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| 22 May 2014 |

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| Reply form for the  ESMA MiFID II/MiFIR Consultation Paper    Template for comments  for the ESMA MiFID II/MiFIR Discussion Paper |
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| Date: 22 May 2014 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA MiFID II/MiFIR Consultation Paper, published on the ESMA website ([here](http://www.esma.europa.eu/content/Consultation-Paper-MiFID-IIMiFIR)).

***Instructions***

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

1. use this form and send your responses in Word format;
2. do not remove the tags of type <ESMA\_QUESTION\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
3. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

1. if they respond to the question stated;
2. contain a clear rationale, including on any related costs and benefits; and
3. describe any alternatives that ESMA should consider

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

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

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

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.

***Publication of responses***

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

***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Disclaimer’.

Overview

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>

TYPE YOUR TEXT HERE

<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>

We 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.

In addition, we even believe that the word “exclusively” should be removed. If some form of communication is provided to the public, it cannot be personal, since it is addressed to a large number of people. For a communication being considered as personal it has to contain elements specific to the client. Otherwise, every published market analysis provided to the client without any qualifying statement would be considered a personal recommendation. If, however, the advisor states that based on the analysis, he would recommend this financial instrument, the communication would have to be considered as personal recommendation.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_10>

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

<ESMA\_QUESTION\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_11>

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

<ESMA\_QUESTION\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_12>

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

<ESMA\_QUESTION\_13>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_13>

* 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>

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

In addition, it should be underlined that manufacturers are not supposed to have a view on distribution on a secondary market which should not be considered as distribution as such. Moreover, an actor coming on a primary market in order to acquire a financial instrument is not necessarily a distributor and may have no contractual relation with the manufacturer. Therefore a manufacturer should not bear any responsibility regarding distribution on a secondary market in this context.

<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>

First, it has to be noted that the manufacturing of UCITS and AIFs is not subject to the product governance standards under MiFID based on the general exemption of these products under MiFID II Article 2(1)(i)[[1]](#footnote-2). The simple reason for this exemption is that these products are under the rules of the respective UCITS and AIFM Directives and already follow specific product governance rules.

Taking this exemption into account, we agree with ESMA that distributors should be able to obtain from manufacturers (including non-MiFID firms) all information necessary to ensure distribution to the relevant target market.

However, we see no necessity to require the parties concerned to enter into a written agreement. It is already in the vital self-interest of the distributor for the provision of its services, as well as of the product manufacturer, to receive all necessary documents from the manufacturer. This decision should therefore be left to the distributor and manufacturer, and not further regulated through Level 2 measures.

Furthermore, in the interest of legal clarity, ESMA’s final technical advice should further specify what “all relevant information” to be provided by manufacturers actually means. In our view, the relevant information should include the manufacturer’s assessment of the target market and they should be able to provide this information in a standardised manner (e.g. by referring to the relevant passages in the fund prospectus or the KIID).<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>

Periodic information about the practical experience with product distribution could be useful for product manufacturers in their regular review process. However, we believe that the responsibilities of product manufacturers and distributors should be clearly separated. Thus, product manufacturers should take the information provided by distributors into account when determining and reviewing the target client group in accordance with the relevant internal process, but must not be bound by any assessment or evaluation of this information stemming from external sources.

It is here necessary to draw ESMA’s attention once again that a product manufacturer does not always have a view on the whole distribution process of the products he provides. Therefore, a clear separation in responsibilities should be granted.

A critical point is the definition of distribution. Listing on a stock exchange should not be considered as distribution as such (see above Q14) and manufacturer should not bear any responsibility in such context.

Furthermore, we believe that the requirement for distributors regularly to review the financial instruments they offer or market is sufficient to warrant regular information exchanges between manufacturers and distributors. We do not see any further need to regulate specific responsibilities of the distributor and/or the manufacturer. Especially, the timing and content of such information exchange should depend on the type of product and the target market, and thus should be subject to the decision by the parties concerned.<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>

In our view, it is preferable to require the product manufacturer to identify, only in general terms, the target market of each product. Investment firms distributing products to the end-clients should then take this determination into strong consideration, while still being allowed to sell a product outside the suggested target market where this is in line with the distributor’s suitability and appropriateness assessment of its client (e.g. certain more complex/riskier products might be added to a client’s portfolio to diversify the overall investment portfolio). In cases of such deviations, instead of further refinement of the characteristics of the target market, the distributor should be aware that different and potentially inconsistent conclusions in terms of the target market for the same product might create confusion in the market and undermine investors’ confidence, and should therefore explain their assessment in an appropriate manner.

In this context, we would also like to point out that there are no uniform criteria for classifying clients that go beyond the general client categorisation as retail or professional according to Annex II of MiFID. Therefore, the duty to determine the target market for a product should not imply a categorisation below that level in order to avoid inconsistent standards being applied by different distribution channels. Furthermore, we are uncertain of the advantages also to specify groups of investors for whom the product is not compatible, as it is the distributors’ ultimate responsibility to ensure suitability of the product.

In fact, determination of a target market should not be interpreted in a highly restrictive way. Indeed a very restrictive approach could prevent a distributor from proposing a product to a client, because this client would be out of the targeted market, even though in the specific situation of such client, this product would correspond to his needs, notably in the particular context of his financial instruments portfolio.

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

As suggested by ESMA, distributors should be required to reconsider the analysis of the relevant target market and make reasonable adjustments to their product governance arrangements. If distributors become aware of circumstances that may also materially affect the identification of the potential target market at the product level, they should be expected to pass the relevant information to the product manufacturer.<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>

We do not think that the draft technical advice provides sufficient clarity with regards to the requirements for product manufacturers. In particular, we do not agree with the implications for UCITS, and potentially for AIFs, as suggested in ESMA’s analysis[[2]](#footnote-3).

UCITS and AIFs are governed by separate pieces of EU legislation, which impose specific requirements on the fund management process in relation to the fund manager and, in the case of UCITS, to the individual product. Therefore, collective investment undertakings – UCITS and AIFs alike – are explicitly exempted from the MiFID regime in MiFID II Article 2(1)(i). Only fund managers providing ancillary investment services in addition to the management of UCITS or AIFs are bound by MiFID provisions on internal organisation and conduct of business in relation to those ancillary services.

Thus, it should be clear that the product governance standards laid down in MiFID II Articles 16(3) and 24(2) cannot be applied to the manufacturing of UCITS and AIFs, which are explicitly exempted from the MiFID scope and subject to specific regulation under EU law. The statement in ESMA’s analysis that “the proposals [on product governance] do not override responsibilities in other directives, such as […] UCITS” is incorrect and should be deleted.

Any other outcome would not only be in breach with the overarching EU financial services legislations, but also incidental in terms of results. This is underlined by the fact that manufacturing of UCITS or AIFswould be affected by the MiFID standards only if the relevant fund manager had been licensed to provide ancillary services in addition to its core activity of collective portfolio management (i.e. UCITS and MiFID licences). Consequently, we would face a situation where a part of UCITS and AIFs were submitted to the product governance provisions under MiFID, whereas UCITS and AIFs managed by UCITS/AIFM-licensed fund managers were not affected by these rules, leading to a split in standards for the same products.

On this basis, we urge ESMA to confirm in its final technical advice to the Commission that UCITS and AIFs are not subject to the product governance obligations at manufacturer’s level due their exemption from the scope of application under MiFID II Article 2(1)(i). At the very least, ESMA should abstain from any statements that might imply a different interpretation of the Level 1 text.<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>

As explained above, we would like to underline that ESMA should confirm in its final technical advice to the Commission that UCITS and AIFs are not subject to the product governance obligations at the level of the manufacturer due to their exemption from the scope of application under MiFID II Article 2(1)(i). The reason for this exemption is that existing regulations should be regarded as preceding special statutory or legal regulations, with the consequence that the product regulations in MiFID II should be applicable only for products not yet regulated to the same level of detail.

