European Securities and Markets Authority

Reply form for the ESMA MiFID II/MiFIR Consultation Paper

22 May 2014

European Securities and Markets Authority

Date: 22 May 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA MiFID II/MiFIR Consultation Paper, published on the ESMA website (here).

Instructions

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

i. use this form and send your responses in Word format;

ii. do not remove the tags of type <ESMA_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

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

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

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

All contributions should be submitted online at www.esma.europa.eu 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 under the heading 'Disclaimer'.

1. Overview

2. Investor protection

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

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

<ESMA_QUESTION_1>
Yes. We agree with the approach taken by ESMA. The second condition, regarding 'systematic source of income' may benefit from rewording to enhance its clarity.
<ESMA_QUESTION_1>

2.2. Investment advice and the use of distribution channels

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

<ESMA_QUESTION_2>
We agree.
<ESMA_QUESTION_2>

2.3. Compliance function

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

<ESMA_QUESTION_3>
Yes. We generally agree with the proposals. However, we would question whether this level of detail is appropriate for inclusion in a delegated act.

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

Also paragraph 3(iv) of the Draft Technical Advice should 'consider complaints as a potential source of relevant information'.

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

We would suggest that the responsibility assigned in paragraph 5(ii) of the Draft Technical Advice is too broad. Compliance Officers should be responsible for 'any ***compliance*** reporting required by MiFID II'.

Also, in paragraph 3(iii), the requirement that the compliance functions should report 'on the implementation and effectiveness of the overall control environment' is too broad. Other control functions, such as risk management, have responsibility, and the requisite expertise, to undertake such reporting. It should be, ultimately, up to the Board to ensure that they have suitable controls, and control functions, to manage and report on the effectiveness of the overall control environment. Compliance is only one part of this structure.

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

We would, finally, note that due to the wide range of investment management firms under MiFID, and the variety of ways in which they operate, it may be useful if ESMA advice were to reflect the fact that compliance functions take a range of different operational structures. Indeed, they will often outsource what may be viewed as compliance activities to other functions, such as internal or external auditors, compliance consultancies, risk functions etc. The acceptability of this should be explicitly recognised, as long as the compliance function has ultimate control and responsibility for these activities, under the Board.
<ESMA_QUESTION_3>

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

<ESMA_QUESTION_4>
See our response to Q3. We would question whether this level of detail is appropriate for inclusion in a delegated act.
<ESMA_QUESTION_4>

2.4. Complaints-handling

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

<ESMA_QUESTION_5>
In the UK, the FCA already has a body of rules addressing the fair treatment of complainants. These rules apply to "eligible complainants", which are defined as: consumers; micro-enterprises; smaller charities; and the trustees of smaller trusts. Article 10 of the MiFID Implementing Directive applies only to retail and potential retail clients. The measures set out in ESMA's draft technical guidance should only apply to retail clients.

We believe professional clients are in a position to look out for their own interests and would derive little benefit from an extension of existing Implementing Directive provisions, particularly in the context of MiFID II revisions to the criteria necessary for firms to be able to categorise a client as professional.
<ESMA_QUESTION_5>

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

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

<ESMA_QUESTION_6>
No.
<ESMA_QUESTION_6>

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

<ESMA_QUESTION_7>
We do not believe any additional costs will arise from the proposed approach as all of the types of record summarised in the non-exhaustive list are, in our view (and under FCA rules), already required to be maintained under MiFID II/MiFIR or the MiFID Implementing Directive. There is some benefit in a non-exhaustive list, both in terms of helping firms to track their record-keeping obligations and in terms of promoting harmonisation of implementation.
<ESMA_QUESTION_7>

2.6. Recording of telephone conversations and electronic communications

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

<ESMA_QUESTION_8>
Firms could consider banning the use for business purposes of any telephone or electronic communications device which cannot be recorded by the firm.

An alternative would be to require firms to take reasonable steps to prevent an employee or contractor from making, sending or receiving relevant telephone conversations and electronic communications on privately-owned equipment which the firm is unable to record or copy. It is a concern to implement recording systems if only a small percentage of their orders are given as part of executing (rather than placing of orders).
<ESMA_QUESTION_8>

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

<ESMA_QUESTION_9>
It would seem that firms' risk based monitoring programme should include reviews of this recording requirement. We would seek ESMA clarifying that when they state that the 'firm should periodically monitor the records of all transactions' they mean that the firm should be taking a risk-based sample of all transaction records to review, not review all records of all transactions, which would be impractical.

Any monitoring obligations should be proportionate and appropriate to the size and organisation of the firm, and the nature, scale complexity and risk profile of the relevant business or product.
<ESMA_QUESTION_9>

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

<ESMA_QUESTION_10>

In order to meet the purpose behind this requirement, 'to strengthen investor protection, to improve market surveillance and increase legal certainty in the interest of investment firms and their clients'… 'such records should ensure that there is evidence to prove the terms of any orders given by clients and its correspondence with transactions executed by the investment firms, as well as to detect any behaviour that may have relevance in terms of market abuse' (as per recital 57), such records should contain details of the order from the client.
<ESMA_QUESTION_10>

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

<ESMA_QUESTION_11>
In order to ensure that clients have the opportunity to object to any mis-representation of the meeting, they should be provided with a copy of the note, in a timely manner. Their signature should not be required.
<ESMA_QUESTION_11>

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

<ESMA_QUESTION_12>
The standards proposed seem generally reasonable.

However, paragraph 10 of the proposed technical advice, which states that records 'must be retained in a format that does not allow the original record to be altered or deleted', seems unduly onerous given the continual process of updating and migrating records as new systems come on-line. The Implementing Directive currently requires any corrections or alterations to be easily ascertained and that records cannot otherwise be manipulated or altered. This seems more practical and achievable, and would not diminish the ability of competent authorities to investigate possible instances of market abuse.

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

Could ESMA clarify that the intention of this is that where a competent authority has specific reasons for requiring one specific set of records to be kept they can ask the firm to retain them for a further two years. It should be clear that this provision does not allow competent authorities to extend the standard retention period to seven years for all such records.
<ESMA_QUESTION_12>

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

<ESMA_QUESTION_13>
Given the uncertainty over the scope of this requirement we would request that ESMA take steps to clarify this, particularly as regards portfolio managers.

Article 16(7) of MiFID II applies this record keeping requirement to transactions concluded when dealing on own account, and the provision of client order services that relate to the reception, transmission and execution of client orders.

'Execution of client orders' is defined as acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients and includes the conclusion of agreements to sell financial instruments issued by an investment firm or a credit institution at the moment of their issuance.

ESMA, in CP 2.21 on best execution clearly differentiate between execution; RTO; and placing orders with a third party for execution. Portfolio managers are only associated with the latter of these, which would not constitute 'execution'.

The difference between the execution of client orders and the placing of orders with a broker for execution can be seen in Articles 44 and 45 of the MiFID I Level 2 Directive.

Recital 57 of MiFID II states that 'records are needed for all conversations involving a firm's representatives when dealing, or intending to deal, on own account'. There is no indication in the recital that portfolio managers, who act as agent, should be recording their placement of orders with brokers.

Also Chapter 2.6, paragraph 5 of the CP lists the specific conversations and communications that should be recorded. None of these seem to relate to portfolio managers placing deals, as agent, with brokers for execution.

In short, when portfolio managers place orders with investment firms for execution, this is not a relevant conversation, so need not be recorded. These other investment firms with whom the order is placed would be providing services to clients and the execution of client orders, so would be recording these conversations. It is unnecessary to impose expensive duplication on the industry by requiring portfolio managers to record their telephone conversations as well.
<ESMA_QUESTION_13>

2.7. Product governance

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

<ESMA_QUESTION_14>
No, the distributor requirements should be limited to financial instruments (products) manufactured by investment firms and investment products manufactured by entities that do not fall under MiFID scope. Shares and bonds are not products designed with the characteristics, objectives and needs of an identified target market. Nor should all the requirements apply to listed products such as exchange traded funds or listed investment companies, where the manufacturer is not in a position to identify a target market because, as listed investments, their shares must be available to the whole market.
<ESMA_QUESTION_14>

Q15: When products are manufactured by non-MiFID firms or third country firms and public information is not available, should there be a requirement for a written agreement under which the manufacturer must provide all relevant product information to the distributor?

<ESMA_QUESTION_15>
No, we believe it should be acceptable for the onus to be on the distributor to ensure it has sufficient information to determine the characteristics, objectives and needs of an identified target market for the product. . Manufacturers can reasonably be expected to accede to product information requests from distributors for commercial reasons and, in any case, it is not clear for example how such an obligation could be placed on a UCITS operator or AIFM that is not subject to MiFID.

It is also to be noted that fund managers that distribute UCITS and AIFMD funds are already covered respectively by the UCITS and AIFM Directives.
<ESMA_QUESTION_15>

Q16: Do you think it would be useful to require distributors to periodically inform the manufacturer about their experience with the product? If yes, in what circumstances and what specific information could be provided by the distributor?

<ESMA_QUESTION_16>
Yes, distributors subject to MiFID should be required to comply with reasonable requests from manufacturers to provide them with sales information to support product reviews, including for example data on any complaints they have received that suggest that the product has reached customers who are not in the identified target market and feedback from customers that suggests they have not understood the manufacturer's literature. Proportionality should be considered too. For example, in cases where the distributor only infrequently recommends a manufacturer's product or only represents a minimal proportion of the products, it would not be proportionate to require such distributors to provide input.

Point 21 should be expanded to require distributors to respond to reasonable requests from manufacturers for information as part of their product governance arrangements. Paragraph 15(iii) of the Analysis section suggests that distributors might be asked to provide to the manufacturer any promotional material the distributor itself has produced. We do not agree with this suggestion. It implies that there may be a responsibility on the part of a manufacturer to check that the distributor is complying with its own regulatory obligations. It is important to keep clear and separate the respective responsibilities of the two investment firms. Each investment firm is responsible for any promotional material it has produced.
<ESMA_QUESTION_16>

Q17: What appropriate action do you think manufacturers can take if they become aware that products are not sold as envisaged (e.g. if the product is being widely sold to clients outside of the product's target market)?

<ESMA_QUESTION_17>
Please see our response to Q19 and in particular, the first 5 paragraphs thereof. In an intermediated market, the key investor protection measures are:

- The manufacturer providing product information that is sufficient to enable the regulated distributor to understand and sell the product properly (i.e. as per paragraph 11 of the advice box) AND;
- The distributor having robust systems and controls to ensure that it distributes products appropriately.

ESMA's paper rightly recognises this through placing a responsibility upon the distributor "to identify and assess appropriately the circumstances and the needs to the clients that they intend to focus on" (paragraph 17 of advice box). This is the correct approach as the distributor is the firm which knows the circumstances and needs of its clients.

We therefore do not anticipate that the manufacturer will know whether the distributor has widely mis-sold a product. The manufacturer plays a key role in mitigating this risk through ensuring it provides product information as per paragraph 11. Competent Authorities too will play a key role through their regulation and oversight of distributors.

Part of paragraph 14 of the advice box for the manufacturer also goes further than MiFID II, where the requirement is to assess whether the intended distribution strategy remains appropriate. We recommend the deletion of the wording “or is reaching clients for whose needs, characteristics and objectives the product is not compatible”. For the reasons given above, as well as it going beyond MiFID, this wording should be deleted.

One additional matter worth raising is the possibility that a manufacturer might receive a complaint which is in fact about the way the product has been sold. In such cases, in accordance with regulatory requirements, the manufacturer will promptly acknowledge the compliant, inform the complainant why the complaint has been forwarded by it to the distributor and provide the distributor’s contact details. The distributor will handle the complaint in accordance with regulatory requirements. It may be appropriate for the distributor’s product governance arrangements to include ensuring that any complaints a distributor receives which suggest mis-selling are brought to the attention of the function within the distributor which has overall responsibility for ensuring compliance with its product governance arrangements. This will enable the unit to investigate whether there is a systemic issue.

Similarly, where a manufacturer receives a complaint which suggests its literature is not clear, its complaint arrangements should ensure that it is brought to the attention of its product governance unit.
<ESMA_QUESTION_17>

Q18: What appropriate action do you think distributors can take, if they become aware of any event that could materially affect the potential risk to the identified target market (e.g. if the distributor has mis-judged the target market for a specific product)?

<ESMA_QUESTION_18>
The process envisaged seems to involve two stages: an initial stage where firms assess what products are compatible with the characteristics, objectives and needs of an identified target market; then a second phase where firms assess the appropriateness or suitability of an instrument for each client. If distributors became aware that a product ceased to be compatible with an identified target market, for whatever reason, we assume they would need to reassess the suitability of the product for any advised or portfolio management clients.
<ESMA_QUESTION_18>

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

<ESMA_QUESTION_19>
We support the development of MiFID product governance requirements as we have supported the development of regulatory guidance covering governance arrangements in the UK. Much of the UK’s regulatory guidance was built upon and reflected existing industry practice. Published in July 2008 by the then FSA, it[1] provides a guide to the responsibilities of providers and distributors for the fair treatment of customers which describes how providers and distributors should consider the impact of their action (or inaction) on the customer in various stages of the product life cycle, or the various stages of provision of the service. Depending on the precise nature of a firm's business, this could mean addressing the fair treatment of customers at the following stages: design and governance; identifying target markets; marketing and promotion; sales and advice processes; after-sales information and service; and complaints handling. The guide gives the FCA’s view of the respective responsibilities of providers and distributors during the product life cycle or while the service is provided and, although it is not a complete exposition

[1]

of all of a provider's or a distributor's responsibilities to the customer or to each other, it is helpful to firms in meeting their responsibilities.

In addition, the industry worked closely with the FSA to develop a series of good practice illustrations[2] for managers of authorised collective investment schemes relating to certain provider responsibilities identified in the guide. In this publication, the FSA commented as follows:-

" we recognise that two of the responsibilities we specify in the Guidance have given rise to questions from the asset management sector, particularly managers of collective investment schemes (CIS). These firms are operating in an increasingly dis-intermediated sector, where the use of nominee accounts is widespread and over 80% of fund sales are made through channels that are not controlled by the CIS manager. These factors complicate the distribution chain significantly and result in situations where consumers (including details of their portfolios) are often not known to the CIS manager. Further, these funds are obliged to comply with existing regulation, such as the COLL sourcebook which places a number of requirements on the fund and manager. Also, funds are designed to be used in various ways, for example, singularly or as part of a portfolio. They are therefore created with specific risk/return characteristics rather than targeting a particular demographic."

The publication recognised, that the illustrations represented "*existing good practice that many firms already undertake regarding these two provider responsibilities."*

Whilst CIS managers are not within the scope of MiFID, the above guidance may be useful to reference to other products.

