) of the technical advice, creates competitive disadvantages for certain firms already providing a higher level of service to their clients since the benchmark here is a service that meets the “regulatory requirements”. Taking the “regulatory requirements” as benchmark is not objective for a firm whose course of business already includes providing open architecture, educating its clients via extensive and regular brochures and information materials or giving access to a personal investment advisor in multiple physical locations while it would be sufficient for a firm performing its business over an internet platform to provide educational brochures to demonstrate that there is a quality enhancement.
* As to § 10, iv) of the technical advice, there is no evidence that the mere fact that an ongoing inducement is paid while no ongoing service is provided to an end user has an adverse impact on the quality of the service provided to the client. Ongoing inducements are a typical remuneration for investments with a long duration (such as long term investment funds or investment insurance products which are subject to a certain minimum duration for tax reasons (Branch 21 products in Belgium). These products are valuable alternatives for deposits and savings accounts, which may no longer be available to retail clients if a firm can no longer receive inducements on ongoing basis. Firms may also tend to manufacture and distribute their own investment products rather than third party products, thus limiting the product offer for retail clients. Also, if ongoing inducements are no longer allowed, firms may tend to actively propose arbitrage to their clients and create “churn” in order to be able to receive transaction based commissions.

The current wording could lead to a situation where a recipient firm would opt for a one year fee that is high enough to offer an amount equal to a number of recurrent payments of inducements. Such high one-off fee could be more detrimental than a significantly lower fee that is paid for a number of years.

It is also possible that the higher quality or additional service which is not on-going, costs so much for the recipient firm that it would be beneficial for the client to have the cost amortized over multiple years. An example of such service would be the free access to a financial planner or tax adviser. With the current wording of point 10, iv) there is a risk that the recipient firm would no longer offer such service to the clients. Therefore, it should be considered (preferably) delete point 10 iv) or (alternatively) to amend point 10 iv) as follows:

*“iv. in relation to an on-going inducement, it is not related to the provision of an on-going service to an end user client, with the exception of the situation where it would be beneficial to the client that the cost of the additional or higher quality service is spread over multiple years or the life of the product/service that led to the inducement.”*

<ESMA\_QUESTION\_81>

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

<ESMA\_QUESTION\_82>

It is simply impossible for the Febelfin members to calculate the costs related with the present proposals as they may imply – at least for a some of the Febelfin members – a complete overhaul of their existing business models.

As regards the requirement retained under item 13 of the draft technical advice (p. 124 of the Consultation Paper), we request to adapt the language as follows : drop items (i) and (ii) and replace by :

“(….) to enhance the quality of the service by keeping an audit trail of the deployment of the commissions and fees”.

<ESMA\_QUESTION\_82>

* 1. Investment advice on independent basis

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

<ESMA\_QUESTION\_83>

<ESMA\_QUESTION\_83>

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

<ESMA\_QUESTION\_84>

As firms have very different organizational models, we believe a “one size fits all” approach as to the organisational requirements that firms should have in place to make sure that the obligations in respect of independent advice are complied with would not be effective. Firms should be encouraged to make their own, specific analysis of the appropriate degree of separation, procedures, controls they have to put in place to ensure compliance, taking into account the characteristics and risks proper to that firm.

Besides that, firms providing both independent and non-independent advice, firms should strictly observe their obligation to make sure that clients are adequately informed of whether or not they receive independent and non-independent advice, in a clear, accurate and non-misleading manner. This should occur observing the requirements of Article 24 (4) of the MIFID II, notably by clearly stating if and to what extent the advice is based on a broad or on a more restricted analysis of different types of financial instruments and, in particular, whether the range is limited to financial instruments issued or provided by entities having close links with the investment firm or any other legal or economic relationships, such as contractual relationships, so close as to pose a risk of impairing the independent basis of the advice provided.