In any case, a strict separation of responsibilities should be granted at any time, between the manufacturer and the distributor.

<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>

Given that the manufacturing of UCITS and AIFs is not subject to the new product governance obligations due to the general exemption from scope under MiFID II Article 2(1)(i), we expect no direct costs for fund managers. Additional indirect costs might occur as a consequence of the envisaged contractual obligation in relation to non-MiFID firms to provide “all relevant information” on products to distributors.<ESMA\_QUESTION\_21>

* 1. Safeguarding of client assets

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

<ESMA\_QUESTION\_22>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_22>

##### 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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_59>

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

<ESMA\_QUESTION\_60>

TYPE YOUR TEXT HERE

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

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

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

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

More generally, UCITS and AIFS management companies’ remuneration policies are strictly regulated through UCITS and AIFM’s pieces of regulation. Therefore, MIFID 2 should not apply in such context. As a consequence, remuneration policies ‘scope, should, for management companies, be limited to the one defined in the specific regulation applicable to UCITS and AIF management companies.

<ESMA\_QUESTION\_63>

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

<ESMA\_QUESTION\_64>

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

<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>

*Up-to-date information*

We agree that material information addressed to or likely to be received by retail clients should be up-to-date relevant to the method of communication used. Nonetheless, a differentiation between print and online documents concerning the requirements for up-to-date should be made. In general, print documents should be granted longer time periods.

*Information consistently presented in the same language*

The proposed requirement for retail client information to be consistently presented in the same language does not take into account the information regime under the UCITS Directive. UCITS management companies are only required to translate the UCITS KIID into the official language of the relevant distribution market. All other information materials required by law may be presented in the language customary in the sphere of international finance; this pertains in particular to the UCITS prospectus and annual/semi-annual report[[3]](#footnote-4). These product-related information standards are the outcome of a carefully calibrated approach to investor protection in the context of the Single Market. They should be regarded as prevailing in terms of UCITS information also at the point of sale and must not be put into question by contradicting Level 2 provisions under MiFID.

**Hence, we would welcome a clarifying statement by ESMA that the requirement for consistent use of the same language does not apply insofar as the use of different languages is explicitly allowed under the UCITS Directive and possibly other EU Directives governing product-related information.**

*Information in the same font size*

We agree that indications of relevant risks should be in a font size at least equal to the predominant size used throughout the communication, but we think it is unnecessary to require a fair and prominent warning every time potential benefits are referenced in a document. In our view, the existing requirement in the MiFID Implementing Directive, for a warning where potential benefits are emphasised, is sufficient.

<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>

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

Furthermore, we would like to point out that “structured UCITS” are already under the obligation to display in their KIDs performance scenarios illustrating possible future performance in line with the relevant CESR Guidelines[[4]](#footnote-5). The presentation standards stipulated therein should be regarded as adequate for the purpose of client information under MiFID II.

<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>

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

<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>

We are unable to agree with ESMA’s proposal is contradicting with MiFID Level 1’s clear and distinctive two-step approach on informing the client on independent advice. First the adviser is to decide whether or not to provide independent investment advice (MiFID II Art. 24 para. 4(a)(i)) which only in case of independent advice leads to additional requirements regarding the scope of the advice and the ban on inducements (MiFID II Art. 24 para. 7). ESMA states that investment firms should explain whether and why the investment advice could qualify as independent or not (see p. 97, paragraph 1). Our view is that this should already be the case once the investment firm informs the client that the advice is provided on an independent basis. Therefore the wording “whether and why investment advice could qualify as independent or not” should be removed.

In addition, we believe the client should only be informed about the relevant consequences that apply to the investment firm, if it holds itself out as independent: Firstly, that it is not allowed to accept and retain third party payments and hence is paid by the client. Secondly, that it has to advise on a sufficient range of financial instrument, sufficiently diversified and that it cannot limit its advice to instruments issued by firms having a close link, legal or economic relationship.

*Information on the broad or restricted analysis of different types of financial instruments*

More on the detail of the draft advice, we have doubts on the use of the requirements in paragraphs 4 and 5 of the Draft Technical Advice relating to the “information about the broad or restricted analysis of different types of financial instruments”.

With respect to paragraph 4 we would like to highlight that the total number of financial instruments and providers analysed per each type of instruments according to the scope of the service is not a relevant benchmark. A greater number of products does not necessarily lead to better investment advice. The decisive factor therefore is whether the investment advice given to the client (recommended financial instrument) is suitable and/or appropriate. Secondly, ESMA is making the correct assumption that the basis of the selection process is only relevant for independent advice (see last sentence of paragraph 5(ii) on page 95) which is missing. Paragraph 4 should therefore be amended as follows: “The basis of the selection process used by the investment firm ***providing advice on an independent basis*** to recommend financial instrument(s) should also be provided.”

Regarding paragraph 5, we doubt whether the exact proportion (of financial instruments issued by the investment firm itself or entities having close links or any other close legal or economic relationships with the investment firm and those which are issued by other issuers or providers) will necessarily give the client a better understanding of the offered financial instrument. This could lead to the assumption that investment advice better meets the client’s needs where the proportion of non-“close links” instruments is higher. The decisive factor again is whether the investment advice given to the client (e.g. recommended financial instrument) was suitable/appropriate, i.e. the best possible advice. In addition, this requirement should only apply once the client and the investment firm starts discussing specific financial instruments. Only then the information is relevant to the client. Generally, ESMA should be cautious not to ask for too many information requirements but to focus on the information in fact relevant to the client. If, for example, the client is interested only in shares, the investment firm should not be required to state for all the instruments it assesses the proportion of the instruments issued by entities without close links. We would welcome such clarification.

*Information about the periodic assessment of suitability*

Generally, the ESMA’s advice at this point should only contain requirements regarding the information about the periodic assessment of suitability and not any requirements regarding review or frequency of the assessment. Formally, this should be part of the section regarding the suitability report (2.17). Moreover, the expression “extent of the periodic suitability assessment” is unclear and should therefore be removed (see p. 97, para. 6 (i)). The client has or will receive advice and should therefore understand what the suitability test means. Hence, it is sufficient if he is informed of the frequency, the firm will assess suitability and what the triggers are.

<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>

We are unable to agree with ESMA’s proposal, as the pre-sale disclosure on the functioning and performance of financial instruments (para. 8), the description of risks involving impediments or restrictions for the disinvestments (para. 9), the components (para. 10) or the description of a guarantee (para. 11) is already existing and regulated for a certain number of financial instruments and therefore creates inconsistencies and overlaps.

This is the case for UCITS and AIFs[[5]](#footnote-6), this financial information already has to be provided within the KIID (or at a later point in the PRIIPS KID). Therefore, from a fund perspective, such additional information would be necessary only if this specific financial information was not already required in terms of product disclosure. The disclosure in the UCITS KIID and AIF KIID should be sufficient to fulfil this obligation. We thus ask ESMA to specify in its final advice that the disclosure of further information should not be required if existing European legislation already requests similar information (e.g. UCITS IV or AIFMD).

<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>

Consistent with the aim of providing material and targeted information to clients we do not believe that there are other material information disclosures to be made. For further information, please refer to our answer to Q69.

<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>

Lyxor does not support the automatic extension of this provision to professional and eligible counterparties which in any case will be given fair, clear and non-misleading information.

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

Moreover, professional clients and eligible counterparties can request - either on a general form or on a trade-by-trade basis - to be treated as retail clients.

The opt-out ESMA suggests is too limited in scope (particularly ECPs should be able to opt out from all requirements) and it is not clear to us how the opt-out would work in practice. For example it would be important that such opt-out could be confirmed on a one-off basis via standard terms and conditions. We note that there are competition law issues in determining the service provider when 2 ECPs interact with each other.