Similar guidance under MiFID would be helpful and our comments below should be read in this context and in the light of our long standing support of sound and clear governance arrangements for both providers and distributors, recognising the specificities of products manufactured, and also the fact that these may be designed to form part of a portfolio of investments.

In Paragraph 4.iii, ESMA refers to delivering "on investor protection (taking into account the nature, scale and complexity of their business)" and in paragraph 5.iii that product governance measures be applied "in an appropriate and proportionate manner". These aspects are so important that they should be reflected in the technical advice. This could be achieved through adding a sentence at the end of paragraph 1 in the advice box:

1. "..... These proposals should be applied in an appropriate and proportionate manner taking into account the nature scale and complexity of the investment firm".

In addition, footnote 32 should be deleted as it seeks to extend the product governance provisions to investment services. This extension goes beyond the MiFID II text on product governance. Investment services are adequately covered through a combination of other MiFID provisions. In addition, seeking to cover them under product-related provisions may lead to uncertainty as the provisions are written specifically with products in mind.

It should be made clear, for the avoidance of doubt, that the 'Product governance obligations for manufacturers' section applies to the manufacturer and not to an investment firm which is providing the investment adviser/manager to a manufacturer. It may be the case that such investment adviser/manager

[2]

provides input to the manufacturer (as covered by paragraph 6 of the advice box mentioned below) but the responsibility for compliance with a manufacturer's responsibilities rests with the product manufacturer.

Investment services are adequately covered through a combination of other MiFID provisions. In addition, seeking to cover them under product-related provisions may lead to uncertainty as the provisions are written specifically with products in mind.

<u>Paragraph 2 of the advice box</u> – It is not particularly clear what the second sentence is seeking to capture nor is it covered through commentary in the Analysis section. Given that the first sentence provides the overriding requirement, it might be better to delete the second sentence and provide a number of examples of what ESMA has in mind in a related Q&A. If it is retained, it would be very helpful if the final technical advice is accompanied with explanatory text which includes anonymised but 'real life' examples of products the sentence is intended to capture. This will enable both manufacturers and distributors to understand to what to be alert.

<u>Paragraph 3 of the advice box</u> – The second sentence is not particularly clear. We recommend similar action to the comment on Paragraph 2 above. Also, re subparagraph i, does it apply where the firm has ever previously held exposure? Or is it intended that it capture exposure that could reasonably be considered to be relevant to the offering of the product?

<u>Paragraph 5 of the advice box</u> - The paragraph refers to 'compliance' reports. It is not clear whether the reports must be produced by the compliance function. Another paragraph in the advice box - 20 (which relates to distributor obligations) refers to work being carried out by investment firms' compliance function. We query whether there is a need to specify the function which carries out this work. Depending upon the firm it may, for example, be carried out by a compliance risk function, audit function, product governance function, etc. We suggest that paragraph 5 refers to a requirement for reports on products to be made to the management body. This provides flexibility as to the function which supplies the reports.

<u>Paragraph 6 of the advice box</u> – It may be difficult to obtain such a written agreement in every case. Flexibility should be built into this section, allowing a manufacturer to proceed without such an agreement, on the basis that they take reasonable steps to satisfy themselves as to the input received from the third party.

In addition, the language of the box should be made clearer – it refers to investment firms which collaborate with…to create *or manage* a product…'(our emphasis). As this section is all about arrangements where an investment firm **manufactures** a product, the introduction of the term managing introduces uncertainly. We recommend 'where an investment firm manufactures a product and obtains input from a third party…'

<u>Paragraph 7 and 8 of the advice box</u> – The requirements seem to be based on an assumption that products are always designed for an identifiable target market. But many products are designed to target a specific investment sector (such as Japanese smaller companies) and only ever intended to be bought as a part of a larger balanced portfolio. The 'target market' in this case is any potential investor for whom a exposure to this sector or asset class makes sense in the context of his overall investment strategy. This dichotomy between products designed as investment solutions in themselves and others which are designed to form only part of a larger whole is not reflected in the draft guidance. We recommend that the advice is expanded to recognise this important aspect of product design.

We suggest ‘avoid’ in paragraph 8 should be ‘mitigate the risk that’.

We also query the need for the sentence “As part of this process, the firm should identify any groups of investors for whose needs, characteristics and objectives the product is not compatible. “ This appears to go beyond MiFID II which requires the specification of a target market. It should therefore be deleted.

<u>Paragraph 9(i) of the advice box</u> – There should be an explicit recognition that investment in market(s) is subject to the risks of the market(s) and that a deterioration in market conditions is not an indicator that a product whose aim is to invest in that market(s) is not performing as anticipated or delivers a poor outcome. Outcome will depend upon market conditions when an investor chooses to sell. Alternatively, it may be that (i) is intended to capture products designed to provide a set return in specific circumstances. If so, we suggest this is made clear.

<u>Paragraph 9(iv) of the advice box</u> – ESMA makes a good point about the need to keep demand under review in case it is higher than anticipated and potentially impacts the product. Although not within the scope of ESMA’s current work, we encourage ESMA to consider the liquidity management tools that are available to manufacturers and encourage National Competent Authorities to review the liquidity management tools within their jurisdictions to ensure that the tools enable manufacturers to react swiftly to market conditions which might adversely impact investors in a product.

<u>Paragraph 10 (i) of the advice box</u> - It is also not clear what paragraph 10(i) would mean in practice. With regard to 10(ii), the first sentence appears too general. One could say that any charges will reduce returns.

We also think that the example in the second sentence of 10(ii) might unintentionally capture products where, although there will be tax advantages, this is not the driver of the product. For example, a product whose aim is growth though exposure to markets and which may also has tax advantages. In this case, it is possible that charges might equal or exceed potential tax saved and yet the product produces returns.

<u>Paragraph 12 of the advice box</u> - There should be a recognition that where a product’s aim is exposure to a market(s), investment risk is an inherent feature of the product and poor market performance is not an event that indicates that the product is not fit for purpose.

<u>Paragraph 13 of the advice box</u> - Similar to comment on Paragraph 9 (i) re “any event that could materially affect potential risk to investors”. There should be explicit recognition that this is not intended to capture market risk. Investors seeking exposure to market risk will appreciate, from information provided by manufacturers or from distributors, that markets can fluctuate.

<u>Paragraph 13 of the advice box</u> - It is helpful that the advice recognises a calibrated approach is appropriate.

<u>Paragraph 14 of the advice box</u> – “or is reaching clients for whose needs, characteristics and objectives the product is not compatible”. This goes further than MiFID II –which is to assess whether the intended distribution strategy remains appropriate. We recommend the deletion of the above within the manufacturer section. The manufacturer will not know the end clients. It is the responsibility of the distributor to assess whether it is reaching those of its clients for whose needs, characteristics and objectives the product is not compatible.

Paragraph 15 of the advice box – Please see our comment on paragraph 12 of the Box as it is also relevant here.

Paragraphs 16, 17 and 18 of the advice box and any related references to assessing products to ensure that they are compatible with the characteristics, objectives and needs of an identified target market – we recommend that a paragraph be included regarding UCITS. We base this recommendation on the following aspects of the UCITS Directive:-

- The UCITS Directive covers funds designed for sale to the public,
- Article 78 of the Directive requires the production of Key Investor Information which includes information about the essential characteristics of the UCITS so that investors are able to understand the nature and risks of the fund and make decisions on an informed basis.
- The UCITS Directive already requires UCITS prospectuses to include a profile of the typical investor for whom the UCITS is designed (Annex1, Schedule A, section 5.2).

Given the above and, in particular, the existing requirement for prospectuses to contain a profile of the typical investor for whom the UCITS is designed, we suggest the inclusion of a paragraph which explicitly recognises, as reasonable, that a distributor may have regard to a UCITS' typical investor profile statement in considering whether the UCITS is compatible with the characteristics, objectives and needs of the distributors' clients.

This will potentially reduce costs of compliance as it provides a proportionate and appropriate approach in respect of these highly regulated European products, the literature of which is designed to be comprehensible and already provide typical investor profile information.

[[1] http://media.fshandbook.info/Legislation/2007/2007_41.pdf
[2] http://www.fsa.gov.uk/pubs/other/TCF_CIs_managers.pdf]
<ESMA_QUESTION_19>

Q20: Are there any other product governance requirements not mentioned in this paper that you consider important and should be considered? If yes, please set out these additional requirements.

<ESMA_QUESTION_20>
No.
<ESMA_QUESTION_20>

Q21: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements, either as distributors or manufacturers?

<ESMA_QUESTION_21>
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 managers of collective investment schemes. Additional indirect costs are likely to occur as a consequence of the envisaged contractual obligation in relation to non-MiFID firms to provide "all relevant information" on products to distributors. It is important to ensure that provisions are reasonable enough to implement in a cost effective manner.

The recommendation in our comments to Q19 regarding UCITS will potentially reduce costs of compliance for distributors as it would provide a proportionate and appropriate approach in respect of these highly regulated European products, the literature of which is designed to be comprehensible and already provides typical investor information. Conversely, any increased requirements for review of distributors or additional reporting to regulators would increase costs.

<ESMA_QUESTION_21>

2.8. Safeguarding of client assets

Q22: Do you agree with the proposal for investment firms to establish and maintain a client assets oversight function?

<ESMA_QUESTION_22>
IMA member firms agree with the concept of a single individual having specific responsibility as it allows targeted oversight and clear ownership of issues in relation to client assets. In the UK, there is already the requirement to appoint such an individual for each legal entity, with that person being of a senior enough position within the firm to escalate issues as appropriate. Therefore we would support such a proposal providing it is not overly prescriptive and allows firms of differing size, nature and scale to consider the most appropriate individual to be appointed within each legal entity. Many UK firms have noted benefits from establishing this oversight function.

<ESMA_QUESTION_22>

Q23: What would be the cost implications of establishing and maintaining a function with specific responsibility for matters relating to the firm's compliance with its obligations regarding the safeguarding of client instruments and funds?

<ESMA_QUESTION_23>
IMA member firms do not consider there to be considerable additional costs, as the oversight function is already in place within the UK. However it is recognised there may be some further costs for non-UK firms that have many legal entities within their group of companies. Also, an individual becoming responsible for client assets for the first time may require some additional support from experts from outside the firm whilst that particular individual builds up their knowledge. Therefore it is possible there may be some additional short-term costs.
<ESMA_QUESTION_23>

Q24: Do you think that the examples in this chapter constitute an inappropriate use of TTCA? If not, why not? Are there any other examples of inappropriate use of or features of inappropriate use of TTCA?

<ESMA_QUESTION_24>
Most IMA member firms no longer use their clients' assets in this way, but consider the examples to be appropriate.
<ESMA_QUESTION_24>

Q25: Do you agree with the proposal to clarify that the use of TTCA is not a freely available option for avoiding the protections required under MiFID? Do you agree with the proposal to place high-level requirements on firms to consider the appropriateness of TTCA? Should risk disclosures be required in this area? Please explain your answer. If not, why not?

<ESMA_QUESTION_25>

As per question 24, most IMA member firms no longer use TTCA and therefore do not take title of such assets. Investment firms are deemed responsible for protecting their own clients' assets and therefore TTCA is not really appropriate. However IMA members would not like to see a total ban on TTCAs, but would consider prohibition for retail clients to be appropriate. As part of a firm's review of its own TTCA arrangements, the firm will need to ascertain if it is appropriate to issue a risk disclosure.
<ESMA_QUESTION_25>

Q26: Do you agree with the proposal to require a reasonable link between the client's obligation and the financial instruments or funds subject to TTCA?

<ESMA_QUESTION_26>
Yes these circumstances look reasonable, but in most cases, IMA member firms do not take title of client money or assets when they are responsible for holding them.
<ESMA_QUESTION_26>

Q27: Do you already make any assessment of the suitability of TTCAs? If not, would you need to change any processes to meet such a requirement, and if so, what would be the cost implications of doing so?

<ESMA_QUESTION_27>
In most cases IMA member firms no longer use TTCAs.
<ESMA_QUESTION_27>

Q28: Are any further measures needed to ensure that the transactions envisaged under Article 19 of the MiFID Implementing Directive remain possible in light of the ban on concluding TTCAs with retail clients in Article 16(10) of MiFID II?

<ESMA_QUESTION_28>
In the UK, IMA member firms do not consider further measures are needed.
<ESMA_QUESTION_28>

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

<ESMA_QUESTION_29>
Yes - IMA member firms agree with this proposal.
<ESMA_QUESTION_29>

Q30: Is it suitable to place collateral, monitoring and maintaining measures on firms in respect of retail clients only, or should these be extended to all classes of client?

<ESMA_QUESTION_30>
IMA member firms consider that such measures should not necessarily be strictly governed by client type, as some firms already cover all their clients – however we recognise this is not necessarily industry-wide practice.
<ESMA_QUESTION_30>

Q31: Do you already take collateral against securities financing transactions and monitor its appropriateness on an on-going basis? If not, what would be the cost of developing and maintaining such arrangements?

<ESMA_QUESTION_31>
IMA member firms have said they have no particular strong opinions, as many of them already have such arrangements.
<ESMA_QUESTION_31>

Q32: Do you agree that investment firms should evidence the express prior consent of non-retail clients to the use of their financial instruments as they are currently required to do so for retail clients clearly, in writing or in a legally equivalent alternative means, and affirmatively executed by the client? Are there any cost implications?

<ESMA_QUESTION_32>
IMA member firms that already enter into securities lending activities state they would ensure binding legal agreements with positive client consent and subsequent terms of business letters - these would contain clear definitions for any non-retail clients.
<ESMA_QUESTION_32>

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

<ESMA_QUESTION_33>
No.
<ESMA_QUESTION_33>

Q34: Do you think that it is proportionate to require investment firms to consider diversification of client funds as part of the due diligence requirements when depositing client funds? If not, why? What other measures could achieve a similar objective?

<ESMA_QUESTION_34>
UK client asset rules already require investment firms to diversify across one or many banking institutions if that firm is part of a wider group and is using the bank entity within that group. Diversification of banks is considered as part of an investment firm's due diligence process, but IMA member firms have requested that such consideration should be proportionate, rather than any definitive level or ratio of a firm's client money. In present fiscal times, it can be difficult for investment firms to find a number of different banks that also fulfil their firm's requirement for less risky banking institutions. Any requirement to prohibit investment firms from using only one banking institution would not be beneficial to clients.
<ESMA_QUESTION_34>

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

<ESMA_QUESTION_35>
For IMA member firms, the process of due diligence includes consideration of client money bank accounts being held in appropriate banking institution(s). There may be additional costs if such firms are required to move accounts to alternative or additional institutions. Also in some cases, banks may not want to accept smaller deposits where investment firms move client money from one main account to a number of smaller balances.
<ESMA_QUESTION_35>

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

<ESMA_QUESTION_36>
The UK client money rules already impose a 20% limit in respect of intra-group entities depositing client money, which means there are no additional costs for this type of UK investment firm. However IMA member firms would not like to see this requirement being extended to all investment firms and do not necessarily consider a definitive percentage or similar rate to be appropriate in all cases.