<ESMA\_QUESTION\_84>

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

<ESMA\_QUESTION\_85>

<ESMA\_QUESTION\_85>

* 1. Suitability

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

<ESMA\_QUESTION\_86>

The current draft technical advice is not consistently drafted. Additional guidance is needed to ensure a uniform interpretation. Clear examples would need to be given as to what is additionally required in respect of existing suitability requirements:

* We understand that a firm must specify its advice (it has to explain that (i) the client has sufficient knowledge & experience with respect to the financial instrument that is recommended, why the advice is within the investment objectives of the client and in accordance with the financial situation of the client). This is not new. However, in addition, a firm must also specify “how the advice meets **the preferences, objectives and other characteristics** of the retail client”. These are completely new requirements and concepts. It should be explained what this means, and what is the difference with the previously mentioned criteria.

Moreover:

* In the Consultation Paper, on page 132, number 8, the obligation for a firm to specify ‘how the advice given meets the retail client’s “**circumstances and needs**”. These are, again, other definitions, which adds to the lack of clarity.

In the Consultation Paper on page 134, number 2, (ii), it is imposed on a firm to provide a report that includes “how the recommendation provided is suitable, including how it meets the **client’s objectives and personal circumstances with reference to the investment term required, client’s knowledge and experience and client’s** attitude to risk and capacity for loss”…”. Here again, other requirements and concepts seems to be used.

* A firm should have “policies and procedures” to ensure that it assesses whether alternative financial instruments OR with lower costs, could meet the client’s profile”. In the concrete recommendation, a firm “must assess whether an alternative instrument, less complex AND with lower costs, would better meet the client’s profile”.

While according to the first bullet, it is sufficient to have procedures and policies so that in the advisory process, there is a moment and place for evaluation whether there are no less complex OR less costly solutions, according to the second bullet, it is not sufficient to have such procedure but a concrete assessment should be included of the alternative, less costly and less complex, financial instruments.

Clarification is needed: in most cases, there is no alternative that gives the same result (e.g. high return), but that is less complex/less costly; However, for every client belonging to a certain risk profile, there is always an investment that is less costly and less complex (but giving less return).

<ESMA\_QUESTION\_86>

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

<ESMA\_QUESTION\_87>

<ESMA\_QUESTION\_87>

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

<ESMA\_QUESTION\_88>

The draft technical advice requires that the investment firm explains how the recommended investment will meet the client’s knowledge and experience. Investment firms should be in a position to rely on the information collected from their clients on knowledge and experience for drawing up the client’s investment profile in the first place. However, knowledge and experience are not static and also the range of investment products offered may evolve with the time. The investment firm should therefore be in a position to meet the requirement for a given financial instrument through an appropriate documentation of the fact that relevant information (incl. KIID, KID, prospectus, …) has been provided to the client related to the characteristics of the recommended product and through possible further explanations given in good time before the investment decision was/is taken.

A number of clarifications would also be welcomed:

- Article 25 – suitability report (page 134, 2. (iii) of the Consultation Paper): in the suitability report, an investment firm must give an explanation of the “*disadvantages of the recommended course of action*”.

We believe that the benefit of requiring an explicit explanation of the “*disadvantages of the recommended course of action*” is limited, given the elements that should already be covered as part of the suitability assessment.

Moreover, we are concerned that an obligation to specifically disclose the disadvantages of the recommended course of action may put too much emphasis on opportunities which may look attractive for a client but which a client may miss due to the recommended course of action, this increases the risk that the client will decide not to follow the advice and to follow an alternative course of action which is not recommended.

Conversely, a client may be misled if too much emphasis is put on the fact that the client will not invest in a less complex product with lower cost; in most cases, this would also mean that the client will receive lower return, so that a client may claim that the advice did not sufficiently meet his objectives and claim mis-selling.

In any event, the scope of the obligation to describe "*the disadvantages of the recommended course of action*” is too vague and creates serious compliance risks.

It should be clarified whether or not this requirement refers to the disadvantage of the recommended financial instrument, or the disadvantages of the “*recommended course of action*”. It should also be clarified whether or not this applies to concrete action to buy, sell, or hold (meaning the disadvantage of the step to buy, or sell…°) (e.g. the fact that it may be difficult to divest because it is an illiquid product).