We are of the opinion to remove the restrictions for professional client and eligible counterparty to opt-out (i.e. when the financial instrument is a derivative or in case of investment advice and portfolio management).<ESMA\_QUESTION\_71>

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

<ESMA\_QUESTION\_72>

Paragraph 5 of the draft technical advice states that “When more than one investment firm provides investment or ancillary services to the client, each investment firm should provide information about the costs of the investment or ancillary services it provides”. We agree with this and consider that in the context of retail structured products it is important that a manufacturer is not obliged to disclose any costs imposed by the distributor (or any party to whom the distributor may direct the client etc.) as the manufacturer will not be privy to details of any such costs/charges. This is in line with the PRIIPs Regulation which states: “The KID shall include a clear indication that advisors, distributors or any other person advising on or selling the PRIIP will provide information detailing any cost of distribution that is not already included in the costs specified above.[[6]](#footnote-7)”

We do not agree that the disclosure should include costs charged by third parties, even if the client has been directed to this third party. This would create an unnecessarily complicated system, involving complex links between firms that are unrelated and in all likelihood it will function poorly due to the very high risk of not providing up-to-date and accurate information to clients.

In the context of fund management, when a sales from a management company provides a client with KIID /or KID and prospectus of the product on an ex ante basis, this documentation should be deemed as sufficient. Therefore, we advocate a deletion of point 10 of the technical advice, and a clarification in the draft technical advice that in asset management context, specific regulation applicable to UCITS and AIF apply. Such clarification would be perfectly in line with recital 78 of the MIFID 2 directive.<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>

We do not agree with ESMA’s definition of “continuing relationship” in terms of execution arrangements which applies only to “one-off” investment services, thus implying that e.g. providing an ‘execution only service’ more than once would automatically result in a continuing relationship with the client. Other factors such as the amount of business conducted may also be relevant in order to establish the nature of such a client relationship. It would appear that applying the definition of ongoing relationship narrowly could result in new system requirements (with resulting costs) to flag second transactions. In order to overcome such operational challenges some firms may simply choose to classify all relationships as “continuing”.

Lyxor has a concern regarding the obligation to “provide information on a personalised basis”. Does it mean that all incurred cost should be flagged per each financial instrument/ transaction of the clients? If it is the case, it is not feasible in practice.

In addition, in the context of retail structured products it is important that the obligations under the PRIIPs regime to provide post sale information are considered by ESMA so as to avoid any potential duplication and inconsistencies between the two regimes. We note that the PRIIPs Regulation includes a requirement for the manufacturer to review and update the KID regularly and publish a revised version promptly where a review indicates that changes need to be made.[[7]](#footnote-8) The KID also includes a section entitled “What are the costs” requiring disclosure of direct and indirect costs to be borne by the investor (among other things)[[8]](#footnote-9). In the context of PRIIPs we do not consider that any further post sale information on costs and charges should be necessary. In fact, any requirement to provide additional post-sale information on costs would detract from and devalue the information to be received by investors through the KID.

Same remark applies for UCITS funds for which an annual update of the KIID is requested, as well as the issue of an annual report containing detailed cost information.<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>

We believe that ESMA should thoroughly reconsider the proposed approach to costs and charges related to financial instruments that shall form part of the aggregated cost disclosure. In fact ESMA’s interpretation of the level 1 text seems disproportionate. ESMA is therefore driven to a conclusion which we do not share, stating that the obligation in MiFID II Article 24(4) stipulates aggregated information at the point of sale that covers both ex ante and regular ex post disclosures.

*On-going charges (OCF) at the product level*

Especially with regard to the disclosure of on-going charges, we would point out that it is **practically and operationally impossible to stipulate, ex ante, the level of costs that will be incurred in the management of a product**. For investment funds, only straightforward charges calculated in relation to the NAV of the fund, such as the management fee and the depositary fee, can be determined in advance, and only in percentage terms (as the future NAV of the fund cannot be known). All other cost items are entirely dependent on specific management activities during the financial year, which are influenced by market developments. This applies, in particular, to costs and charges related to portfolio transactions, including securities lending costs and costs associated with derivative contracts. In the case of performance fees triggered by a specific outperformance of a fund (and often subject to further conditions like a high-water mark or other measures of outperformance), it is even unknown ex ante whether any costs will be charged to the fund at all.

In our view, this situation prompts two necessary conclusions:

* First, it is not reasonable to include highly volatile cost elements in the on-going charges figure, as this would lead to confusion and misinterpretations by investors. This applies to all elements of transaction costs mentioned and, above all, to performance fees. We would not consider it a responsible conduct of business to disclose an on-going charges figure including a performance fee, if its existence in the next year is entirely unclear, and vice versa (i.e. suggesting an overall cost disclosure based on a year without performance fee might provoke false expectations in terms of the product costs and eventually mislead investors).
* Second, it seems practically unworkable to present investors with an on-going charges figure in monetary terms. Given that at the point of sale only the investment sum, but not the investment outcome at the end of the charging period can be specified, investors cannot even be informed in a reliable manner of the amount of the management fee to be paid to the product provider, let alone the amount of other fees and charges that depend not only on the fund’s NAV. It should be clear that disclosing specific numbers in such circumstances provides only a false accuracy that will never produce correct results. This is further aggravated by the fact that MiFID does not provide for a limitation of liability similar to the UCITS KID[[9]](#footnote-10), disclosure of knowingly false figures on the basis of assumptions bears significant liability risks for investment firms under the applicable civil law.

Consequently, we urge ESMA not to reinvent the on-going charges figure for investment funds under the MiFID regime, but to adhere to the understanding developed under the UCITS Directive. This proven and tested interpretation of on-going charges should be regarded as appropriate in accordance with MiFID recital 78. In particular, there should be no obligation to disclose cash amounts in terms of on-going charges at the product level due to the many imponderables and assumptions, which have the potential to seriously mislead and confuse investors.

*Transaction costs*

Given our previous comments, we have to disagree with ESMA’s conclusion that transaction costs have to be made transparent ex ante as part of the overall product costs. Generally speaking, transaction costs are – to a high degree – caused by the underlying market risk of the instruments traded. In case of e.g. bonds traded with bid and ask spreads, it is not possible to determine which part of the spread is attributable to the broker and which goes down to a market momentum at the time of trading. Moreover, it should be borne in mind that in some transactions such as OTC derivative contracts transaction costs are simply not knowable as they are intrinsically embedded in the instrument price. **Therefore, transaction costs should not be included in the required compilation of costs and charges in accordance with MiFID Article 24(4) second subparagraph and therefore further aligned with the UCITS KIID disclosure requirements.**

*Treatment of UCITS and AIFs that feature a KIID according to UCITS standards*

Specifically in relation to the cost transparency of UCITS, ESMA should bear in mind that the EU co-legislator has decided upon a temporary relief from the PRIIPs information requirements for the next five years. This temporary exemption applies to UCITS and, in addition, to all retail AIFs that provide a KID in line with the UCITS standards according to national law[[10]](#footnote-11). We believe that ESMA should not attempt effectively to circumvent this exemption by requesting the Commission to consider aligning the UCITS disclosure standards with the future requirements of the PRIIPs Regulation. Such measures appear incompatible with the level 1 legislation and would not be in line with the Commission’s request to ensure coherence within the wider regulatory framework of the EU[[11]](#footnote-12). On the contrary, UCITS distributors should remain able to rely on the UCITS KIID as a sufficient and appropriate source of information on product costs and charges. The same should apply for retail AIF distributors, provided the AIFs provide a KID in line with UCITS standards according to national law.

As a general and final remark, we would like to underline that in a fund management context, ex-post disclosures, as requested by applicable pieces of legislation, notably UCITS rules, should be considered as sufficient through

-actualised fee level thanks to updated KIID according to applicable regulation.