<ESMA_QUESTION_36>

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

<ESMA_QUESTION_37>
As noted in question 36, the UK client money rules have already implemented this rule.
<ESMA_QUESTION_37>

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

<ESMA_QUESTION_38>
As noted in question 36, the UK client money rules have already implemented a rule regarding 20% intra-group deposits
<ESMA_QUESTION_38>

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

<ESMA_QUESTION_39>
IMA member firms have no comments.
<ESMA_QUESTION_39>

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

<ESMA_QUESTION_40>
IMA member firms have no comments.
<ESMA_QUESTION_40>

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

<ESMA_QUESTION_41>
As noted in question 36, the UK client money rules have already implemented a rule regarding 20% intra-group deposits
<ESMA_QUESTION_41>

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

<ESMA_QUESTION_42>
In the UK, the FCA has already established that any custodian agreement with a third party does not include a lien or right of retention or sale over the safe custody assets, or right of offset on client money save for certain specified circumstances reflecting the requirements of particular jurisdictions. Therefore it can be difficult for IMA member firms to have strong views on this issue.
<ESMA_QUESTION_42>

Q43: Do you agree with the proposal to specify specific risk warnings where firms are obliged to agree to wide-ranging liens exposing their clients to the risk?

<ESMA_QUESTION_43>

As per question 42, IMA firms do not have views in relation to liens, as the UK regulator (FCA) determined a ‘no liens clause’ within its rules. However we agree that any risk warnings should clearly articulate any impact the client may suffer as a result of any general liens.
<ESMA_QUESTION_43>

Q44: What would be the one off costs of reviewing third party agreements in the light of an explicit prohibition of such liens, and the on-going costs in respect of risk warnings to clients?

<ESMA_QUESTION_44>
As per question 43, the FCA has already made rules in this area and a ‘no liens’ clause has been required for a number of years. Therefore any changes should have minimal impact on IMA member firms.
<ESMA_QUESTION_44>

Q45: Should firms be obliged to record the presence of security interests or other encumbrances over client assets in their own books and records? Are there any reasons why firms might not be able to meet such a requirement? Are there any cost implications of recording these?

<ESMA_QUESTION_45>
For many IMA member firms, this issue is not relevant.
<ESMA_QUESTION_45>

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

<ESMA_QUESTION_46>
Whilst this issue is not relevant for many IMA member firms, there are a number of investment firms that operate across many jurisdictions and across a number of global markets. Therefore it is possible that including an option relating to ‘other equivalent measures’ could be beneficial in the future, even if this is not currently appreciated.
<ESMA_QUESTION_46>

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

<ESMA_QUESTION_47>
As per question 46, although not currently relevant for many IMA member firms, this could become a wider issue in the future and therefore we would be grateful for further guidance on what would be expected of a firm.
<ESMA_QUESTION_47>

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

<ESMA_QUESTION_48>
The concern for IMA member firms is the implication of additional re-papering if disclosures for existing clients are required in addition to periodic reviews to accommodate any regulatory changes. This could potentially add costs for investment firms, but without additional clarification, firms are not able to calculate costs at this stage.
<ESMA_QUESTION_48>

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

<ESMA_QUESTION_49>
While this is not relevant for many IMA member firms, as the clients' custodians hold the assets and they, or depositaries, oversee this; there are some comments with regard to the operational complexities that may be involved in meeting these guidelines for the few that run other models. It is possible there could be significant costs to implement monitoring systems to 'ensure' the ability to deliver settlement date on a real time basis. There are a number of reasons for failed trades. Therefore the monitoring of positions to 'ensure' the ability to settle transactions may be impractical in some cases and also costly in order to provide real time information prior to settlement. Some firms operate omnibus accounts where assets are pooled and clients will share in a shortfall where they arise. Although a requirement for clients to have individually segregated accounts with custodians may be possible, this can lead to further operational complexities. So where omnibus accounts are used to bring cost-savings to clients, rather than 'ensure', we suggest "systems and controls should be designed to avoid shortfalls and to identify and remedy any shortfall on a timely basis."
<ESMA_QUESTION_49>

Q50: Do you already have measures in place that address the proposals in this chapter? What would be the one-off and on-going cost implications of developing systems and controls to address these proposals?

<ESMA_QUESTION_50>
IMA member firms report they have many of the proposals already in place, as part of adherence to the FCA CASS rules. These investment firms are aware that such arrangements are to protect underlying clients in the event of a failure of a firm, which is the right thing to do.
<ESMA_QUESTION_50>

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

<ESMA_QUESTION_51>
The FCA already has rules in place for firms to have a CASS resolution pack which would assist an insolvency practitioner should the firm fail. Therefore IMA member firms support this initiative.
<ESMA_QUESTION_51>

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

<ESMA_QUESTION_52>
IMA member firms support these obligations as they align with the FCA CASS resolution pack rules. If a firm has good record-keeping procedures, maintains a definite monitoring and oversight plan and has in place good governance policies, there should be no issues with thee requirements.
<ESMA_QUESTION_52>

Q53: Do you already maintain the information listed in a way that would be easily accessible on request by a competent person, either before or after insolvency? What would be the cost of maintaining such information in a way that is easily accessible to an insolvency practitioner in the event of firm failure?

<ESMA_QUESTION_53>
All IMA member firms following the FCA CASS rules have created a CASS resolution pack, which is reviewed on a regular basis. As for the requirements in this consultation, we believe they should be part of a firm's business as usual operations and therefore not cause additional costs.
<ESMA_QUESTION_53>

2.9. Conflicts of interest

Q54: Should investment firms be required to assess and periodically review - at least annually - the conflicts of interest policy established, taking all appropriate measures to address any deficiencies? Please also state the reason for your answer.

<ESMA_QUESTION_54>
Yes. This is necessary in order to ensure that conflicts are identified and managed.
<ESMA_QUESTION_54>

Q55: Do you consider that additional situations to those identified in Article 21 of the MiFID Implementing Directive should be mentioned in the measures implementing MiFID II? Please explain your rationale for any additional suggestions.

<ESMA_QUESTION_55>
No, the situations set out in MiFID Implementing Directive Article 21(a)-(e) seem comprehensive.
<ESMA_QUESTION_55>

Q56: Do you consider that the distinction between investment research and marketing communications drawn in Article 24 of the MiFID Implementing Directive is sufficient and sufficiently clear? If not, please suggest any improvements to the existing framework and the rationale for your proposals.

<ESMA_QUESTION_56>
This remains sufficiently clear.
<ESMA_QUESTION_56>

Q57: Do you consider that the additional organisational requirements listed in Article 25 of the MiFID Implementing Directive and addressed to firms producing and disseminating investment research are sufficient to properly regulate the specificities of these activities and to protect the objectivity and independence of financial analysts and of the investment research they produce? If not, please suggest any improvements to the existing framework and the rationale for your proposals.

<ESMA_QUESTION_57>
We would recommend that the requirements on firms disseminating investment research are fully aligned with those recently agreed in Article 7 of the Market Abuse Regulation.
<ESMA_QUESTION_57>

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

Q58: Are there additional details or requirements you believe should be included?

<ESMA_QUESTION_58>
We are not aware of any.
<ESMA_QUESTION_58>

Q59: Do you consider that investment firms should be required to discuss with the issuer client any hedging strategies they plan to undertake with respect to the offering, including how these strategies may impact the issuer client's interest? If not, please provide your views on possible alternative arrangements. In addition to stabilisation, what other trading strategies might the firm take in connection with the offering that would impact the issuer?

<ESMA_QUESTION_59>
Yes. This is very important; hedging strategies may not operate in the interest of investors.
<ESMA_QUESTION_59>

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

<ESMA_QUESTION_60>
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<ESMA_QUESTION_60>

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

<ESMA_QUESTION_61>
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<ESMA_QUESTION_61>

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

<ESMA_QUESTION_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_62>

2.11. Remuneration

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

<ESMA_QUESTION_63>
It depends how you interpret "material impact", but we understand this to apply to client-facing sales staff and individuals in the management chain above them, with which we agree. We support the broad scope of the requirements but without further clarity we have concerns with the scope in relation to variable remuneration and in particular the inclusion of a fixed element of remuneration within that scope in the context of Article 24(10). In English Civil (employment) law within the UK, to have a fixed element of remuneration would indicate more often than not that an individual is employed by the firm. The UK has varied distribution models in operation but within the appointed representative (AR) population, the predominant volume of ARs will be self-employed as opposed to employed. As a result of this self-employed status (the ARs are running their own business), 100% of the remuneration paid by the principal firm to the AR will be on a variable basis. To include a fixed element of remuneration, and potentially bring those ARs within the scope of the employed sector, would have a dramatic effect on the business models of this distribution sector. Clarity should be provided as to how ESMA is defining the word 'fixed' and the resulting scope of Level 2 measures should not preclude 100% variable remuneration in certain cases. It seems odd (in point 4) to have a requirement for the management body to take advice from the compliance function; one role of the compliance function is to advise the management body, but we think it should be up to that body to take advice when it sees fit, rather than being required to do so. As it is

possible that some senior staff may be subject to remuneration provisions under MiFID and CRD IV and/or AIFMD, we urge ESMA and EBA to work together to rationalise the different provisions where this is feasible.
<ESMA_QUESTION_63>

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

<ESMA_QUESTION_64>
No, we agree that incentives should be constructed in such a way as to avoid situations where staff might be encouraged to put their own interests or those of the firm above the client's, but we do not accept that necessarily means that they cannot be based on commercial criteria. It is sensible business practice and reasonable to reward sales staff for meeting or exceeding sales targets as long as all sales are appropriate.
<ESMA_QUESTION_64>

2.12. Fair, clear and not misleading information

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

<ESMA_QUESTION_65>
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. We also agree that it is desirable to require information to be consistently presented in the same language throughout all forms of information and marketing materials provided to each client. We agree that, in general, indications of relevant risks should be in a font size at least equal to the predominant size used throughout the communication, but there needs to be flexibility in the context of short adverts or image adverts so that the advert does not end up being more risk warning than advert. 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>

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

<ESMA_QUESTION_66>
No, it is not clear to us that two indications of future performance would be better than one. Any indication must be fair and, 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.
<ESMA_QUESTION_66>

Q67: Do you agree that the information to professional clients should comply with the proposed conditions in order to be fair, clear and not misleading? Do you consider that the information to professional clients should meet any of the other conditions proposed for retail clients?

<ESMA_QUESTION_67>
We 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 and 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, likely knowledge and experience, and the fact that MiFID II has the effect of moving certain categories of investor from a professional to a retail categorisation. In practical terms, the kind of detailed presentation prepared for professional investors, by institutional portfolio managers for example, would not be enhanced by multiple risk warnings throughout, and professional investors would not be well served by what they would see as cumbersome and unnecessary disclosure.
<ESMA_QUESTION_67>

2.13. Information to clients about investment advice and financial instruments

Q68: Do you agree with the objective of the above proposals to clarify the distinction between independent and non-independent advice for investors?

<ESMA_QUESTION_68>
Yes, we agree with the objective to clarify the distinction between independent and non-independent advice.
<ESMA_QUESTION_68>

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

<ESMA_QUESTION_69>
We think that MiFID is the wrong place to include requirements relating to investment performance in relation to PRIIPs and UCITS (see point 4). Pre-sale disclosure requirements should be addressed through the PRIIP KID Legislation and the UCITS KIID Legislation, not MiFID.
<ESMA_QUESTION_69>

Q70: Do you consider that, in addition to the information requirements suggested in this CP (including information on investment advice, financial instruments, costs and charges and safeguarding of client assets), further improvements to the information requirements in other areas should be proposed? If yes, please specify, by making reference to existing requirements in the MiFID Implementing directive.

<ESMA_QUESTION_70>
No.
<ESMA_QUESTION_70>

2.14. Information to clients on costs and charges

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

<ESMA_QUESTION_71>
In our view, the draft technical advice is unclear with respect to whether information on costs and charges must be made available to professional clients, or provided to them. Whilst we support making more detailed costs and charges information available to professional clients at their request, we would not support any requirement to provide this to professional clients as a matter of course. By their nature, professional clients have the capability to identify their needs and request that the firm tailor its information according to these.
<ESMA_QUESTION_71>

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

<ESMA_QUESTION_72>
The IMA is committed to achieving full and meaningful disclosure of costs and charges. Consumers of financial services should be provided with consistent, clear, understandable and meaningful information on all costs and charges.

In particular, consumers should receive better and more meaningful disclosure of both product costs and distribution costs for all packaged retail investment and insurance products (PRIIPs). Those disclosures should enable comparisons to be made between different products and between different types of products. IMA is committed to consistency in approach to costs and charges disclosure across different types of PRIIPs. Below we provide commentary on how meaningful disclosure can be achieved for funds.

We are, however, concerned that ESMA's draft advice appears to stray into areas that are a matter for the PRIIP KID, the development of which is to be the subject of consumer testing. (See also our response to Q74.)

That said, we agree with the scope of the point of sale information in the draft Level 2 advice, other than:

- **We do not agree that there is an obligation under Article 24(4) to provide aggregated information <u>at the point of sale</u>**. The draft Level 2 advice reads (incorrectly in our view) the last paragraph of Article 24 as being a sub-paragraph of Article 24 (4)(c). In fact, Article 24(4) has two sub-paragraphs – the first, which ends at (c), covers *ex ante* disclosure and the second (i.e. last) sets out the obligation for regular *ex post* disclosure. It is the latter that requires aggregation of costs on an *ex post* basis, when these costs are known.

- **For portfolio management services,** ESMA's Example 1 (and in particular, footnote 59 on page 108) appears to presume that, as general practice, transaction costs are within the portfolio management service charge. In reality, they are invariably accounted for separately for institutional clients, and for a growing number of wealth management clients. They should therefore be disclosed separately, in the second line of the table on an *ex post* basis and by way of narrative on an *ex ante* basis.

- For funds, the MiFID Level 2 measures should include **a specific requirement for distributors to use the OCF (on-going charges figure) and not any other less comprehensive figure**.

The following describes the way forward for achieving good disclosure for funds, which should sit in the UCITS KIID and the PRIIP KID. The costs and charges of on-balance sheet PRIIPs issued by banks and insurance companies are generally less transparent and will require greater consideration in the context of the development of the PRIIP KID. In particular, there is a real risk that structured products, which involve financial engineering on banks' balance sheets, will look cost and charge-free.