It is our understanding that it would be sufficient to disclose any information on disadvantages of a recommended course of action on a generic basis, by stating whether or not alternative products, less complex or with lower costs, could meet the clients profile, without specifying and identifying which products could meet the clients profile (unless the client request to so). We would also welcome that it is confirmed that firms can comply with the requirements to give an explanation of the “*disadvantages of the recommended course of action*”, by providing an explanation of the risks of the product to which the recommended course of action relates. In case of a buy transaction, we fail to see what could be the difference between the risk of the product and the “*disadvantages of the recommended course of action*”. In case a sale transaction, it is obvious that the disadvantage is that an investor may incur a loss or miss opportunities for future return, so that it there is no added value in requiring firms to specifically disclose this.

- Article 25 – suitability report (page 134-135 of the Consultation Paper, point 3): the firm has the right not to give a periodic assessment to the client but must make this clear before the service is provided. A new obligation is now proposed to include in the suitability report (not the periodic one, but the one given per advice) the obligation to bring under the attention of the client that he should seek a periodic review of “their arrangements” (referring to the recommended instruments or the arrangements between the firm and the client) when the recommended instrument is likely to require it. In an indirect way, this imposes again the obligation for a firm to give a periodic assessment. It can also be very confusing for a client that has no continuing advisory relationship with the firm. Item 3 seems indeed to introduce an additional requirement in the form of a warning in the suitability report provided at the level of the initial advice where the instrument recommended may have an impact at a later stage on the composition of the investor’s portfolio (deviation of the target asset allocation). This goes beyond ESMA’s mandate.

<ESMA\_QUESTION\_88>

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

<ESMA\_QUESTION\_89>

<ESMA\_QUESTION\_89>

* 1. Appropriateness

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

<ESMA\_QUESTION\_90>

We are not in favor of introducing additional criteria not yet included in article 38 of the present MiFID I Implementing Directive to distinguish complex from non-complex financial instruments.

It is not clear what is meant with point 1 (ii) of the draft technical advice on page 137 “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”

<ESMA\_QUESTION\_90>

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

<ESMA\_QUESTION\_91>

<ESMA\_QUESTION\_91>

* 1. Client agreement

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

<ESMA\_QUESTION\_92>

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

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

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

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

1. “new” professional clients, and
2. where the firm and the professional client intend to establish an on-going business relationship.

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

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

<ESMA\_QUESTION\_92>

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

<ESMA\_QUESTION\_93>

We do not agree with the requirement to impose a written agreement for investment advice where a “continuing business relationship” is in place. A firm may have such a relationship in place with a given client as soon as a securities account relationship is opened with the firm. In any event, additional guidance must be provided on the scope of “on-going advice” other than in the case the investment firm and the client agreed on the provision of periodic suitability assessments”. Both the terms “ongoing” and “advice” are in this context relevant. Advice also in this context must be understood as investment advice as defined in the MiFID II, level 1. In other words advice to bring a client’s portfolio in line with an originally defined asset allocation should generally not qualify as such. One should furthermore not underestimate the impact of such a requirement and its feasibility (incl. cost) in a mass retail environment.

Regarding the format of the agreement, it should be clarified that this written agreement should not be a separate legal document but can also be a set of general terms and conditions that have to be accepted by the client.

<ESMA\_QUESTION\_93>

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

<ESMA\_QUESTION\_94>

<ESMA\_QUESTION\_94>

##### 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?

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_95>

* 1. Reporting to clients

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

<ESMA\_QUESTION\_96>

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

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

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

<ESMA\_QUESTION\_96>

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

<ESMA\_QUESTION\_97>

<ESMA\_QUESTION\_97>

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

<ESMA\_QUESTION\_98>

<ESMA\_QUESTION\_98>

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

<ESMA\_QUESTION\_99>

<ESMA\_QUESTION\_99>

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

<ESMA\_QUESTION\_100>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_100>

* 1. Best execution

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

<ESMA\_QUESTION\_101>

It should not be required that a firm has to disclose the name of the specific entity to which it transfers its orders in the situation of RTO for specific order, as long as it is able to demonstrate that it is able to satisfy its best execution requirement. There is no added value for a customer to know to which entity exactly the firm transmits its orders. This would be problematic if a competitor uses another local competitor to execute its orders. If the name has to be communicated, firms may prefer to have orders executed by a (foreign) entity that is no direct local competitor, which does not necessarily contribute to better investor protection.