-annual report

*Portfolio management context*

In the context of portfolio management activities we would here like to underline that ex-post disclosures on charges and fees seem acceptable and appropriate. On the contrary, ex-ante disclosure requirements in this context seem impossible and inappropriate, as the fee level depends on the financial instruments detained in the mandate. These elements will by principle be unknown on an ex-ante bais, meaning that, even on a generic basis, accurate ex ante information may not be provided to the investor.<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>

We agree that information about the costs related to the financial instrument could be provided on a generic basis at the point of sale. However, we believe that the limitation in para. 56 of the ESMA’s analysis, according to which generic disclosure should be allowed only if “the investment firm ensures that the costs and charges provided in the generic disclosure are representative of the costs that the client would actually incur”, is not suitable in the broader context of the draft technical advice. As explained in our reply to Q74, disclosure encompassing volatile cost elements such as transaction costs and/or performance fees and requiring specification of cash amounts on the basis of several assumptions will not produce even roughly accurate results.

Thus, we would ask ESMA to reconsider its proposed approach to product cost disclosure in the light of our comments above as well as our comments made in our response to Q14 showing that the identity of the end investor is often hidden from the producer of the KIID/KID.<ESMA\_QUESTION\_75>

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

<ESMA\_QUESTION\_76>

Although we agree in principle that the actually incurred costs should be taken as a proxy for the disclosure of the ex ante product costs, we would stress once again that such an approach is appropriate only in relation to steadily recurring costs such as the management fee and constant expenses included in the calculation of the on-going charges figure for UCITS. Volatile cost elements such as transaction costs and/or performance fees should not be taken into account in the calculation of ex ante figures, as they will prompt significant fluctuations of the overall costs, which have the potential to confuse and mislead investors.

Moreover, ESMA should bear in mind that the MiFID regime does not provide a limitation of liability in terms of the cost disclosure similar to the one existing under the UCITS Directive or to be applicable under the PRIIPs Regulation. Therefore, the required assumptions and estimations bear a significant liability risk for the distributors of financial instruments under the relevant civil law.

The final recommendations by ESMA should thus be carefully calibrated in order not to discourage investment firms from distributing products with variable on-going costs. Otherwise, distribution of investment funds involving active portfolio management could be put at a disadvantage compared to e.g. banking products based on pre-defined formulas and hence displaying rather stable cost profiles.

*On consistency with accounting standards*

The building blocks for the aggregate figures used in client disclosures on product costs will be drawn from the audited figures set out in the case of investment funds such as UCITS and AIFs in their annual reports and accounts and prepared according to the local accounting standards (e.g. local GAAP or IFRS). It is important to ensure that there is no conflict in the accounting methodology used to avoid misleading or confusing investors.

*Range of examples provided*

While we applaud ESMA for providing examples to underline the proposals made, it is interesting to note that all of ESMA’s examples provided in the consultation paper are related to situations regarding independent advice (if advice is provided at all). We believe it would be in the interest of clarity to expand these to situations in conjunction with non-independent advice as well. Examples could include

* a situation where the client receives a unpaid, ad-hoc investment advice and where an advice is given for fund that is managed by the own management company of the same group that receives a management fee from the fund, of which it distributes a percentage as a distribution fee to the distributing bank; or
* a situation where the client has a contract of investment advice with a dependent advisor and pays a yearly one-off fee for this advisory service.

Further, none of the examples provides instances of costs “not caused by the occurrence of the underlying market risk”. As explained above, 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 beneficial, if ESMA were able to provide an example of such cost related to a 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>

We understand that ESMA considers requiring investment firms to provide clients with an illustration of the cumulative effect of costs and charges on the return of a product at the point of sale. The corresponding explanatory text in para. 59 of the ESMA’s analysis is, however, very misleading, as it states that the obligation to illustrate the cumulative cost effect should apply both ex ante and ex post, and refers specifically to the services of portfolio management and investment advice.

In our opinion, it should be clear that the respective illustration requirement is meant to assist clients with their understanding of the overall costs before the investment decision is taken and, therefore, applies only at the point of sale and not after the provision of the investment service. Consequently, there should be no obligation for portfolio managers or firms providing investment advice to present their clients with any retrospective illustrations of costs and charges. This ties into our already stated opinion that post-sale information should focus primarily on the development of the financial instrument with respect to the performance and total amount of the investment, as this is the relevant variable for subsequent decisions of the investor. Any information on current costs of a financial instrument are already provided in the KID/KIID and/or the annual and half-annual reports.

**While we clearly understand the need for cost transparency that has been instilled in MiFID II, we would like to stress that the display of cumulative costs and charges is meaningless and even alarming for the client, if it is not accompanied with a corresponding illustration of the cumulative returns over the same period. To give a complete and comprehensive understanding of the overall investment and its development over time, costs need to be compared to revenues or losses.**

This brings us to the fact that calculating cumulative returns (or cumulated losses) needs to rely on predetermined market scenarios which is based on a myriad of variables and assumptions of the future. As there are no common market practices in drawing up market scenarios, each investment firm will have to make their own assumptions, therefore making the comparison among financial instruments simply impossible.[[12]](#footnote-13) In order to better illustrate these effect to the clients, it is important that they would be expressed in terms of percentage in order to facilitate the comparison with the performance of the fund or investment which is always expressed in percentages.<ESMA\_QUESTION\_77>

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

<ESMA\_QUESTION\_78>

Any additional requirement may trigger additional costs which are however difficult to determine at this stage.<ESMA\_QUESTION\_78>

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

##### 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>

LYXOR does not agree with ESMA’s approah consisting in establishing a list of acceptable non monetary benefits. By principle, we think that the creation of a list is not a satisfactory approach. Indeed, all the relevant situations cannot be dealt with on an ex ante basis. An indicative, and non limitative approach of acceptable benefits would, in our view, be more appropriate.<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>

Regarding non-monetary benefits, financial assessment seems, by nature unadaptedDisclosure of amounts is not possible.

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

We think that ex-ante information on monetary benefits should be disclosed on a generic basis and stick with the market practice:

ESMA points out correctly, the MiFID Implementing Directive rules for third party payments for investment services other than independent investment advice and portfolio management should be used as the basis for MiFID II Level 2 measures. Nevertheless, ESMA believes that the current rules should be improved in order to enhance investor protection. In this regard ESMA proposes that investment firms should disclose certain information ex ante to the provision of the services and ex post on an on-going basis. We approve the requirement to disclose the existence, nature and amount (respectively the method of calculating the amount) of the payment or non-monetary benefit prior to the provision of the relevant investment or ancillary service.

As for ex-post disclosure regarding monetary and non monetary benefits, we think that this requirement goes far beyond level 1 text which in our view does not include this kind of disclosures in the scope of ex post disclosures . However, with regard to the proposed requirement of ex post and on-going disclosure, the CP goes beyond the Level 1-Directive. Such a requirement can by no means be derived from the wording of Article 24 para. 9 (“[…] must be clearly disclosed to the client […] prior to the provision of the relevant investment or ancillary service.”).