Disclosure of costs and charges will not be meaningful unless it recognises the differences between costs that have already been incurred, those that are predictable and those that are unpredictable with any precision. *Ex post,* all charges and costs are known and should be quantified and meaningfully disclosed. *Ex ante,* only certain charges that are to be applied to known amounts can be quantified, and some others can be expressed in *ad valorem* terms but the amount to which they are to be applied is not known. Furthermore, some costs are not known even in *ad valorem* terms (e.g. underlying transactions costs within the product) as they are contingent upon a range of external factors that are not predictable.

Therefore:

- Meaningful disclosure requires **differentiation between *ex ante* information and *ex post* reporting and accountability**.

- ***Ex post* disclosure should include <u>all</u> charges and costs**, including for funds and for portfolio management services, performance fee and underlying transaction costs (brokerage commissions and, where applicable, transaction taxes), which *ex ante* could not have been predicted, but which, *ex post,* will be precisely known. Moreover, there should be no netting of revenue against costs and charges and, preferably, audited figures should be used.

- The aggregate charges figure, the aggregate performance fee and the aggregate figure for transactions costs **should be presented separately as well as being presented as a single figure alongside a comparable figure for performance over the period**. If presented <u>only</u> as a single, totalled figure, there would be a serious risk of investors being misled about both the actual and comparative cost of different products or services. This is particularly the case given the different nature of transaction costs encountered in delivering investment returns based on different asset classes and strategies.
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- ***Ex ante* disclosure should reflect the qualitative difference between certain charges and costs** in order to ensure their effect can be understood. It should treat differently: charges and costs that are known amounts (one-off fixed costs) or that are an *ad valorem* charge on a known amount (e.g. entry charge applied to the amount invested); *ad valorem* charges that will be applied to amounts or differentials unknown (such as the OCF); *ad valorem charges* that might be applied but it is not certain that they will be or to what amount (e.g. performance fee); and costs that cannot be known in advance (such as transaction costs).

  - Where the charge is ***ad valorem* and will be applied to a known amount** (e.g. for funds, the entry charge), then the product provider should disclose the charge in percentage terms, but only the end-distributor can translate this percentage into a monetary figure once its client decides how much to invest (and any distribution payment received or applied).

  - A charge that is ***ad valorem* but will be applied to an amount as yet unknown** (e.g. for funds, the OCF, which will be applied to the future value of the fund) should be disclosed only on an *ad valorem* basis.

  - Similarly, a charge that is **a known rate, but whose application and the value to which it will be charged is contingent upon future events** (such as a performance fee, which is contingent upon returns exceeding a performance target) should require disclosure of the rate and the performance target.

  - The future events that underpin **charges and costs** that are contingent upon unpredictable factors (such as transaction costs, which depend on volume of trading and the rates applicable in the markets where the trading takes place) should be clearly and prominently explained but should not be assumed, and unpredictable amounts in monetary terms should not be included as they will inevitably be misleading.

- ***Ex ante* disclosure should be expressed in terms that look ahead and not attempt to compound charges or costs over time** as that would require assumptions about return and period of holding. These quickly become highly problematic, particularly when trying to undertake comparisons between products, given the reality of differing investment performance. Any projection based on assumptions will produce misleading results.

- Both *ex post* and *ex ante* disclosures should be **drawn up at the product or share/unit level** (only the end-distributor can provide personalised accounts for the investor).

<ESMA_QUESTION_72>

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

<ESMA_QUESTION_73>
Yes. We agree that it is the existence of a continuing relationship that makes the provision of post-sale information applicable.
<ESMA_QUESTION_73>

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

<ESMA_QUESTION_74>
No. We do not agree. The second table in the annex dealing with the costs and charges related to the financial instrument should be relevant only where a KIID/KID is not provided.

Where a KIID/KID is provided, Recital 78 makes it clear that document should be regarded as appropriate for the purposes of MiFID II. Moreover, Article 78(2) of the UCITS Directive establishes the KIID as providing appropriate information for investors to understand the UCITS being offered and consequently to take informed investment decisions. The text of this Article is substantially the same as Article 24(5) of MiFID II, which defines the qualitative criteria to be fulfilled by the information to be provided under Article 24(4). ESMA proposed approach would appear to suggest that the UCITS KIID does not satisfy the criteria in Article 78(2) of UCITS.

The second table directly conflicts with the UCITS KIID in the examples of on-going charges. In particular, it defines contingent charges as ongoing. For example, to report performance fees in the same way as known on-going charges is misleading and will give investors a false expectation of future charges. Article 24(2) of the KIID Regulation rightly establishes an expectation that on-going charges should be indicative of likely future charges, and this principle should be upheld.

MiFID II should not be so prescriptive as to create a potential conflict with the PRIIP KID if the KID follows the methodologies established and tested for the UCITS KIID. Whether or not these methodologies are followed is a matter to be resolved by the PRIIP KID level 2 measures, which will be informed by consumer testing, and should not be pre-judged by MiFID.

The tables in the annex underpin the aggregation of costs and charges required by the second (i.e. last) paragraph of Article 24(4). As discussed in our answer to question 72, aggregation is meaningful only on an *ex post* basis. Nevertheless, ESMA's interpretation of aggregation as being the sum of like-for-like costs of the service and the financial instrument is helpful. Where the financial instrument is a PRIIP, the

aggregation should respect the types of costs and charges (one-off, ongoing, contingent) as reported in the KIID/KID.
<ESMA_QUESTION_74>

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

<ESMA_QUESTION_75>
Yes. We agree, because the identity of the end investor is very often not known to the firm responsible for producing the KIID/KID.
<ESMA_QUESTION_75>

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

<ESMA_QUESTION_76>
According to Article 24(13) the Commission is empowered to adopt delegated acts in relation to costs and charges that deal with the content and format of information. For PRIIPs, the methodology for calculating the figures is the remit of Article 8(5)(c) of the PRIIP KID Regulation. MiFID Level 2 should not interfere with the development of the PRIIP disclosures, which will be the subject of consumer testing.
<ESMA_QUESTION_76>

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

<ESMA_QUESTION_77>
As discussed in our answer to question 72, the obligation to provide aggregated information to allow the client to understand the cumulative effect of costs and charges arises only in relation to *ex post* reporting. This respects the fact that unknown amounts (i.e. amounts to be determined by unpredictable future events) cannot be aggregated in a meaningful way.

Moreover, ***ex ante* disclosure should not attempt to compound charges or costs over time** as that would require assumptions about return and period of holding. These quickly become highly problematic, particularly when trying to undertake comparisons between products, given the reality of differing investment performance. Any projection based on assumptions will produce misleading results. Indeed, we do not read Article 24 as requiring such compounding.
<ESMA_QUESTION_77>

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

<ESMA_QUESTION_78>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_78>

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

Q79: Do you agree with the proposed exhaustive list of minor non-monetary benefits that are acceptable? Should any other benefits be included on the list? If so, please explain.

<ESMA_QUESTION_79>
The IMA does not support ESMA's advice to the Commission. In addition to our technical analysis of the relevant text, which is provided later, and our view that the purchase of research from dealing

commissions is a conflict management issue rather than an inducement issue, we believe that ESMA's proposals would create a muddled regime with never-ending debate about what was allowed and what was not.

In addition, the IMA would draw ESMA's attention to our February 2014 paper on this subject "The use of dealing commission for the purchase of investment research" which proposed further enhancements to help Members reduce research costs, improve procurement practices and which committed to a review of disclosure codes that would ensure both retail and institutional clients receive specific and simple-to-understand disclosure of the precise costs of the research that they have paid for from dealing commissions. The paper can be found here:

http://www.investmentuk.org/assets/files/research/2014/20140218-imadealingcommissionresearch.pdf

There are many examples of best practice that have been unrecognised in the debate so far. However, the IMA was disappointed by the FCA's recent findings in DP14/3, which found that of the 17 investment managers sampled, only two were operating at the level the FCA expected. The IMA is encouraging Members to audit their own practices against the proposals in the IMA paper to ensure that they can demonstrate best practice.

It may be possible to establish an alternative model and the IMA is calling on ESMA to work together with IOSCO and other regulators, as well as market practitioners globally, to evaluate thoroughly and objectively both current and alternative models, including those where dealing commissions are no longer used for the purchase of research.

The IMA believes that any evaluation process must consider the impact that any new model might have on investors and equity market users, including in particular the potential for reduced research coverage, poorer price formation, reduced liquidity in small cap stocks and raised barriers to entry for new entrants to the investment management industry.

The IMA also believes that unilateral change in Europe or the UK would create regulatory arbitrage that would put the UK investment management industry at a competitive disadvantage and the IMA could not support this.

If the issues above can be addressed and it was determined that a new, global model for the purchase of research would bring material overall benefits for clients, the IMA would support it, in line with the UK investment management industry's commitment to constant improvement in value for money, accountability and transparency. In that event, an extended timetable would be required so that new business models on both the buy-side and the sell-side could be developed.

Whilst this process of assessment is in progress the IMA would point to its existing guidance as to how further improvements to governance and transparency can continue to be made.

It is entirely appropriate for ESMA to consider the market for the purchase of research. The UK has long operated a specific regime. It is similar to the soft commission regime of the US. It provides a globally operational regime for the procurement of research by asset managers.

Over the last two years, the FCA has been reviewing the ways in which firms manage conflicts between themselves and their clients and between clients. The IMA has played a leading role in assisting the industry and stakeholders to understand and develop best practice.

Our members make investment decisions from the UK in relation to €2.4 trillion of equities belonging to collective investment schemes, pension schemes, life companies and other institutional clients. The UK industry already operates under the tightest existing regime in the EU (and indeed globally) and has, in the FCA, the Competent Authority most engaged with strengthening that regime further.

Whilst, the IMA does not agree with ESMA's proposed advice concerning research, we are however supportive of a more detailed EU-wide regime for managing conflicts relating to the procurement and consumption of research. To be clear, we think that ESMA could play an important role in achieving this, and within the MiFID II timetable. We do not think the proposal to address this important subject as if Article 24.8 is restricting research procurement in the way expressed in ESMA's proposed guidance to the Commission is correct. As we discuss later, it can be argued strongly that Article 24(8) does not have the meaning articulated by ESMA.

Given the proposed start date of MiFID II is as early as January 2017, the discussions about research in section 2.15 of the Paper and the proposed advice related to it, risk causing a disorganised dismantling of the research market within the EU. It may lead to a significant loss of business from institutional clients in Asia and the Middle East and inefficiencies in transatlantic trading. We state this having set out all these issues in our Report earlier this year on the market for research.

IMA members, who contributed to our report, range from the major global asset management firms to smaller boutiques and include every ownership model from partnerships to unlisted companies and from listed independents to bank- and insurer-owned firms. For many of these firms, investment management is an international business, in terms of client base and the investments made on their behalf.

For many managers, research is a key part of the investment decision process. That process connects the savings of millions of people globally to businesses and national governments, providing the capital that generates growth, employment and tax revenues.

We are not aware of any published review on the subject, beyond the FCA's work in this area, by national regulators or ESMA. The FCA has only recently published a Discussion Paper to ask industry and clients about the overall balance of risk and benefit. We would invite you to consider our Report as well and the issues it raises in Section 3 about the potential impacts on international competitiveness.
Externally provided research can come from a variety of sources: major investment banks, smaller brokers or a range of other businesses, some of them major distributors of information, while others are boutique research houses.

The cost of research is typically passed back to the client, alongside the execution cost of buying or selling equities. Globally, the IMA estimates that over half the total investment-manager-directed expenditure on externally sourced research is treated in this way, as an extension of execution costs. The current regime, including the use of commission sharing arrangements (CSAs) by those whose business models it suits, brings many benefits, including: flexibility over which suppliers are rewarded for the quality of their research; economies of scale; and breadth of coverage of companies. It also underpins a global procurement model that can be operated from bases within the EU. This means the asset management businesses employing individuals, paying tax and procuring the services of a wide-range of professional and support enterprises can be larger than might be expected precisely because they can manage the money of clients from any part of the world. Additionally, those managers can very efficiently act as sub-advisors to funds being run from the Americas (including the USA) and the Asian region.

It is accepted that the use of dealing commission to pay for research can give rise to conflicts of interest between the investment manager and its clients. It can also give rise to conflicts of interest between various clients of the same investment manager. It is also unarguable that ESMA should consider how such conflicts should be managed under MiFID II on an EU-harmonised basis. We support a conceptual approach and our Report describes well the types of controls that should be applied by investment managers.

But it is not clear to us that this important subject is governed by the prohibition on the receipt of non-monetary benefits and we do not agree that this is the necessary conclusion to be drawn from the Level 1 text. We make four points to explain why we think this may be so:

1. It is not clear that ESMA's view fully reflects the legislative intention amongst the institutions. ESMA's approach suggests that the legislative institutions deliberately decided to re-engineer the entire European asset management industry's research procurement process and the business models of the

major suppliers of research - but to have done so without any discussion or any recital. This would seem to be improbable in relation to the research industry, which has a turnover in the billions of Euros annually. The use of dealing commission does not *induce* asset managers to make decisions as to whether to invest or disinvest the portfolio for which they are responsible, but rather it *informs* that very process in the best interests of clients. It does of course give rise to conflicts because of the way in which it has been funded and (at least historically) valued by asset managers but that does not convert the issue from one of conflict management to one about inducements.

2. ESMA notes that its approach gives rise to an unequal regulatory position between AIF managers and UCITS managers. This also would be a surprising intention of the legislature given there is no suggestion in MiFID II that such changes should be made – in contrast for example to the last line of recital 87, recital 88, the last line of recital 160 and the changes to the IMD. As it stands, ESMA proposes advising the Commission that where a fund appoints an external investment manager then that manager is prohibited from charging its client separately for research. If however, the fund manager now carries on directly all the portfolio management, there is no ban. Accordingly, it must be arguable that in a group with a MiFID portfolio manager and a UCITS manager, the UCITS manager could supply research received bought by the funds with dealing commission to the MiFID manager to assist it in providing an enhanced service of advice about what to buy, sell or hold. The MiFID manager will not be receiving anything from a third party, but will be receiving it from its client, the UCITS manager. Accordingly, until UCITS and AIFMD are amended it will be perfectly lawful for all the groups to act as they do now for collective undertakings, with the same human beings do as they do now, but with the contracts between MiFID and UCITS and AIFMs in the groups being re-structured so that they become advice contracts.

   In contrast, this will not be available for business conducted under segregated mandates (i.e. portfolio management for direct clients such as pension schemes and insurance companies). Such institutional business is by its very nature, often carried on for global clients.