Firms that route orders to another investment firm (RTO) should not have to include relevant information in their execution policy on the execution policy of the executing broker. The rule should be that they are held by a best selection obligation and that they have to motivate only the best selection in their own policy.

<ESMA\_QUESTION\_101>

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

<ESMA\_QUESTION\_102>

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

A number of clarifications would also be welcomed:

* Item 8 of the technical advice : the MiFID II Directive does not require that information on venue fees, clearance and settlement fees need to be disclosed in the execution / RTO policy.  ESMA seems to admit this.  We do not see the direct interest of links to the execution quality data of the different venues (this also entails a  risk of successive changes and required updates of execution policies), the principle being that the investment firm makes the choice of what it considers to be the best available ex venues and  ultimately bears the burden of proof that it consistently offered best execution.
* Item 9 of the technical advice : information regarding inducements / third party payments : it should be clear that firms do not have to provide “figures” but can limit this information to a general statement of the nature of the third party payments received / benefits received and how the enhance the quality of the execution services
* Item 10 – 11 : a requirement to disclose fees (even maximum amounts in an execution policy) does not seem to be proportionate (this also entails a  risk of successive changes and required updates of execution policies)
* Item 12 : price alone cannot be the decisive factor to choose one venue above another but if the price is set aside, we understand that firms need to be in a position to justify the choice (qualitative criteria, inducements enhancing quality of service)

<ESMA\_QUESTION\_102>

* 1. Client order-handling

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

<ESMA\_QUESTION\_103>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_103>

* 1. Transactions executed with eligible counterparties

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

<ESMA\_QUESTION\_104>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_104>

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

<ESMA\_QUESTION\_105>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_105>

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

<ESMA\_QUESTION\_106>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_106>

Product intervention

##### Do you agree with the criteria proposed?

<ESMA\_QUESTION\_107>

<ESMA\_QUESTION\_107>

##### Are there any additional criteria that you would suggest adding?

<ESMA\_QUESTION\_108>

<ESMA\_QUESTION\_108>

1. Transparency
   1. Liquid market for equity and equity-like instruments

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

<ESMA\_QUESTION\_109>

<ESMA\_QUESTION\_109>

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

<ESMA\_QUESTION\_110>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_110>

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

<ESMA\_QUESTION\_111>

<ESMA\_QUESTION\_111>

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

<ESMA\_QUESTION\_112>

<ESMA\_QUESTION\_112>

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

<ESMA\_QUESTION\_113>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_113>

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

<ESMA\_QUESTION\_114>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_114>

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

<ESMA\_QUESTION\_115>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_115>

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

<ESMA\_QUESTION\_116>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_116>

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

<ESMA\_QUESTION\_117>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_117>

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

<ESMA\_QUESTION\_118>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_118>

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

<ESMA\_QUESTION\_119>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_119>

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

<ESMA\_QUESTION\_120>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_120>

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

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

<ESMA\_QUESTION\_121>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_121>

* 1. The definition of systematic internaliser

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

<ESMA\_QUESTION\_122>

Febelfin fears that the thresholds are too low – especially for small economies, where an investment firm in question easily will reach the threshold.

The draft technical standard should be clarified with the following words in order to make it more understandable:

The investment firm internalises on a frequent and systematic basis if

- the number of OTC transactions executed by the investment firm on own account (when executing client orders) in liquid instruments is, during the most recent quarter, equal or larger than (between 0.25% and 0.5%) of the total number of transactions in the relevant financial instrument in the European Union during the same period.

- For shares, depositary receipts, ETFs, certificates and other similar financial instruments for which there is not a liquid market the condition is deemed to be met when the investment firm deals on own account OTC (when executing client orders) on average at least on a daily basis during the most recent calendar quarter.