It seems as if ESMA wants to justify the excessive ex-post and on-going disclosure requirement proposed in the CP, by including inducements in the discussion on information to clients on costs and charges (where such disclosure requirements are expressly regulated in the Level 1-Directive). Thus, ESMA advises the Commission (page 104; para. 26) that third-party payments received by investment firms should be regarded as part of the cost of the service, in order to reflect the fact that the client will pay them through the charges of the price of the financial product. **This recommendation has to be rejected, as there is no indication in the Level 1 Directive that could justify such an assumption. Having provided two different sets of regulations with regard to disclosure requirements** (Article 24 para 4 with regard to costs and charges and Article 24 para 9 with regard to fees, commissions and other monetary benefits), **it seems clear, that the Level 1-Directive clearly distinguishes in this point between costs and charges on the one hand and fees, commissions and other monetary benefits on the other hand**. Furthermore, if fees, commissions and other monetary benefits were to be considered as part of the cost of the service, the Level 1-Directive could have implemented this either by mentioning this instance in Article 24 para 4 or by inserting a cross-reference to Article 24 para 4 in Article 24 para 9.<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 agree with the negative list of circumstances and situations that NCAs should consider when determining whether a quality enhancement test is not met. The EU co-legislator has decided to continue to allow payments of inducements (in compliance with MiFID II Level 1 criteria). The proposed negative list, however, seems to disregard this approach because it remains totally unclear under what condition a payment could be allowed in future. The MiFID II regime implies a positive list of criteria since the Commission is empowered to adopt delegated acts to ensure that investment firms comply with the principles set out in MiFID II Art. 25. In particular, these shall include criteria to assess compliance of firms receiving inducements and not criteria for non-compliance). We therefore suggest a list of positive criteria, which would be in line with the requirement of the Level 1 text and the general decision of the EU legislator that MiFID firms may still receive and pay commission, if these are designed to enhance the quality of the relevant service to the client.

The negative list disregards the EU legislator’s decision regarding payment of inducements. The EU co-legislator has decided to allow both commission-based and fee-based advice, the former as long as the payments are designed to enhance the quality of the service and do not impair the firm’s duty to act in accordance with the best interests of its clients. The MiFID II Level 1 text clearly states that investment firms should have the choice between independent and non-independent advice (see recital 73), which are considered equal. One reason for this decision is that a prohibition of such payments would significantly decrease retail clients’ access to investment advice, including advice for private retirement savings. Studies show that only a small minority of the population is prepared to pay for advice.

Non-independent advisors must therefore remain allowed to be remunerated through commission payments. Under ESMA’s proposal it is very unclear how any payment of distribution commissions may be regarded as being designed to enhance the quality of the service. First, it is not clear which payments would fulfil the negative criterion that they are “used to pay or provide goods or services essential for the recipients firm in its ordinary course of business” (ESMA’s draft technical advice para. 10(i), p. 124). ESMA does not give any reasoning why the use of payments for goods or services essential in the ordinary course of business cannot be considered as designed to enhance the quality. We believe that there are situations where e.g. a service would not be provided at all to clients without the commission payment. It might simply be too expensive for an investment firm to provide for investment advice, if commission payments are prohibited, in particular in less populated regions that have less developed financial distribution networks. In addition, the objective of the inducements provision is to enhance investor protection. The prohibition in this case would, however, lead to a completely different effect, since investors would not be advised at all and therefore would effectively become less protected. Hence, the criterion “designed to enhance the quality of the service” should not be defined in a way that payments cannot be used to provide for the provision of the service or the payment for goods, since this might be in the client’s very interest and therefore be ultimately deleted.

More generally, ESMA should keep in mind that a principle of inducement permission should prevail, as inducements can in many situations be profitable to all concerned actors, from the product manufacturer to the final client. Indeed inducement constitute a satisfying way for a manufacturer to remunerate the product distributor. This satisfying remuneration ensures a documentedcontractual relation between the manufacturer and the distributor and therefore and as a consequence a satisfying flow of information between the two. This will ensure the distributor to be provided with all relevant documentation and elements, in order to ensure a good and accurate understanding of the product by the distributor who will therefore be in a position to sell the product to relevant clients. A precise and relevant definition of a targeted market is clearly an objective of new MIFID II Directive and is in the interest of the final investor.

On the contrary, in an absence of payment made to the distributor, it is very likely that such documented relation will not be formalized, resulting in a very probable lack of information exchange. Such lack would in our view finaly turn against final investor’s interest.

As a conclusion, it has to be underlined that inducements as such can be considered as a positive practice. Authorisation of inducements should therefore stay an applicable principle, their prohibition being limited to certain circumstances or activities for instance protfollio management and independent advice, as stated in the level 1 text).

Second, the negative criterion of a firm not providing a higher quality above the regulatory requirements disregards the fact that, in many instances, the Level 1 text or ESMA in its proposals already provide for the highest possible standards. Due to this, it might in practice not be possible generally to increase such high standards. For example, according to ESMA’s proposed technical advice, investment firms have to be able to demonstrate that they assess whether alternative financial instruments, less complex or with lower costs, could meet their client’s profile (for our assessment on this issue, please refer to our answer to Q86). According to ESMA, it is hence not sufficient to provide for a suitable product, but it seems as if the firm has to rule out that no other product available in the market is more suitable. The quality for such a standard might simple not be enhanced even more than these regulatory requirements. In fact, in such a case it would in practice not be possible to pay or receive inducements since there would be no room for it to be designed to enhance the quality. Consequently, the applicability of the second negative criterion would in such case lead to a prohibition of inducements, which was not intended by the EU co-legislator. We therefore believe that in some cases the compliance with regulatory requirements should be sufficient generally to enhance the quality of the service.

Third, it is unclear how the criteria ESMA provides are related to each other in terms of hierarchy. In particular, it is uncertain how the positive criteria of enabling the client to receive access to a wider range of suitable financial instruments or the provision of non-independent advice on an ongoing basis (para. 11, p. 124) relate to the negative criteria (para. 10, p. 124). In our view, payments

fulfilling any of the positive criteria have to be considered as being designed to enhance the quality regardless of whether in addition any of negative criteria is fulfilled. This means that granting a client access to a wider range of suitable financial instruments should be per se considered as designed to enhance the quality, even if the payments to secure such access are used to pay for goods or services that are essential for the recipient’s firm.

Negative list not appropriate to assess compliance but only non-compliance

MiFID II Level 1 empowers the Commission to adopt delegated acts that include the criteria to assess compliance of firms receiving inducements with the obligation to act honestly, fairly and professionally in accordance with the best interest of the client (Art. 24 (13) sentence 1 d). This means that the Commission has to define criteria according to which firms may know that inducements received or paid may be regarded as enhancing the quality. The Commission, however, requests ESMA to provide for conditions under which inducements are not deemed to meet the requirement of enhancing the quality of the relevant service (Commission’s Request, p. 25). ESMA follows this request and proposes a list of negative criteria where the requirement of enhancing the quality of the relevant service is not met.

A list of negative criteria does not allow firms to assess whether the way they act is in compliance with the condition that the receipt or payment of inducements is designed to enhance the quality. It only shows when it is not designed to enhance the quality. Hence, it further narrows the Level 1 text. Further restricting requirements on payment or receipt of inducements is allowed for Member States when implementing MiFID II (see recital 76); however, the Level 1 text does not indicate that the Commission or ESMA are allowed further to narrow such requirements in the Level 2 Delegated Acts.

Positive list of criteria would be in line with Level 1 and able to achieve greater convergence across Europe

ESMA rightly points out that MiFID II aims to strengthen the current MiFID regime by distinguishing between investment advice on an independent basis and other investment services. There is no indication though that the EU co-legislator believed that the criterion “designed to enhance the quality” should be tightened. MiFID II Level 1 only incorporates the wording that previously was part of the MiFID I Implementing Directive. The Commission requests measures further detailing the criterion of enhancing quality in order to achieve greater convergence in its application across Europe (Commission’s Request, p. 25). This does not mean that the preconditions for inducements payments have to be tightened. Notwithstanding the fact that the negative list is not in line with MiFID II for formal and material reasons, we believe that a positive list is at least as appropriate to achieve convergence as a negative list. Unlike a negative list, a positive list will give market participants legal certainty and will allow them to comply with the criteria instead of trying to avoid the negative criteria and still being not sure whether the payment would be considered as designed to enhance the quality. By this it will achieve greater convergence since the market participants can rely on these criteria.