3. We would also ask ESMA to ensure its advice to the Commission explains how the UCITS and AIFMD will be amended. As we understand it, ESMA is of the view that the fund manager, as manager of the collective undertaking, would be prohibited from receiving research that it uses to make better decisions for the fund if it recharged that cost separately from the AMC – or at least as a variable add-on to it. How otherwise does ESMA think the fund operator will get research? We think that this evidences the key issues. They are about disclosure and conflicts, not inducements:

   i. Whether the research is charged in the AMC or in addition to it, there must be proper disclosure of total costs – and the OCF and fund cost disclosure obligations would be the most appropriate place for a discussion. The IMA will support and argue for improved disclosure across the EU.

   ii. The question as to how to ensure a level playing field between self-managed funds and those with a separate management entity must be addressed and answered.

   iii. There is a need to consider conflicts where a manager running several funds seeks to ensure those funds make a fair contribution between them for the research expenditure. This is a conflicts issue and may be capable of being proportionately addressed through conflicts management and advances already appearing in the UK such as research budgeting.

4. FCA takes the view that ESMA's approach, and hence the MiFID II text, would ban the receipt of higher value (credit) research provided by brokers and funded, we assume (because there are no dealing commissions) through the spread charged in fixed income markets. This shows the change is even wider in its application than the rules on the use of equity dealing commission for research, which has characterised the FCA's approach and review, as well as the notifications to the European Commission of such rules by the UK and the French Republic. We question whether the legislature was really focused upon research which may be cross-subsidised inside investment banks from the spread in trading and from their corporate businesses and that they did so even though there is no

available competing "no research" spread – in distinction to bundled and execution only rates in equity markets.

Article 24.8 is not addressing this issue. Of course, textually it does refer to non-monetary benefits paid or provided by any third party, but this benefit is bought by the client and provided by (delivered) by a third party. Such a reading by ESMA means that anything a client buys must only ever be supplied by it (the client) to the manager. Moreover the process does not induce asset managers to make decisions as to whether to invest or disinvest the portfolio for which they are responsible, but rather it informs that very process in the best interests of clients. It does of course give rise to conflicts because of the way in which it has been funded and (at least historically) valued by asset managers but that does not convert the issue from one of conflict management to one about inducements. Accordingly, we provide some comments about conflict management below, based on the existing FCA approach and the best practice seen in the UK.

We have some specific comments on the proposed advice – whilst maintaining our view that it is discussing research under the wrong Article of MiFID II:

a. In paragraph 12, ESMA refers to para 23. We think this is paragraph 5 of the proposed advice. More importantly we do not know whether (given ESMA's choice of a new term "financial research") ESMA is referring in para 12 line 3 to "investment research" as that is defined in MiFID.

b. Paragraph 13 then refers to financial analysis – is this another sub-type of research? We ask because the explanation in para 13 seems to be that only mass-distributed product could be "acceptable" However without explanation the proposed advice at para 5.i states: "This information could be generic in nature *or personalised to reflect the circumstances of an individual client*". We have added the italics to identify the part of the advice that seems to go against the proposition in the text at paragraph 13.

c. The advice does not discuss the criteria by which the notion of "minor" should be assessed – against the overall cost of a service, in absolute terms or by some other method? Also, no mention is made of the different types of client (retail and professional and the nature of different mandates). Does ESMA consider here that an approach that does not distinguish in any way between the natures of clients to be proportionate?

Addressing the issue as a conflict

As said above IMA consider this issue relates to conflicts of interest. The effective management of conflicts of interest is a fundamental quality that all investment managers should be able to evidence. The principal challenges in the existing global research procurement model identified by the IMA's paper are as follows (in no particular order of priority):

a) Conflicts of interest embedded into the model;
b) Lack of price transparency;
c) Lack of ability for clients to assess the value of third party research for which they have directly paid;
d) Risk of cross-subsidy benefitting one cohort of clients to the detriment of others;
e) A risk of over-production of low and no-value research; and,
f) Time and effort required on the part of investment managers to manage the model so as to ensure fairness, value for money and transparency for all clients.

Practical means of addressing these can include the use of Commission Sharing Agreements, and critically depends on separating the trading and research functions within a firm. It is also good practice for firms to set a budget for research on an annual basis. As part of the budget management, commissions will also be used on an "execution-only" rate. Firms should establish committees to review the research paid for through commissions and monitor payments for research, as well as reporting to clients on commission spending. These measures are all directed at addressing potential conflicts of interest. Further details are set out in Appendix 1 (page 22 et seq.) of the IMA Report and are copied at the end of this answer as part of our response.

Additionally, the IMA's Report also identifies a number of benefits that participants believe accrue to clients generally as a result of the model. The benefits include:

a) Client alignment due to any costs feeding through to returns, which ultimately have an impact on the size of funds (on which managers base their own charge as well as competitive advantage);
b) Motivation of third party providers because their remuneration is determined *ex post-facto*;
c) Flexibility;
d) Economies of scale;
e) Ability to focus internal expertise on highest-value work;
f) Availability of research to start-up and smaller investment managers, promoting competition;
g) Availability of research on SMEs and AIM-traded companies
h) Ability to procure research on a global basis under a single model;
i) Significant optionality, as investment managers are not tied contractually into any research services;
j) Broad coverage of stocks; and,

k) Company coverage by multiple providers leading to better consensus views, more accurate valuations and lower volatility.

(FCA takes a different view about the existence or measure of some of these benefits in its Discussion Paper and IMA will be considering those points in due course.)

We consider that ESMA and the Commission should be guided by an assessment of the current regimes across the EU, those regimes if enhanced through improved conflicts management and the proposal that there should be a ban against eight measures – expressed for the EU:

The Eight Measures of a Good Regime for Research Payments

Clients

1 The regime should operate in the best interests of the clients of investment managers. This is particularly important because those clients depend upon investment outcomes for their prosperity and security. They are also the key suppliers of capital to industry.

2 Investment managers, as agents of the clients for whose ultimate benefit the research services are procured, should behave demonstrably as the guardians of their clients' best interests within that regime, including conflict management and the provision of value for money.

3 Any cost borne by a client should reflect an investment manager's honest, fair and professional assessment that it is in the interest of that client to bear that cost.

4 Investment managers should disclose to their clients in a timely and meaningful fashion any costs or fees relating to the consumption of research borne by them or their investments.

Market

5 The research market should operate efficiently and transparently, so that investment managers can negotiate the best value for the research consumed for the benefit of their clients.

6 The market structure should ensure that a wide range of investment managers have access to a broad spectrum of competing research providers and service offerings and does not raise barriers to entry.

7 Research providers should not discriminate in their supply according to the use of other services, including execution and allocation.

8 The EU's regime for paying for research should not undermine the EU's international competitiveness as a leading jurisdiction for asset management and other activities associated with financial services.

Accordingly, the IMA encourage and would support ESMA in any efforts to secure a global debate about research payments and the management of conflicts (as we do support the FCA). But to approach this important issue as if it was already settled, that it does not matter quite how legislation could be altered for other fund managers, and to propose that January 2017 should be the date by which the current global model is re-structured for the EU is unrealistic.

Extract of the IMA Report giving IMA's recommendations about the use of dealing commission to purchase research.

Appendix 1: IMA Recommendations to improve current practice

This Appendix presents a series of proposals that investment managers should consider (if they have not done so already) regarding the duties they owe to clients in relation to research procurement. The recommendations build on work (described below) with members and have been made public to assist in a wider debate about the current regime for purchasing research via dealing commission.

It is uncontentious that – in procuring, consuming or evaluating research services – investment managers should be just as diligent when using dealing commission as when they fund the purchase themselves. It follows that a system that prominently reinforces this principle will be the most effective in promoting that standard widely and consistently.

There is a subtle but potentially important difference in approach towards a service, depending on whether or not it appears to be free at the point of consumption.

In December 2012, the IMA set up three working groups to consider aspects of the FSA's 'Dear CEO' letter. Reflecting the three sections of the letter, the groups looked at firm policies, trading policies and business culture.

Output from the first and third of these working groups provided useful pointers for firms considering their own review of conflicts. They were made available to IMA members in January 2013.

In March 2013, the IMA released a paper designed to assist members in meeting the requirements of the FSA's rules on the use of dealing commission to pay for research and how that relates to the subject of corporate access. That paper was made public subsequent to consultation with interested parties.

Necessarily, some proposals are more or less applicable to particular models but the IMA is not recommending any particular model (whether direct payment or use of dealing commission, or whether the latter should entail CSA usage or bundled trading). Given that the FCA rules do not prescribe a single approach, the IMA's proposals are intended to help its members consider, and enhance, their compliance with the rules on use of dealing commission and conflicts of interest. They should be read proportionately having regard to the nature and size of an investment manager and its business. Greater clarity and control is always to be preferred over increased bureaucracy or box-ticking.

The proposals also need to be read proportionately in light of the points made in this report, particularly as regards the challenges concerning pricing in a market with a significant amount of unpriced, bundled supply. Accordingly, there are real limits to what investment managers can achieve in relation to some of the issues which follow. The proposals cover:

a) Budget-setting;
b) Commission generation;
c) Research vote process; and,
d) Conflicts with clients.

Budget-setting

The 'Dear CEO' letter stated that too few of the firms visited adequately controlled spending on research and execution services. A measure of that was whether the investment manager "exercised the same standards of control over these payments that they exercised over payments made from the firms' own resources."

One example of good practice mentioned was where a firm set a maximum spend on research services for any one period and, once these limits were reached, switched commission rates for the brokers concerned to execution-only rates for the remainder of the commission period.

This reflects a central tenet of the current FCA rules that, to the extent possible, decisions over the provider of execution should be separated from the choice as to which research provider is rewarded. The benefit of such a separation is not only to ensure the best suppliers are used for each service but also that the costs of each service can be controlled independently.

The FCA's identification of good practice begs the question of how an investment manager determines at what point to switch (to execution-only), in order to ensure that clients obtain the best value for money from their payments towards research. One obvious risk stemming from the current model is over-consumption (and over-payment connected with over-ordering) of research services, not helped by the relative paucity of restrictions or even feedback mechanisms on the levels of research consumption.

It is a given that trades for which there is no need to purchase research should not in principle be traded at a bundled rate as mentioned in Section 1, but once they have been excluded, as FCA mentions, controls must then be applied to those which carry a research cost. The IMA's view is that it is inappropriate for the aggregate value of research commission generated merely to reflect trading levels in any period, without being constrained by some consideration of the value of the research services charged to clients.

Investment managers should set research budgets.

Although budget-setting could be approached as a purely fiscal exercise, investment managers also need to carefully consider how they consume research services, taking into account a number of issues.

Investment managers should employ a process to set an amount of research credits that they expect to generate. That 'research budget' can vary on the basis of a number of factors and is, due to inherent shortcomings in the structure and transparency of the market, challenging to determine and control.

How to incorporate a mix of forward- and backward-looking considerations

It is important to consider the parties likely to be paid from the budget. Some, commonly independent research providers, will provide services for a fixed price (including subscriptions), facilitating budget-setting. Others will be paid either through bundled execution or under a CSA.

An *ex ante* determination of expected consumption can, in combination with regular feedback, help managers to identify balanced research budgets.

Budgets should reflect the expected benefits to clients; in other words, the production of a budget can be thought of as part of treating customers fairly.

Robust methodologies will help to guard against any concerns (even if unjustified) that the individuals at investment managers might want to reward full- service brokers for the provision of other services, such as for execution and non-research services. Amongst these are the fears of intangible risks such as not being provided with IPO allocations from other parts of a full-service broker. (It is outside the scope of this paper but the market would benefit from greater clarity as to the responsibilities of all parties on this issue.)

Review and control

Appropriate budget periods should be agreed and reviewed at regular intervals

Although the FCA recommendations on research consumption refer to oversight, one area of budget-setting relates to the manner in which payment is made. The FCA refers to switching from a full-service rate to an execution-only rate, when a maximum spend is reached. This could introduce a new form of conflict of interest, between clients whose transactions are executed before the switch to execution-only and after. It might be argued that the impact of switching is such that, for specific clients, it will even out, as trading could be sufficiently spread across any period. Analysis of trade data could help establish or disprove this, but there may be better ways to achieve budget discipline.

Firstly, by considering how quickly any maximum is reached in a period, bundled rates could be altered for trades in future periods, so as to try to match better the end of the period with when the cap is reached. Another response, seen at some investment managers, is to blend the trades between bundled rates and execution only, so as to reach the maximum more smoothly and avoid cliff edge effects with a sudden switch. Adopting smaller budgetary periods can help mitigate the effects of uneven trading across clients. This does not entirely obviate some clients having a different treatment to others but it may randomise distribution of impacts. The blended approach may, of course, demand technology spend.

Any budget-setting cannot be made in isolation from an investment manager's experience of how research votes allocate value to specific research providers. A budget will impose limits on what previously would have been paid out using the percentage payment model (whereby the research vote determines percentage allocations from a whole pool for research payments). A budget may, of course, also impact situations where the research vote has previously determined an absolute monetary amount.

Whenever any combination of budget and research vote means there is a residual balance of dealing commission left at a broker at the end of any period, investment managers will wish to consider whether they can recapture any balance for the benefit of clients or whether it is better to leave it for use it in a future period.

Disclosure

Clients may expect to be provided with a description of the factors which have been considered at any investment manager in aligning their budget methodologies with those clients' best interests.

As mentioned earlier (see Executive Summary), the IMA will now review the Disclosure Codes which it promulgates.

Paucity of data points

There are relatively few external data points which can be used by investment managers to determine an appropriate budget. This reflects the challenges which arise from the blind auction process, which dominates price setting in this market.

There are market initiatives to provide benchmarking. In the meantime, however, in comparison with the vast amount of data available to allow investment managers to analyse and compare the cost of execution services across a variety of providers and execution venues, the absence of data about research costs is particularly stark.

The IMA will work with its members to identify any potential wider industry initiatives in this area that would be beneficial.

Commission generation

Given the amount of research-oriented dealing commissions which may be generated in any period, investment managers need to ensure measures are in place in order to direct and account for them appropriately and without unnecessary delay.

Oversight

The IMA recommends investment management firms have clear reporting lines and oversight, with escalation processes and management information, in relation to both the generation and allocation of research spend. To the extent they have not already done so, investment managers should consider whether to form a research oversight committee.

Any research oversight committee that does operate can helpfully be informed, but not chaired by, individual portfolio managers. A member of the compliance department should have clear responsibility to consider the commission generation and expenditure process.

It is important that investment management firms properly oversee the process of research-commission generation, even if they outsource that process to external administrators or research providers.

Investment managers will consider what management information is needed, both for any oversight committee and more widely. The IMA is open to consider with its members whether to provide examples of appropriate oversight models.