The investment firm internalises on a substantial basis if the size of OTC trading carried out by the investment firm on own account (when executing client orders) is, during the most recent calendar quarter, equal or larger than either:

1. (between 15% and 25%) of the total turnover in that financial instrument executed by the investment firm on own account or on behalf of clients (executed on a trading venue or OTC); or
2. (between 0.25% and 0.5%) of the total turnover (OTC or on a trading venue) in that financial instrument in the European Union.”

For non-equity instruments, the same clarifications should be added.

<ESMA\_QUESTION\_122>

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

<ESMA\_QUESTION\_123>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_123>

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

<ESMA\_QUESTION\_124>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_124>

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

<ESMA\_QUESTION\_125>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_125>

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

<ESMA\_QUESTION\_126>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_126>

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

<ESMA\_QUESTION\_127>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_127>

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

<ESMA\_QUESTION\_128>

Clarification is needed. For non equity it is mentioned that the thresholds should be calculated per sub-asset class (as referred to in annex 3.6.1. of the Discussion Paper). This annex also includes bonds and structured finance products. However, for bonds and structured finance products, the Consultation Paper mentions (page 196 N 19) that it should be calculated per ISIN. It is unclear why Annex 3.1.6 of the Discussion Paper mentions bonds and structured finance products.

<ESMA\_QUESTION\_128>

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

<ESMA\_QUESTION\_129>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_129>

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

<ESMA\_QUESTION\_130>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_130>

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

<ESMA\_QUESTION\_131>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_131>

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

<ESMA\_QUESTION\_132>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_132>

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

<ESMA\_QUESTION\_133>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_133>

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

<ESMA\_QUESTION\_134>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_134>

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

<ESMA\_QUESTION\_135>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_135>

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

<ESMA\_QUESTION\_136>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_136>

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

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

<ESMA\_QUESTION\_137>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_137>

* 1. Exceptional market circumstances and conditions for updating quotes

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

<ESMA\_QUESTION\_138>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_138>

* 1. Orders considerably exceeding the norm

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

<ESMA\_QUESTION\_139>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_139>

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

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

<ESMA\_QUESTION\_140>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_140>

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

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

<ESMA\_QUESTION\_141>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_141>

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

<ESMA\_QUESTION\_142>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_142>

As to systematic internalisers:

- if it is a liquid instrument, the quotes must be made public according to the proposal of ESMA (which can be via the own website of the firm). Everybody will be able to consult these quotes (competitors, retail clients…).

- this does not mean that everybody will be able to trade with the SI under the quotes made public: there, the commercial policy can determine with whom you are willing to deal or not, on the condition that it is objective and non discriminatory.

It should be clarified whether a firm can determine that a financial institution is excluded form dealing on the basis of the quotes made public.

- it is clear that the SI must publish one bid and ask quote. However, taking into account that it concerns transactions that will not be cleared by a CCP but bilaterally settled, the SI takes counterparty risk. The price cannot be identical towards every counterparty because the counterparty risk will not be identical (the Probability of Default rating (PD) will differ)? How can we deal with it? Does a SI has to publish one quote identical for everybody, but can add a add-on depending on the PD class of each client? If yes, must it be made public beforehand? (if so, it goes against a tradition not to make clear such PD ratings to the clients). What if the PD rating of the counterparty changes?

- We suppose that the trading with an SI can be continued via telephone? We suppose it is not necessary to develop an electronic trading platform as an SI?

1. Micro-structural issues
   1. Algorithmic and high frequency trading (HFT)

##### Which would be your preferred option? Why?

<ESMA\_QUESTION\_167>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_167>

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

<ESMA\_QUESTION\_168>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_168>

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

<ESMA\_QUESTION\_169>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_169>

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

<ESMA\_QUESTION\_170>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_170>

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

<ESMA\_QUESTION\_171>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_171>

* 1. Direct electronic access (DEA)

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

<ESMA\_QUESTION\_172>

<ESMA\_QUESTION\_172>

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

<ESMA\_QUESTION\_173>

<ESMA\_QUESTION\_173>

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

<ESMA\_QUESTION\_174>

<ESMA\_QUESTION\_174>

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

<ESMA\_QUESTION\_175>

<ESMA\_QUESTION\_175>