For such list, it seems appropriate to use ESMA’s ideas regarding the criteria “designed to enhance the quality of the service” by transferring the negative approach into a positive one. We therefore suggest the following approach:

A payment can generally be regarded as fulfilling the criteria “designed to enhance the quality of the service”, if

it provides for an additional or higher quality service above the regulatory requirements provided to the end user client; or

it provides a tangible benefit or value to the recipient’s end user client; or

in relation to an on-going inducement, it is related to the provision of an on-going service to an end user client; or

it enables the client to receive access to a wider range of suitable financial instruments; or

it enables the build-up of an efficient and high-quality infrastructure for services with regard to financial instruments including the qualification of the investment firm’s employees; or

it enables the client to receive the provision of non-independent advice on an on-going basis.

It should be understood that a fee, commission or non-monetary benefit could be considered acceptable as long as any such service is provided without bias or distortion as a result of the fee, commission or non-monetary benefit being received.<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>

We strongly believe that if ESMA does not reconsider its approach regarding inducements, additional costs would arise for clients and investment firms.

In general it has always been our belief that society should have a strong interest in maintaining the choice of distribution channels for investors and that a ban on inducements will actually lead to a reduction in competition among distribution channels, and/or a reduction in the number of products offered by distributors. Several studies show that a large majority of retail clients are unwilling to pay for advice, and under a fee-based model the current subsidization of advice to small retail clients will no longer be possible. More than ever, EU citizens need access to sound advice for long-term investment, as both social security systems and companies are forced to cut back on pension provision, and pension fund returns suffer from the financial crisis. Further reducing access to advice is neither in the interest of retail investors, nor encourages savings accumulation and therefore a healthy growth of EU capital markets in the long term.<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>

We do not fully agree with ESMA’s approach regarding obligations to fulfil in order to provide independent advice.

First of all, with respect to paragraph 1 (p. 128), we would like to underline that the total number of financial instruments and providers analysed per each type of instruments according to the scope of the service is not a relevant benchmark. A greater number of products does not necessarily lead to better investment advice. It can even be considered that, for some specific kind of instruments, such as, equity derivatives for instance, a very reduced number of providers are in a position to offer the best possible products. Therefore, in such a situation, the analisys of a broad number of instruments coming from numerous providers, would not be in favour of the final, and mat on the contrary affect relevance of the advice provided.

Still, in some situations, we understand the need to consider a broad scope of instruments in order to be qualified as an independent adviser. However the need to comprise a substantial part of financial instruments available on the market seems vague and rather dangerous for investment firms. Indeed a client who would be unsatisfied with the performance of his investment may try to use this imprecise criterion in order to demonstrate that the investment firm did not properly comply with its obligation.

As a consequence, with such a criterion added to other very demanding ones, investment firms will be dissuaded to deliver independent advice. Thus this will finally not be favourable to the client.

What has to be kept in mind is that the most important element regarding quality of the advice is the advisor’s capacity to provide an investment solution in line with the client’s needs and objectives.

Lastly, we strongly oppose the notion that less complex financial instruments or financial instruments issued by an entity not having close links to the investment firm generally better meet the client’s profile or needs. As this is in contradiction with the principles of the suitability and appropriateness tests, we would strongly urge ESMA to delete this inprecision.<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 a general point it should be observed that the higher ESMA sets any requirements, the less it becomes that investment firms will set up independent advice as a viable business alternative due to its high costs that will not allow the building up a sufficiently large client base. We are appreciative of ESMA’s ideas to clearly distinguish between independent and non-independent advice. This has to be done mindful of the increases to the costs which will greatly influence the likelihood of firms offering independent advice.

An option could be for ESMA to consider a transitional period for firms to enable them to build up a client base for independent advice. It should also be clear that an investment firm could be paid by the client, even if it does not present itself as independent. It then could still only advice on a smaller range of products. This is based on the fact that the advisor has to follow the rules for independent advice once it informs the client of its independence.

As a last point, we would consider it practical if the investment firm has the duty to clearly disclose its status in respect of specific trade to product manufacturers, so that product manufacturers can fully rely on this disclosure.<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>

As developed in our answer above, we fear that, if a separate department with full organisational separation is required to provide both independent and non-independent advice, this might become a too expensive undertaking for existing investment firms.<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>

We do not agree with ESMA’s proposal expanding the suitability requirements.

We would strongly suggest to re-evaluate the current draft technical advice suggesting that investment firms have to reassess their intended assessment in the light of alternative financial instruments that are less complex or that have a lower cost that “would meet the client’s profile better” (para. 1(iii); last part of the paragraph and para. ix; p. 133 f). **We believe that these requirements are simply contradicting the suitability assessment, which is meant to provide investors with the best possible and best suitable advice. These paragraphs insinuate that this is not already the case and that investment firms would generally be in breach of their duties when assessing suitability.** Secondly, this would also place too big an emphasis on the cost element of suitable financial instruments, as cheaper financial instruments are not necessarily better suited for the client. From an advice perspective it has to be considered that there are more facets for suitable products than costs alone.

Furthermore, we do not agree with ESMA’s assumption that less complex products are generally better suited. The complexity tests focuses on the financial instrument alone. Hence, it does not take into account the investors knowledge and experience. Products considered as complex might still be very suitable for some investors. In addition, the requirement to assess whether an alternative instrument with lower costs would be suited to the client would also place too big an emphasis on the cost element of suitable financial instruments, as cheaper financial instruments are not necessarily better suited for the client. From an advice perspective it has to be considered that there are more facets for suitable products than costs alone. Moreover, in our view the requirement contradicts ESMA’s proposal regarding the second criteria of inducements not designed to enhance the quality of the service: If one is required by law to provide for the best suited product, it is simple not possible to enhance the quality compared to the legal requirements. Hence, ESMA should delete this requirement proposed in para. 1(iii), last part of the paragraph and paragraph 1(ix); p. 133f.<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>

We currently see no further areas where MiFID Implementing Directive requirements covering the suitability assessment should be updated, improved or revised based on our experiences under MiFID I.<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>

We do not advocate specific constraints coming from ESMA regarding the content of suitability reports. In our view, investment firms should be given enough space to personalize and improve their suitability report along with their type of services and clients. At least, we would like to underline the following elements regarding the draft technical advice ;

With respect to the first question, we ask for deletion of para 2(iii) of ESMA’s draft technical advice. An explanation of the disadvantage of the recommended course of action makes no sense for the client because the explanation of the risk is not a result of the investment advice but rather of the financial instrument itself. The risk is not inherent in the financial advice as such but rather with the financial instrument. Here we also suggest that the scope of para. 3 advice should be limited to an explicit proactive request of the client. We do not see a need for such automatic review, as it suggests that the original advice given was not suitable nor appropriate and therefore was not the best possible advice (e.g. a periodic review and therefore also any changes to the periodic suitability report should be necessary only if the client explicitly request it).<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>

We do not advocate specific constraints coming from ESMA regarding periodic suitability reports. In our view, investment firms should be given enough space to personalize and improve their suitability report along with their type of services and clients. That being said, we agree with the idea that periodic suitability reports would need to cover only any changes in the instruments and/or circumstances of the client, rather than repeating information that is unchanged from the first suitability report.<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 certainly agree with ESMA’s posed question. However, in this regard, we strongly disagree with ESMA's assessment regarding shares in AIFs being automatically excluded from execution-only (see para. 7, p. 137). While MiFID II Level 1 does not signal that shares in AIFs should not be considered as non-complex, we believe ESMA’s general a priori treatment of AIFs as complex products is be inappropriate, as certain AIFs may meet the requirements of instruments being considered as non-complex.