Reconciliation

Reconciliation is essential, particularly where CSAs are used

As part of the control function, it is essential to have reconciliation of a) the amounts actually held, for later allocation, with b) records of what should be held. Whether bundled at one provider or operated through one or more CSAs, the balances held need to be reconciled with the trades which generated them on a periodic basis. Investment managers will want to ensure that when payments are made, and these are commonly in batches from CSAs, there is a proper reconciliation with escalation, as might occur for bank balances held by the investment manager.

Of course, the amount and time of a trade is already checked through the need to match trades for settlement purposes.

Documentation

IMA recommends fully documenting any CSAs

Consideration should be given to provisions relating to:

- Who is authorised at the investment manager to direct payments;
- Reporting obligations and standards, including breach and error notifications;
- Dispute resolution clauses;
- Key embedded risks such as foreign exchange rates and responsibilities;
- Clarity as to the existence of credit risk (on which we expand below);
- The timeliness of payments; and,
- Clarity about unused balances.

As mentioned in Section 2, the IMA will consider whether it would be appropriate and beneficial to develop model CSA clauses or a model framework agreement.

Credit risk

Balances at research providers introduce a form of counterparty risk. Formulations such as stating that a broker holds money as client money need to be underpinned by robust legal analysis. CSA balances are not automatically client money and, in order for them to qualify for treatment as such, one requires careful analysis in the context of the FCA's client money rules (with accompanying regulatory guidance) before adoption of such an approach.

Good practice would naturally include checking the creditworthiness of the brokers concerned at appropriate intervals.

The IMA recognises the impact that applying the current FCA rules on client money would have, in terms of cost, administration and risk, and this is an area in which the IMA will carry out further work. The FCA may have the power to impose some form of statutory trust on CSA pools, albeit with a more tailored, simpler regime than for traditional client money. If the IMA's further work supports this, the IMA would then ask the FCA to examine the benefits, costs and proportionality of this.

Timely usage

Expenditure, reporting and escalation procedures at the investment manager can ensure that balances are not allowed to build up beyond approved parameters

An investment manager might determine that it is prudent to direct expenditure frequently. (This will, of course, go a long way towards mitigating the credit risk discussed above.) Procedures should address any residual balances, particularly when those balances are left in place to the next period.

CSAs should address this possibility and also whose responsibility it is to identify unused balances

Research vote process

As part of the good practice mentioned in the 'Dear CEO' letter, one firm gave careful consideration as to which services represented valuable inputs to its investment process and challenged brokers about why it should pay for other services.

Certain principles, which reflect the fiduciary nature of discretionary portfolio management, are relevant to the research-vote process. In addition to the duty of investment managers to justify the use of client money as rigorously as the use of their own, one can identify the following:

The method of determining how research providers are rewarded should be aligned with the interests of the investment manager's clients

Monetary budgets should be set at an appropriately granular level, depending upon the nature of the investment process and internal arrangements of the investment manager. For some, a firm-level approach will be adequate; for others, matching budgets and their usage to teams of individual portfolio managers will be more suitable. But there should also be independent review and internal consistency checks, commensurate with the size and nature of the investment manager and its business. The ultimate goal here, of course, remains accountability to customers.

Robust governance models include several 'lines of defence'

In areas of expenditure outside external research, governance would conventionally involve a prior-year budget process, intra-year controls, management information, financial officer oversight, and end-of- year audit. These are expected minima in order to demonstrate stewardship and accountability in the interest of a key stakeholder group – the shareholders.

It is not suggested that these controls be replicated in their entirety for dealing commission. The focus is rather on a control-side dominated oversight process for the entire commission budget, with escalation of management information. For example, control may lie with an independent oversight committee (just as remuneration might be) but a Board might receive reports on research commission spend if similar-sized spend from their balance sheet would be flagged within other reports the Board receives.

Some managers, use a rolling average of expenditure to assist with this, as trading peaks and troughs unrelated to stock selection (for example, driven by large inflows from customers) can distort the numbers over the shorter term.

Embrace wholly qualitative evaluations appropriately

An individual portfolio manager's opinion as to what research was valuable will always be needed. This will also support evaluations as to how well ideas are tailored to any individual's needs. Appropriate internal challenge and internal consistency checks can guard against excessive reliance on opinion alone.

Ensure the commission distribution is tested against objective factors where practicable

Appropriate records, both in type and volume, should be kept (or accessed from brokers) to provide a sense check as to the reasonableness of the value an investment manager ascribes to the broker concerned. Brokers could be asked to supply records of: access to analysts; the commissioning and delivery of bespoke research; and key pieces of research which appeared to be used. Too small an amount of records will of course make it difficult to form a view but, equally, there is a danger of being swamped in data that cannot then be assimilated.

Services which were not used or did not add value to the investment process cannot (under FCA rules) be provided with any distribution of commission. To make this practicable, sampling could check that the services being provided do meet the definition of substantive research.

Provide feedback to research providers in a form and with a frequency which connects the payment made with the resource valued

Whilst investment managers may allocate votes to research providers and tell them how many votes they obtained, it is often far from clear to the broker what more precisely is being rewarded or how the broker/research provider might alter or improve its service, ultimately to benefit the investment manager's clients. The frequency of providing such feedback to research providers should be measured so as to strike an appropriate balance, keeping research services relevant and additive without encouraging views and analysis that are short-termist.

Conflicts with clients

As part of further response to the November 2012 'Dear CEO' letter, this Appendix provides a checklist of conflicts of interest which may arise under various arrangements for paying for research with dealing commission. The checklist is provided to assist i) any internal review and ii) consideration of appropriate client disclosures. The IMA will do further work on this with its members, identifying best practice.

Potential conflicts

Are there different impacts on clients dependent upon their size?

It is likely that large clients will have larger trades than small clients. Under the current system, research contributions are correlated to values traded, so larger clients may in practice contribute more towards the research spend than smaller clients.

Are there impacts from switching to execution- only rates when a budget limit is reached?

If a firm trades bundled until the budget is hit and then it trades execution-only, there could be a conflict between clients who trade in the period before the budget target is reached and those who trade afterwards. Even if a firm uses a blended approach, there can be different treatments for different clients.

Does it matter if budget setting is forward- or backward-looking?

Leaving aside valuation issues, there is an open question as to the nature of conflicts (if any) that arise, if research spending is committed on a forward- looking basis, as compared to a backward-looking basis.

Are clients differentially affected by differing research appetites?

Conflicts arise where the clients whose trading generates the research credits are not the same identical clients as those for whose benefit the research is consumed.

An example is where different clients are looked after by different teams, so that one team in a firm may generate more trading but another team may gain greater consumption of, and benefit from, the research.

Also where different trading strategies generate different commissions this can lead to unequal cost sharing between clients.

Are clients impacted where trades occur on an international basis?

Is the research credit able to be spent by the geographic area where the trade was executed or by the area, if different, where the portfolio manager is located? Do firms reallocate overseas research credits to the UK manager?

Are clients impacted by the use of commission outside equity teams?

Research may be used by teams that are not involved in equity asset classes, most commonly fixed income; is this unproblematic, so long as the other team(s) who consume research have no impact on either i) whether research is purchased (by the equity team); or ii) the value at which it is purchased?

How should firms deal with international trades, which may come bundled with a service that is allowed in the country of execution but is ineligible as substantive research in the UK?

This is a profoundly difficult issue. Narrowly, it may depend upon the extent to which the FCA's rules apply; but translating that into a global business is testing many investment managers, especially as the FCA may take a purposive approach to its rules. The use-of-dealing-commission rules appear not to envisage a process to rebate any cost which could be attributed to the ineligible service.

<ESMA_QUESTION_79>

Q80: Do you agree with the proposed approach for the disclosure of monetary and non-monetary benefits, in relation to investment services other than portfolio management and advice on an independent basis?

<ESMA_QUESTION_80>
Yes.
<ESMA_QUESTION_80>

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

<ESMA_QUESTION_81>
We believe that the items included in the non-exhaustive list are potentially so restrictive as to make the intention of MiFID II, that inducements should be permitted for non-independent advice, unachievable. We note that this particular area has led to significant concern (not least at the open hearing) and we hope that ESMA will reconsider its draft guidance here so as to properly reflect MiFID II and so that items 10 and 11 of its draft technical advice are less capable of being misinterpreted.
<ESMA_QUESTION_81>

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

<ESMA_QUESTION_82>
See our response to Q79.
<ESMA_QUESTION_82>

2.16. Investment advice on independent basis

Q83: Do you agree with the approach proposed in the technical advice above in order to ensure investment firm's compliance with the obligation to assess a sufficient range of financial instruments available on the market? If not, please explain your reasons and provide for alternative or additional criteria.

<ESMA_QUESTION_83>
Yes. However, we wish to make a point on timing. The experience in the UK of moving to an independent/non-independent model, with commission/retrocession bans, is that this is a complex process for the entire distribution chain to adapt to. In the UK, the Retail Distribution Review regime was rolled out over an extended period, to give all parties sufficient time to plan and implement necessary structural arrangements. We urge ESMA to take these issues into account and to make recommendations for sensible transitional arrangements in order to ensure that new MiFID II regulations are implemented successfully.
<ESMA_QUESTION_83>

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

<ESMA_QUESTION_84>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_84>

Q85: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.

<ESMA_QUESTION_85>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_85>

2.17. Suitability

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

<ESMA_QUESTION_86>
Yes. However, we think the test in point 1.v, that firms should be reasonably able to demonstrate that the benefits of switching are greater than the costs, would be better structured as a requirement to be able to demonstrate a rationale for switching, including how the benefits of switching are greater than the costs where this is possible. Quantifying benefits is very difficult as it involves assumptions about future performance. Similarly, the 'benefits' may be attributable to aligning the portfolio with a client's investment objectives, which cannot be readily quantified. It is also not clear what the term 'switch' includes, for example does it only cover a sale transaction followed by a buy transaction carried out on the same day, or over a longer period?
<ESMA_QUESTION_86>

Q87: Are there any other areas where MiFID Implementing Directive requirements covering the suitability assessment should be updated, improved or revised based on your experiences under MiFID since it was originally implemented?

<ESMA_QUESTION_87>
No.
<ESMA_QUESTION_87>

Q88: What is your view on the proposals for the content of suitability reports? Are there additional details or requirements you believe should be included, especially to ensure suitability reports are sufficiently 'personalised' to have added value for the client, drawing on any initiatives in national markets?

<ESMA_QUESTION_88>
We think the proposals are appropriate and sufficient.
<ESMA_QUESTION_88>

Q89: Do you agree that periodic suitability reports would only need to cover any changes in the instruments and/or circumstances of the client rather than repeating information which is unchanged from the first suitability report?

<ESMA_QUESTION_89>
Yes.
<ESMA_QUESTION_89>

2.18. Appropriateness

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

<ESMA_QUESTION_90>
We agree that the existing criteria of Article 38 of the Implementing Directive should be expanded as proposed.

However, we suggest that ESMA has misinterpreted Article 25(4)(a) in an important respect that could have considerable cost implications for firms and narrow the availability of retail products without any benefit to retail consumers. We disagree that the article requires that some types of financial instruments should not be considered non-complex. Rather, it defines some types of instrument as automatically non-complex, with others to be judged on their merit against the further (enhanced) tests. It is therefore wrong, for example, to say that all non-UCITS collective investment undertakings are complex, which would in any case represent an irrational policy, given that many non-UCITS funds are in fact less complex than many UCITS. Other non-UCITS collective investments, such as listed investment funds, may be similarly adversely affected.

In its technical advice to the Commission in 2010[3] and its feedback statement[4] CESR stated in both executive summaries that there was a need to provide a more graduated and risk-based approach to the distinction between complex and non-complex products. We agree.

The technical advice provided to the Commission on page 25 mirrors the wording now contained in MIFID II. The commentary to the proposed wording gives a clear statement on what the wording should mean

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stating, at paragraph 121, "CESR believes the shares in a non-UCITS undertaking should therefore be assessed against the Article 38 [MIFID Level 2 Implementing Directive] criteria…."

The feedback statement goes on to state: "Shares in non-UCITS collective investment undertakings are clearly of a different nature to shares in companies and they also stand outside the regulatory framework of UCITS. It is therefore appropriate that the criteria in the MIFID Level 2 Directive should be used to determine whether or not they are complex or non-complex".

The Commission accepted that advice and in its consultation paper in advance of the proposal[5] offered two options on how to proceed. Option A states the following (Option B suggested deletion of the relevant Article):

> "a) Amending the reference to "shares" in Article 19(6) in the framework directive in order to clarify these shares may be treated as automatically non-complex are shares admitted to trading on a regulated market or MTF or on an equivalent third country market, where these are shares in companies, and excluding shares in collective investment undertakings, convertible shares and other shares that embed a derivative"

Finally the Commission proposal[6] adopted the wording from the CESR technical advice and this wording now appears in MIFID II.

In conclusion we would argue that ESMA's analysis of the wording of Article 25(4)(a) has failed to take into consideration the legislative intent and that the correct interpretation of the MIFID II wording is that the exclusion of non-UCITS collective undertakings from the reference of shares in Article 25(4)(a)(i) is merely to identify them as not **automatically** non-complex. As the CESR advice proposed, the further tests should then be applied to such undertakings to consider if they are able to be non-complex instruments.

To interpret Article 24(4)(a) in the way ESMA proposes would be a very significant change, as was made clear by a number of attendees at the ESMA open hearing. For example, in the UK the FCA has developed a regime for non-UCITS retail schemes (NURS), most of which are considered non-complex and so able to be sold, execution only, on fund platforms in the UK. To require fund platforms to introduce appropriateness tests in order to continue to sell such products would result in those platforms facing additional costs associated with IT development which they might not be prepared to meet, meaning a need to convert such funds into UCITS funds. Given that the value of NURS funds in the UK as at May 2014 was c. £125 billion (one sixth the value of UK-domiciled UCITS), this could be a hugely expensive exercise.

Neither does there appear to be any benefit to the proposal since it will reduce choice on self-selected platforms. ESMA would appear to consider there is a high risk of mis-buying such products (hence the benefit will be to avoid potential consumer detriment at some point in the future). But the analysis fails to take into consideration the proposed technical advice to the Commission on product governance and the increased duties on both product manufacturer and distributor, particularly those relating to identifying the target market and the type of client whose needs, characteristics and objectives the product is compatible with. These additional duties should mitigate the potential risk of mis-buying.

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Although the final conditions for sales of ELTIFs have not yet been finalised, we recommend a generic comment saying that the appropriateness test may need to reflect the final outcome of the ELTIF negotiations.