A general treatment of AIFs as complex would be inappropriate. AIFs cover a broad range of products. On the one hand, these include single hedge funds units with leverage and short-selling strategies or closed-ended funds that might lead to further liability for the client. Such products will likely be considered as complex. On the other hand, AIFs also include highly regulated retail funds that differ from UCITS only insofar as they may invest in precious metals or highly regulated open-ended real estate investment funds or certain specific concentration requirements or be available only to certain types of retail investors (and therefore not generally available to the public). Those funds today meet the requirements of instruments being non-complex and accordingly will also comply with the two new criteria suggested by ESMA. They should therefore still qualify as non-complex under the MiFID II regime.

Therefore, we urge ESMA to confirm in its final advice to the Commission that there is no presumption that AIFs are not to be considered non-complex. At the very least ESMA should delete the presumption in para. 7 of the analysis (p. 137) regarding shares in AIFs. Such a presumption would indeed constitute an overriding of the mandate given to ESMA and an inaccurate interpretation the level 1 text, the aim of which is clearly not to consider de facto an AIF as a complex product<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>

We currently see no further regulatory need to revise the requirement for an instrument to be considered non-complex nor the requirements for the appropriateness assessment.<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>

We do not see any reason to impose regulatory requirements relating to the conclusion of service contracts with professional clients. The status of a professional client implies per se higher flexibility in the business relationship with the service provider which should correspond with a measurably lower level of regulatory investor protection. Professional clients are either financial institutions and large undertakings or other entities/individuals who meet the relevant criteria relating to their financial means and experience and in respect of whom the investment firm is satisfied on the basis of an individual assessment that the client is capable of making investment decisions and understanding the risks involved[[13]](#footnote-14). Hence, it should be borne in mind that the assignment of the

professional client status on request already involves high hurdles in order to exclude waiving the investor protection standards for the insufficiently experienced or adept clients.

Therefore, it is not appropriate to require professional clients to enter into written agreements with investment firms, let alone to prescribe the formal conditions of such agreements (in paper/other durable medium). Similarly, the content of service agreements with professional clients should be subject to contractual negotiations between the parties and not be bound by protective measures designed for retail clients. In particular, the suggestion to “state the types of financial instruments that may be purchased and sold and the types of transactions that may be undertaken” goes too far in the context of professional portfolio management. The same applies to the underlying reasoning depicted in recital 19 of ESMA’s analysis: professional clients do not need regulatory measures enabling them to better understand the nature of the services provided and where appropriate, to seek judicial recourse. **As a consequence, paragraph 2 of the ESMA’s draft technical advice should be deleted.**

<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>

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

<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>

Yes

<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?

<ESMA\_QUESTION\_95>

In principle we agree with this idea. However, we would like to underline that, as far as portfolio management is concerned, the description made should be kept at a rather general level, in order to allow the manager to have sufficient freedom to manage the client’s portfolio in a satisfying way. Indeed narrowing excessively the scope of possibilities offered to the manager may turn against client’s interest.

<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>

We do not agree with the idea consisting in aligning requirements for retail clients and professional clients. Indeed this would consist in denying the difference between categories of clients which is not what the Directive aim at. We consider that on demand a professional may ask the investment dirm for more detailed reports if needed.<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>

Such a requirement seems unnecessary as a client already has access to regular reports regarding his investment .<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>

A statement should indeed include relevant information regarding the value of the financial instruments. However elements regarding the liquidity should not in our view be included in a statement as such. These elements should be mentioned in the product documentation, specifically in a section dealing with product risk profile*.*<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>

TYPE YOUR TEXT HERE

<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>

No specific changes in relation to reporting should be made.<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>

.<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>

Periodical review of the best execution policy is already in place. We would just like to draw ESMA’s attention on the fact that best execution policy and communication to clients linked to such policy should remain a possibly standardised process, otherwise it would result in a high increase of financial services cost which would finally have a negative impact for final client.<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>

No we do not agree with this proposition, considering that a professional client should always be in a position to ask for a classification change <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>

* 1. Product intervention

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

<ESMA\_QUESTION\_107>

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Product intervention regime implies a serious restriction of the free functioning of the markets and the freedom to conduct business. Consequently, such regime should be considered as a last resort mechanism, only to be used in residual and specific cases.

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

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

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

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

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

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

In relation to 4(vii) of the draft technical advice in relation to the ease and cost for investors to switch or sell an instrument, we note that in the context of retail structured products there is typically no obligation of a product provider to provide a secondary market in a product for hold to maturity products. This is however made clear to investors. Similarly there is clear disclosure that if an investor is able to sell the product on the secondary market, the price received may not be the price the investor paid for the product (or the price payable at maturity). Provided that the investors are made aware at or prior to purchasing the product of the availability of any secondary market and that the price an investor may receive for their product on the secondary market may not be the same as the price they paid, we do not think these facts should be relevant factors in the context of determining whether there is a “significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets and to the stability of the whole or part of the financial system of the Union”. Illiquidity should only be a relevant consideration where there has not been clear disclosure of the nature and availability of a secondary market.

<ESMA\_QUESTION\_107>

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

<ESMA\_QUESTION\_108>

No we do not have further criteria to suggest. However we would like to insist on the following elements :

As explained above, we would like to suggest that the existence of a supervisory product approval process encompassing substantive examination of the product rules should be accepted as a criterion for the assessment of a potential “threat” under para. 4 of the draft technical advice. The same applies to product notification requirements involving direct intervention powers of NCAs. Specifically, para. 4 could be supplemented by the following new subparagraph:

***“(xii) Alternative means of supervisory intervention. Under this factor, more detailed elements to be considered could include, for example:***

1. ***Application of a product approval process prior to the commencement of distribution,***
2. ***Requirement of product notification prior to the commencement of distribution,***
3. ***Requirement of prior approval or notification in terms of material changes to the product.”***

<ESMA\_QUESTION\_108>

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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

In addition to the definition provided under Article 4(1)(46) of MiFID II, ETFs have some specific characteristics that have a defining impact on their liquidity:

1. ETFs in the EU are providing exposure to a liquid basket of underlying securities, typically by tracking an index
2. Due to the open-end nature of ETFs the number of units issued for trading can be increased (creation) or decreased (redemption) to meet investors’ demand.

Due to these two specific features, the liquidity of the basket of securities to which the ETF is providing exposure can be accessed through the creation & redemption process, adding to the intrinsic liquidity of the ETF.

Free Float, ADNT and ADT are therefore not relevant to qualify liquidity for ETFs. These criteria are suitable to measure the intrinsic liquidity of the ETF itself, which is irrelevant compared to the liquidity of the underlying components.

If liquidity thresholds are required for ETFs then they must be based on the liquidity of the underlying basket of securities rather than the intrinsic liquidity of the ETF itself. This would be difficult to implement for some exposures, notably for instance in the Fixed Income space where accurate data on traded volumes is not readily available.

Given this operational constraint and, more importantly, the fact that ETFs provide exposure to diversified indices we believe that all European-domiciled ETFs should be qualified as liquid.