[[3] European Commission Consultation on the review of the Markets in Financial Instrument Directive 8/12/2010
[4] 2011/0298 (COD) Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (20/10/2011)

[5] European Commission Consultation on the review of the Markets in Financial Instrument Directive 8/12/2010
[6] 2011/0298 (COD) Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (20/10/2011)]
<ESMA_QUESTION_90>

Q91: Are there any other areas where the MiFID Implementing Directive requirements covering the appropriateness assessment and conditions for an instrument to be considered non-complex should be updated, improved or revised based on your experiences under MiFID I?

<ESMA_QUESTION_91>
No.
<ESMA_QUESTION_91>

2.19. Client agreement

Q92: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement with their professional clients, at least for certain services? If yes, in which circumstances? If no, please state your reason.

<ESMA_QUESTION_92>
No, professional firms are able to negotiate the nature of any agreement with an investment firm and there is no evidence that this needs to be buttressed by further regulation.
<ESMA_QUESTION_92>

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

<ESMA_QUESTION_93>
Yes.
<ESMA_QUESTION_93>

Q94: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement for the provision of custody services (safekeeping of financial instruments) to any client? If not, why not?

<ESMA_QUESTION_94>
Yes.
<ESMA_QUESTION_94>

Q95: Do you agree that investment firms should be required to describe in the client agreement any advice services, portfolio management services and custody services to be provided? If not, why not?

<ESMA_QUESTION_95>
Yes.
<ESMA_QUESTION_95>

2.20. Reporting to clients

Q96: Do you agree that the content of reports for professional clients, both for portfolio management and execution of orders, should be aligned to the content applicable for retail clients?

<ESMA_QUESTION_96>
In general, we do not believe the content of reports for professional clients should be prescribed. Professional clients are more sophisticated than retail clients, for example, they may be investment firms authorised to operate in the financial markets or organisations with large balance sheets and turnovers. In many cases the format of the reports presented to professional clients are tailored to meet their specific requirements, e.g. reflecting the requirements of segregated mandates. However, there is a need for prescription in cases where certain information may be required by professional clients in order to enable them to fulfil their own regulatory responsibilities. This will be the case, for example, when a broker executes a transaction on a trading venue as agent for another firm, such as a portfolio management firm, in which case the broker should be required to inform the other firm of the venue in order that it can report the transaction properly under MiFIR Article 26. We recommend that the technical guidance be amended to require reporting only of technical data that another firm would need to meet its regulatory obligations.
<ESMA_QUESTION_96>

Q97: Should investment firms providing portfolio management or operating a retail client account that includes leveraged financial instruments or other contingent liability transactions be required to agree on a threshold with retail clients that should at least be equal to 10% (and relevant multiples) of the initial investments (or the value of the investment at the beginning of each year)?

<ESMA_QUESTION_97>
We do not believe it is appropriate to require portfolio managers to agree a threshold with retail clients that would trigger an obligation to produce a report. Portfolio managers have an obligation to ensure a client's portfolio is suitable and clients will receive periodic reports and we believe this is sufficient.
<ESMA_QUESTION_97>

Q98: Do you agree that Article 43 of the MiFID Implementing Directive should be updated to specify that the content of statements is to include the market or estimated value of the financial instruments included in the statement with a clear indication of the fact that the absence of a market price is likely to be indicative of a lack of liquidity?

<ESMA_QUESTION_98>

We agree that the basis of valuations used in the report should be clear to the client. However, it is not always the case that an indicative price means a lack of liquidity, for example, a share may be suspended for a short time on a regulated market due to a corporate action.
<ESMA_QUESTION_98>

Q99: Do you consider that it would be beneficial to clients to not only provide details of those financial instruments that are subject to TTCA at the point in time of the statement, but also details of those financial instruments that have been subject to TTCA during the reporting period?

<ESMA_QUESTION_99>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_99>

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

<ESMA_QUESTION_100>
Many retail clients already object to the volume of paperwork they receive from their investment firm and would not wish to receive quarterly statements, the cost of which would fall to them eventually.
<ESMA_QUESTION_100>

2.21. Best execution

Q101: Do you have any additional suggestions to provide clarity of the best execution obligations in MiFID II captured in this section or to further ESMA's objective of facilitating clear disclosures to clients?

<ESMA_QUESTION_101>
We welcome ESMA's statement that MiFID 2 does not require major changes to the existing best execution regime.

There needs to be better clarity on when firms are executing transactions, and when they are transmitting or placing orders with other entities for execution.

The ESMA paper refers to three types of policy to be produced by different firms

Policy type	Firm type
Execution policies	The entity that ultimately executes the client's order
RTO policies	RTO firm
Placing policies	Portfolio manager

The MiFID Implementing Directive clarifies that the best execution provisions are not intended to apply to a firm that transmits or places orders with other entities for execution. Rather, such a firm should determine that the entities it uses will enable it to comply with the overarching best execution requirement when placing an order with, or transmitting an order to another entity for execution. RTO firms and portfolio managers are required to implement an appropriate policy and to monitor and review its effectiveness including the execution quality actually delivered by the entities they choose.

Member firms will have to look to the activities they engage in to determine which types of policy they will need to produce and disclose to clients.

The wording of the Draft Technical Advice seems ambiguous at times as regards the policy to be produced and the appropriate information about the policy to be provided to clients. For example paragraph 9 requires clear information on permitted third party payments to be set out in the policy, and implies that this is so that the client is aware of this. Paragraph 12 states that information on fees charged by execution venue should be in the policy, so that this information is provided to clients. Just because the information is in the policy does not mean that it would be in the information about the policy disclosed to clients.

The level of detail required to be disclosed by firms transmitting or placing orders that may be executed outside an RM, MTF or OTF may be unworkable for larger firms. Large portfolio management firms may have over 100 approved counterparties, so providing relevant information on the execution policies of each of these entities in each category of financial instrument would lead to an enormous administrative and cost burden. Some of these entities will not be in the EU, so will not be subject to the same requirements to provide information on their execution policies. Also brokers are sometimes added on a temporary basis when they are the only source of liquidity. Putting such an onerous disclosure requirement on firms could result in firms trying to reduce the counterparties used, which would run counter to the firm seeking out the best possible price in the entire market.

It is unclear what elements under 'Detail of execution policies' need to be disclosed to clients. It should be clear that ESMA does not require a full list of entities that might be used but the ones on which the firm places significant reliance.

In paragraph 9 of the draft technical advice it should be clear that firms need not provide "figures" but rather a general statement of the nature of the third party payments received / benefits received and how they enhance the quality of the execution services.
<ESMA_QUESTION_101>

Q102: Do your policies and your review procedures already the details proposed in this chapter? If they do not, what would be the implementation and recurring cost of modifying them and distributing the revised policies to your existing clients? Where possible please provide examples of the costs involved.

<ESMA_QUESTION_102>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_102>

2.22. Client order-handling

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

<ESMA_QUESTION_103>
We are not aware of any changes to the MiFID I Implementing Directive that are required.
<ESMA_QUESTION_103>

2.23. Transactions executed with eligible counterparties

Q104: Do you agree with the proposal not to allow undertakings classified as professional clients on request to be recognised as eligible counterparties?

<ESMA_QUESTION_104>
This is not applicable to IMA members as portfolio managers.
<ESMA_QUESTION_104>

Q105: For investment firms responding to this consultation, how many clients have you already classified as eligible counterparties using the following approaches under Article 50 of the MiFID Implementing Directive:

<ESMA_QUESTION_105>
As portfolio managers IMA members cannot categorise clients as ECPs
<ESMA_QUESTION_105>

Q106: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements?

<ESMA_QUESTION_106>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_106>

Product intervention

Q107: Do you agree with the criteria proposed?

<ESMA_QUESTION_107>
We broadly agree.
<ESMA_QUESTION_107>

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

<ESMA_QUESTION_108>
No.
<ESMA_QUESTION_108>

3. Transparency

3.1. Liquid market for equity and equity-like instruments

Q109: Do you agree with the liquidity thresholds ESMA proposes for equities? Would you calibrate the thresholds differently? Please provide reasons for your answers.

<ESMA_QUESTION_109>
We support ESMA's proposals in principle however we are particularly concerned about the reduction of the free-float threshold from EUR500 million to EUR 100 million. EUR 250 million would be more appropriate.

A free float of EUR 250 million represents a reduction of 50% from the requirements in MiFID I. ESMA should set an appropriate calibration for liquid shares such that asset managers are still able to trade larger blocks without undue price detriment to their underlying clients. Asset Managers have an obligation to provide best execution to their clients, a very wide definition of liquid shares will impact their ability to provide that.
<ESMA_QUESTION_109>

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

<ESMA_QUESTION_110>
Yes, we agree with ESMA's approach. The premium or discount at which a Depositary Receipt (DR) trades to its underlying shares is largely determined by the liquidity and costs of trading in the national market.

Where creation and cancellation of DRs is on-going and freely available, the free float of DRs should be linked to the free float in the national market.

However, foreign ownership limits in some jurisdictions may prevent the creation or issuance of new DRs, and this influences the liquidity threshold of DRs based on free float alone.
<ESMA_QUESTION_110>

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

<ESMA_QUESTION_111>
Yes we support the proposal for DRs at the same level as for shares.
<ESMA_QUESTION_111>

Q112: Do you agree with the liquidity thresholds ESMA proposes for depositary receipts? Would you calibrate the thresholds differently? Please provide reasons for your answers.

<ESMA_QUESTION_112>
We do not agree with ESMA's approach. We believe that the liquidity threshold set by ESMA for DRs should be the same as for equities.
<ESMA_QUESTION_112>

Q113: Do you agree that the criterion of free float could be addressed through the number of units issued for trading? If yes, what *de minimis* number of units would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.

<ESMA_QUESTION_113>
While the criteria to determine free float could be addressed through the number of shares issued for trading, we believe using the free float to determine liquidity is not an appropriate measure.
<ESMA_QUESTION_113>

Q114: Based on your experience, do you agree with the preliminary results related to the trading patterns of ETFs? Please provide reasons for your answer.

<ESMA_QUESTION_114>
No, we do not agree.

In Europe, trade size on exchange has steadily fallen since MIFID I. Therefore, using the trade data from the stock exchanges to determine what a "large" ETF trade is likely to lead to the majority of ETF trades being un-reported and undermining the value of trade data.

We would instead recommend that ESMA bases recommendations on the broader set of data related to ETF trading:

- Visible "on screen" depth – or the liquidity that is traded visibly on exchange. This is one element of secondary market liquidity. In Europe, not all ETF transactions are reported, so visible liquidity is understated, unlike the US.
- Reserve or contingent liquidity may be provided through market makers.
- The "true" liquidity of an ETF may be limited by the underlying basket liquidity, especially in bonds baskets.

<ESMA_QUESTION_114>

Q115: Do you agree with the liquidity thresholds ESMA proposes for ETFs? Would you calibrate the thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).

<ESMA_QUESTION_115>
No, we do not agree with ESMA's proposed definition of liquidity for ETF.

The use of reported ADV (Average Daily Volume) is not appropriate since the major share of ETF liquidity is currently not being reported hence ETFs are able to support far larger transactions than the ADV would indicate.

Liquidity in the ETF is also driven by the liquidity of the underlying instruments. Due to the open-end nature of ETFs, this liquidity can be accessed through the "Creation & Redemption" process, adding to the intrinsic liquidity of the ETF.

The liquidity thresholds proposed for ETFs should also take into account the liquidity of the underlying basket. While this might be difficult to implement for some exposures (notably in the Fixed Income space), we suggest below a possible way to measure liquidity for equity baskets:

Liquidity thresholds for ETFs levels

ETFs	Free Float (Number of units issued for trading)	Average daily number of transactions	Average daily turnover
	100	20	500,000

Or (for Equity ETFs)

Underlying basket of stocks for Equity ETFs	Free Float	Average daily number of transactions	Average daily turnover
	EUR 100,000,000	250	EUR 1,000,000

Our preference would also be to report all trades in real time, aligning with US market structure.
<ESMA_QUESTION_115>

Q116: Can you identify any additional instruments that could be caught by the definition of certificates under Article 2(1)(27) of MiFIR?

<ESMA_QUESTION_116>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_116>

Q117: Based on your experience, do you agree with the preliminary results related to the trading patterns of certificates? Please provide reasons for your answer.

<ESMA_QUESTION_117>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_117>

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

<ESMA_QUESTION_118>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_118>

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

<ESMA_QUESTION_119>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_119>

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

<ESMA_QUESTION_120>
No, our members consider that discretion to specify additional instruments is unhelpful. The IMA prefer a consistent application of rules across all Member States based on objective and quantative criteria.
<ESMA_QUESTION_120>

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

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

<ESMA_QUESTION_121>
Definition that deviates from the definition in the Eligible Assets Directive

ESMA proposes to deviate from the definition of money market instrument provided in the Eligible Assets Directive. The reasoning that ESMA gives is that the purpose of the MiFID regulation is different from that of the Eligible Assets Directive.

Notably, the European Commission's proposal on Money Market Funds 'MMFs' (published September 2013) is currently under negotiation. The Directive will define what constitutes a money market instrument (i.e. an instrument that is typically traded by a money market fund). We strongly recommend that the definition of money market instrument in the context of MiFID is aligned with the final text in the MMF Directive.

Unlike the definition proposed by ESMA, the Eligible Assets Directive and the European Commission's Money Market Fund Directive proposal also considers the following instruments as money market instruments: (i) financial instruments that have a residual maturity of up to and including 397 days; (ii) financial instruments that undergo regular yield adjustments in line with money market conditions at least every 397 days; and (iii) financial instruments with risk profiles, including credit and interest rate risks, corresponds to that of financial instruments that have maturity as reference in (i) or 397 days or less from issuance or are subject to yield adjustments as in (ii).

Further, there have been discussions in the co-legislative process of the Money Market Directive of extending the period of residual maturity of a typical money market instrument from 397 days to 2 years.

We recommend that MiFID Delegated Acts adopt a definition that includes:

- Instruments with short residual maturities
- Short maturities from issuance

The issuance/residual maturity period should be set at 2 years rather than 397 days.

Reasons for including instruments with short residual maturities

- ***They are typically traded by MMFs***

In practice, desks that trade commercial paper and T-bills are the desks that also trade instruments with residual maturities of less than 397 days.

- ***They are similar to instruments with short maturities from issuance:***

Setting the right definition for money market instruments is of vital importance. The European

Commission has recognised (in its September 2013 proposal) that MMFs are an "*important source of short-term financing for financial institutions, corporate bodies and governments. For example, almost 40% of short-term debt issued by the banking sector is held by MMFs. MMFs represent a crucial link bringing together demand and offer for short-term money. With total assets under management of roughly EUR 1 trillion, MMFs represent around 15% of the European fund industry*".