This is the most consistent and simple approach and would be instrumental in ensuring maximum transparency for ETFs.<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

Data publication

* 1. Access to systematic internalisers’ quotes

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

<ESMA\_QUESTION\_143>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_143>

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

<ESMA\_QUESTION\_144>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_144>

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

<ESMA\_QUESTION\_145>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_145>

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

<ESMA\_QUESTION\_146>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_146>

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

<ESMA\_QUESTION\_147>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_147>

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

<ESMA\_QUESTION\_148>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_148>

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

<ESMA\_QUESTION\_149>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_149>

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

<ESMA\_QUESTION\_150>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_150>

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

<ESMA\_QUESTION\_151>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_151>

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

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

<ESMA\_QUESTION\_152>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_152>

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

<ESMA\_QUESTION\_153>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_153>

* 1. Reasonable commercial basis (RCB)

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

<ESMA\_QUESTION\_154>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_154>

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

<ESMA\_QUESTION\_155>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_155>

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

<ESMA\_QUESTION\_156>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_156>

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

<ESMA\_QUESTION\_157>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_157>

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

<ESMA\_QUESTION\_158>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_158>

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

<ESMA\_QUESTION\_159>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_159>

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

<ESMA\_QUESTION\_160>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_160>

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

<ESMA\_QUESTION\_161>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_161>

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

<ESMA\_QUESTION\_162>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_162>

##### What are your views on the costs of the different approaches?

<ESMA\_QUESTION\_163>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_163>

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

<ESMA\_QUESTION\_164>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_164>

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

<ESMA\_QUESTION\_165>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_165>

##### If yes, in which circumstances?

<ESMA\_QUESTION\_166>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_166>

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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_175>

Requirements applying on and to trading venues

* 1. SME Growth Markets

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

<ESMA\_QUESTION\_176>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_176>

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

<ESMA\_QUESTION\_177>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_177>

##### Do you agree with the approach described above (in the box Error! Reference source not found.), that only falling below the qualifying 50% threshold for a number of three consecutive years could lead to deregistration as a SME-GM or should the period be limited to two years?

<ESMA\_QUESTION\_178>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_178>

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

<ESMA\_QUESTION\_179>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_179>

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

<ESMA\_QUESTION\_180>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_180>

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

<ESMA\_QUESTION\_181>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_181>

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

<ESMA\_QUESTION\_182>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_182>

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

<ESMA\_QUESTION\_183>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_183>

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

<ESMA\_QUESTION\_184>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_184>

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

<ESMA\_QUESTION\_185>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_185>

##### Do you agree with Error! Reference source not found., Error! Reference source not found. or Error! Reference source not found. Error! Reference source not found.?

<ESMA\_QUESTION\_186>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_186>

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

<ESMA\_QUESTION\_187>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_187>

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

<ESMA\_QUESTION\_188>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_188>

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

<ESMA\_QUESTION\_189>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_189>

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

<ESMA\_QUESTION\_190>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_190>

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

<ESMA\_QUESTION\_191>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_191>

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

<ESMA\_QUESTION\_192>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_192>

##### Do you agree with this initial assessment by ESMA?

<ESMA\_QUESTION\_193>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_193>

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

<ESMA\_QUESTION\_194>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_194>

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

<ESMA\_QUESTION\_195>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_195>

##### Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph Error! Reference source not found.) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?

<ESMA\_QUESTION\_196>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_196>

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

<ESMA\_QUESTION\_197>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_197>

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

<ESMA\_QUESTION\_198>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_198>

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

<ESMA\_QUESTION\_199>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_199>

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

<ESMA\_QUESTION\_200>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_200>

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

<ESMA\_QUESTION\_201>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_201>

* 1. Suspension and removal of financial instruments from trading

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

<ESMA\_QUESTION\_202>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_202>

##### Do you agree that NCAs would also need to consider the criteria described in paragraph Error! Reference source not found. Error! Reference source not found. and Error! Reference source not found., when making an assessment of relevant costs or risks?

<ESMA\_QUESTION\_203>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_203>

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

<ESMA\_QUESTION\_204>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_204>

* 1. Substantial importance of a trading venue in a host Member State

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

<ESMA\_QUESTION\_205>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_205>

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

<ESMA\_QUESTION\_206>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_206>

* 1. Monitoring of compliance – information requirements for trading venues

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

<ESMA\_QUESTION\_207>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_207>

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

##### Do you support the approach suggested by ESMA?

<ESMA\_QUESTION\_208>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_208>

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

<ESMA\_QUESTION\_209>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_209>

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

<ESMA\_QUESTION\_210>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_210>

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

<ESMA\_QUESTION\_211>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_211>

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

<ESMA\_QUESTION\_212>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_212>

Commodity derivatives

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

##### Do you agree with ESMA’s approach on specifying contracts that “must” be physically settled and contracts that “can” be physically settled?

<ESMA\_QUESTION\_213>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_213>

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

<ESMA\_QUESTION\_214>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_214>

##### Do you agree with ESMA’s approach on specifying contracts that must be physically settled?

<ESMA\_QUESTION\_215>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_215>

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

<ESMA\_QUESTION\_216>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_216>

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

<ESMA\_QUESTION\_217>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_217>

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

<ESMA\_QUESTION\_218>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_218>

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

<ESMA\_QUESTION\_219>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_219>

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

<ESMA\_QUESTION\_220>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_220>

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

<ESMA\_QUESTION\_221>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_221>

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

<ESMA\_QUESTION\_222>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_222>

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

<ESMA\_QUESTION\_223>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_223>

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

<ESMA\_QUESTION\_224>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_224>

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

<ESMA\_QUESTION\_225>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_225>

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

<ESMA\_QUESTION\_226>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_226>

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

<ESMA\_QUESTION\_227>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_227>

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

<ESMA\_QUESTION\_228>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_228>

* 1. Position reporting thresholds

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

<ESMA\_QUESTION\_229>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_229>

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

<ESMA\_QUESTION\_230>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_230>

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

<ESMA\_QUESTION\_231>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_231>

* 1. Position management powers of ESMA

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

<ESMA\_QUESTION\_232>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_232>

##### What other factors and criteria should be taken into account?

<ESMA\_QUESTION\_233>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_233>

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

<ESMA\_QUESTION\_234>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_234>

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

<ESMA\_QUESTION\_235>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_235>

##### What other factors and criteria should be taken into account?

<ESMA\_QUESTION\_236>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_236>

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

<ESMA\_QUESTION\_237>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_237>

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

<ESMA\_QUESTION\_238>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_238>

##### What other factors and criteria should be taken into account?

<ESMA\_QUESTION\_239>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_239>

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

<ESMA\_QUESTION\_240>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_240>

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

<ESMA\_QUESTION\_241>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_241>

##### What other criteria and factors should be taken into account?

<ESMA\_QUESTION\_242>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_242>

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

<ESMA\_QUESTION\_243>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_243>

Portfolio compression

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

<ESMA\_QUESTION\_244>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_244>

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

<ESMA\_QUESTION\_245>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_245>

1. [↑](#footnote-ref-2)
2. Cf. recital 17 on page 46 of the Consultation Paper. [↑](#footnote-ref-3)
3. Cf. 94(1) of Directive 2009/65/EG (UCITS Directive). [↑](#footnote-ref-4)
4. Cf. CESR Guidelines on selection and presentation of performance scenarios in the Key Investor Information document (KII) for structured UCITS dd. 20 December 2010 (CESR/10-1318). [↑](#footnote-ref-5)
5. If either required on the national level or provided voluntarily by the AIFM. [↑](#footnote-ref-6)
6. [↑](#footnote-ref-7)
7. Article 10 of the PRIIPs Regulation [↑](#footnote-ref-8)
8. The details of the presentation and the content of the required costs disclosure in the PRIIPs Regulation will be the subject of regulatory technical standards (Article 8(5)(a) of the PRIIPs Regulation). [↑](#footnote-ref-9)
9. Cf. Article 79(2) of the UCITS Directive. [↑](#footnote-ref-10)
10. Cf. Article 24 of the Regulation (EU) on key information documents for packaged retail and insurance based investment products (PRIIPs). [↑](#footnote-ref-11)
11. Cf. 1.2 of the Commission’s request to ESMA for technical advice dated April 23, 2014, p. 7. [↑](#footnote-ref-12)
12. Besides, costs and charges of a managed portfolio vary from one year to another depending on a number of situations (i.e. turn-over, type of instrument used, volatility of the markets). Where it may be possible to give an estimation for one year in the future with an acceptable spread of error, the spread is no longer acceptable when cumulated over several years in the future. [↑](#footnote-ref-13)
13. [↑](#footnote-ref-14)