ABCP

We disagree that ABCPs should be categorised as structured finance products rather than money market instruments. We recommend that they should be treated as money market instruments. The reasoning that ESMA has provided is that ABCPs are both structured finance products and money market instruments and as such should be treated as structured finance products. If the same logic is applied to commercial paper, which ESMA has deemed a money market instrument, commercial paper should be considered like any other bond because the only difference is that it has a very short term. Therefore, the reasoning is inappropriate. The only difference between a CP and an ABCP is that the cash flows of an ABCP are derived from an underlying pool of assets.

The European Commission in its Money Market proposal, suggests that the definition of 'money market instrument' encompasses certain types of securitisation.

Proposal:

1. Financial instruments that are categorised as money-market instruments and are therefore outside the scope of the non-equity regime of MiFIR are limited to those instruments expressly stated to be treasury bills, certificates of deposit, commercial paper and other instruments with equivalent features and have one of the following characteristics:

i. they have a maturity at issuance of 2 years or less and their value can be determined at any time on either an amortised cost basis or in reference to the short term yield curve for the currency of the instrument; or
ii. they have a residual maturity of up to an including 2 years and their value can be determined at any time on either an amortised cost basis or in reference to the short term yield curve for the currency of the instrument; or
iii. financial instruments that undergo regular yield adjustments in line with money market conditions at least every 2 years; or
iv. financial instruments with risk profiles, including credit and interest rate risks, corresponding to that of financial instruments that have a maturity of 2 years or less from issuance or a residual maturity of 2 years or less or are subject to yield adjustments as in line with money market conditions at least every 2 years

2. Asset back commercial paper should be classified as a money market instrument for the purposes of MiFIR

<ESMA_QUESTION_121>

3.3. The definition of systematic internaliser

Q122: For the systematic and frequent criterion, ESMA proposes setting the percentage for the calculation between 0.25% and 0.5%. Within this range, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications.

<ESMA_QUESTION_122>
The systematic internaliser requirements are new to fixed income markets. 'Systematic internalisers' in instruments where there is a liquid market must publish quotes they provide to clients, and make those quotes available, subject to stated criteria and limits, to other clients. They must enter into transactions under the published conditions where the quote is below the 'size specific to the instrument' used for pre-trade transparency waivers.

It will be important to apply the systematic internaliser rules to fixed income markets in a way that recognises the limited liquidity in many instruments. As well taking account of the exclusion for illiquid instruments, it will be important to give full weight to the specified ability of systematic internalisers to update and withdraw quotes; to decide objectively which clients are to have trading access to them; to refuse transactions on commercial considerations; to set limits on the number of transactions entered into in relation to a particular quote; and to improve on the quote.

We consider that the appropriate level for this criteria is 0.4 per cent.
<ESMA_QUESTION_122>

Q123: Do you support calibrating the threshold for the systematic and frequent criterion on the liquidity of the financial instrument as measured by the number of daily transactions?

<ESMA_QUESTION_123>
Yes, frequent as a term is clear, and it is logical that frequency would be measured in this way.
<ESMA_QUESTION_123>

Q124: For the substantial criterion, ESMA proposes setting the percentage for the calculation between 15% and 25% of the total turnover in that financial instrument executed by the investment firm on own account or on behalf of clients and between 0.25% and 0.5% of the total turnover in that financial instrument in the Union. Within these ranges, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the thresholds should be set at levels outside these ranges, please specify at what levels these should be with justifications.

<ESMA_QUESTION_124>
We consider that 20% is the appropriate level within the range of total turnover of the investment firm, and 0.4% is the appropriate level within the range of total turnover in the Union where the calculations should be set.
<ESMA_QUESTION_124>

Q125: Do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of shares traded? Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.

<ESMA_QUESTION_125>

IMA supports these definitions.
<ESMA_QUESTION_125>

Q126: ESMA has calibrated the initial thresholds proposed based on systematic internaliser activity in shares. Do you consider those thresholds adequate for:

<ESMA_QUESTION_126>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_126>

Q127: Do you consider a quarterly assessment of systematic internaliser activity as adequate? If not, which assessment period would you propose? Do you consider that one month provides sufficient time for investment firms to establish all the necessary arrangements in order to comply with the systematic internaliser regime?

<ESMA_QUESTION_127>
The frequency of assessment should take into account the burden that re-assessment would place, not just on those firms who are required to consider whether they meet the definition of a Systematic Internaliser (S.I.), but also on market participants who want to understand whether a transaction with a particular counterparty would be subject to the S.I. transparency requirements. We note that at this point, there is a lack of clarity as to how market participants would be informed of an investment firm's status as an S.I. for any particular instrument or class of instruments.
The frequency with which the S.I. assessment is conducted will have an impact on the ability for accurate and up to date information to be maintained, and we would therefore urge ESMA to consider this when designing the S.I. assessment regime.
<ESMA_QUESTION_127>

Q128: For the systematic and frequent criterion, do you agree that the thresholds should be set per asset class? Please provide reasons for your answer. If you consider the thresholds should be set at a more granular level (sub-categories) please provide further detail and justification.

<ESMA_QUESTION_128>
We agree with ESMA that there should be different Systematic Internaliser ('SI') thresholds by asset class, namely, bonds, derivatives and emission allowances. We do not believe that a differentiation between the SI bond and SFP thresholds are necessary. For simplicity, this level of granularity is unnecessary. Further, we do not recommend any further levels of granularity for fixed income.

Given that the definition of a systematic internaliser applies at instrument-level, it is essential that the MiFID/R regime does not result in an operationally complex regime, which introduces volatility. The risk of a highly volatile regime would be that investment firms would be an SI in certain instrument one quarter and not an SI in a subsequent quarter – resulting in firms having to constantly change their status and operational systems.

We believe that an investment firm cannot trade an illiquid instrument on a frequent, systematic and substantial basis because there is simply not enough flow to do so. As such, it essential that the thresholds for frequent and systematic and substantial are consistent with the liquidity threshold.

<ESMA_QUESTION_128>

Q129: With regard to the 'substantial basis' criterion, do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of instruments traded. Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.

<ESMA_QUESTION_129>
Substantial basis: volume turnover parameter

We consider that volume turnover should be based on notional volume rather than the turnover based on market value. We believe that this extends to all volume calculations.

Justification:

- Basing turnover thresholds on market value will introduce unnecessary price volatility as a factor into the threshold calculations and thereby introduce uncertainty for market participants.
- The purpose of the substantial basis criterion is to determine whether an investment firm trades in the instrument in a material manner.

Instruments do not trade on a price x volume manner – the size of trades, there thereby volume, is determined on the basis of notional not price.
<ESMA_QUESTION_129>

Q130: Do you agree with ESMA's proposal to apply the systematic internaliser thresholds for bonds and structured finance products at an ISIN code level? If not please provide alternatives and reasons for your answer.

<ESMA_QUESTION_130>
We agree with the ISIN level approach to the determination as to whether a firm is a systematic internaliser.
<ESMA_QUESTION_130>

Q131: For derivatives, do you agree that some aggregation should be established in order to properly apply the systematic internaliser definition? If yes, do you consider that the tables presented in Annex 3.6.1 of the DP could be used as a basis for applying the systematic internaliser thresholds to derivatives products? Please provide reasons, and when necessary alternatives, to your answer.

<ESMA_QUESTION_131>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_131>

Q132: Do you agree with ESMA's proposal to set a threshold for liquid derivatives? Do you consider any scenarios could arise where systematic internalisers would be required to meet pre-trade transparency requirements for liquid derivatives where the trading obligation does not apply?

<ESMA_QUESTION_132>
Yes, we agree with ESMA's proposal to set a threshold for liquid derivatives on the basis that we consider it is likely that FX derivatives will be sufficiently liquid for the pre-trade transparency requirements to apply.
<ESMA_QUESTION_132>

Q133: Do you consider a quarterly assessment by investment firms in respect of their systematic internaliser activity is adequate? If not, what assessment period would you propose?

<ESMA_QUESTION_133>

In our view a quarterly assessment period is too short and is likely to capture seasonal or episodic internalisation which could result in firms falling in and out of the definition of a systematic internaliser. Such a result conflicts with ESMA's desire for legal certainty.
We would suggest that the frequency of the calculation should align with the period for determining whether the ancillary activity exemption applies to a firm In this context ESMA recognises that "it would be unhelpful and impractical for the operation of business if it were possible to fall in and out of regulation due to seasonal patterns of activity" and further that "activity in financial instruments might fluctuate from year to year". We would therefore propose that the calculation to determine whether an entity is an SI be performed on an annual basis using data from a rolling three year period, in the same way that the "ancillary exemption" determination is to be made.
<ESMA_QUESTION_133>

Q134: Within the ranges proposed by ESMA, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications and where possible data to support them.

<ESMA_QUESTION_134>
Frequent and systematic

(i) absolute threshold should be used

We believe that the ratio proposed for the calculation of whether a firm trades an instrument on a frequent and systematic basis is too complex. Further, the threshold of 2-3% would capture up to the top 50 firms trading an instrument, creating a ranking of firms in each instrument that is dynamic.

(ii) align with liquidity OR set at a low level

For illiquid instruments, we believe that an absolute threshold rather than a ratio is a more appropriate measure of frequent and systematic. For example, if an instrument is only traded twice in the whole market in a quarter and one firm undertakes one of those trades, it in effect has executed 50% of all trades in the market. However, undertaking one trade out of two in the whole market cannot be deemed frequent and systematic.

(iii) Thresholds

Substantial basis tests:

i. Absolute threshold

As with the frequent and systematic ratio, we believe the investment firm to market ratio (i.e. total turnover in the instrument by the investment firm / total turnover in the instrument in the whole market) is practically cumbersome, creates dynamic ranking of firms (some firms would be an SI in an instrument one quarter and would not be required to be an SI another quarter) and inappropriate. We believe, an absolute volume turnover threshold would achieve the intended purpose and ensure alignment of the SI requirement with the liquid market threshold. Such an approach would be consistent with the approach taken in the calculation of a liquid instrument, as proposed by ESMA in Section 3.6 of the Discussion Paper. Specifically, the threshold should require an investment firm to be an SI if it trades an instrument at or above an ADT threshold.

ii. Threshold

We believe that the thresholds should generally be set quite low to ensure minimum volatility and complexity of the regime. The opt-in regime is critical for the workability of the systematic internaliser.

iii. Substantial based on level of internalisation

We understand that Article 2(20) MiFID provides that: *"the substantial basis shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in relation to the total trading of the investment firm in a specific financial instrument or by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument".*

However, for fixed income, the total internalised turnover (i.e. total turnover in an instrument by the investment firm / total turnover in all instruments) is an inappropriate threshold because it does not demonstrate that an investment firm trades an instrument on a substantial basis. For example, if a firm trades only in one instrument, then it will meet the threshold of trading on a substantial basis (it is 100% internalised). If the firm then meets the frequent and systematic threshold, it will need to trade the instrument as an SI. In fixed income, there are no standard trade sizes, which means that a firm can trade an instrument very frequently and in small sizes but with a total volume that is not substantial in comparison to the total market turnover. Such a firm should not be considered an SI.

In other words, a small firm that specialises in one instrument (or a small number of instruments), trading the instrument frequently and in small sizes but not in volumes that are substantial compared to the market would be caught by the SI requirement. We question the purpose of including such small firms and believe that it would result in the creation of a significant barrier to entry into the fixed income markets.

Therefore, we recommend that the internalisation threshold is not used for fixed income.

<ESMA_QUESTION_134>

Q135: Do you consider that thresholds should be set as absolute numbers rather than percentages for some specific categories? Please provide reasons for your answer.

<ESMA_QUESTION_135>
For the reasons given above, we recommend that the thresholds should be set as absolute numbers rather than percentages.
<ESMA_QUESTION_135>

Q136: What thresholds would you consider as adequate for the emission allowance market?

<ESMA_QUESTION_136>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_136>

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

Q137: Do you agree with the definition of portfolio trade and of orders subject to conditions other than the current market price? Please give reasons for your answer?

<ESMA_QUESTION_137>
Yes, but ESMA could usefully identify criteria that allows for the evolvement of order types that may fall into this category in future.
<ESMA_QUESTION_137>

3.5. Exceptional market circumstances and conditions for updating quotes

Q138: Do you agree with the list of exceptional circumstances? Please give reasons for your answer. Do you agree with ESMA's view on the conditions for updating the quotes? Please give reasons for your answer.

<ESMA_QUESTION_138>
Exceptional circumstances should include an instrument going into auction on a relevant market and an instrument added to a restricted list.

We agree that an SI which withdraws its quotes should inform the NCA and its clients that it has done so. Active flagging for withdrawal of quotes due to *exceptional circumstances* will discourage withdrawal of liquidity without good reason.

<ESMA_QUESTION_138>

3.6. Orders considerably exceeding the norm

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

<ESMA_QUESTION_139>
Yes, the Systematic Internaliser is best placed to understand its own risk profiles.
<ESMA_QUESTION_139>

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

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

<ESMA_QUESTION_140>

Yes, the drafting is clear in its meaning that any price within the bid and offer spread quoted by the systematic internaliser would fall within a public range close to market conditions.
<ESMA_QUESTION_140>

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

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

<ESMA_QUESTION_141>
We agree with this proposal.
<ESMA_QUESTION_141>

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

<ESMA_QUESTION_142>
We agree with this proposal.
<ESMA_QUESTION_142>

4. Data publication

4.1. Access to systematic internalisers' quotes

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

<ESMA_QUESTION_143>
The IMA agrees with ESMA's proposed definition of regular and continuous publication of quotes.
<ESMA_QUESTION_143>

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

<ESMA_QUESTION_144>
The IMA agrees with ESMA's proposed definition of normal trading hours, subject to the requirement that they are at a minimum, at least equivalent to the main Regulated Market (RM) for that instrument in each Member State.
<ESMA_QUESTION_144>

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

<ESMA_QUESTION_145>
The IMA agrees with ESMA's proposal.
<ESMA_QUESTION_145>

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

<ESMA_QUESTION_146>
The IMA agrees with ESMA's proposal.
<ESMA_QUESTION_146>

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

<ESMA_QUESTION_147>
No, those currently covered are sufficient.
<ESMA_QUESTION_147>

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

<ESMA_QUESTION_148>
The IMA agrees with ESMA's proposal. Given that High Frequency Traders (HFT) are now operating in degrees of microseconds investment firms should, on a best efforts basis, ensure their quotes are available simultaneously on each venue on which they are published.
<ESMA_QUESTION_148>

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

<ESMA_QUESTION_149>

We support ESMA's proposal to ensure use of consistent data standards.

Article 66 requires that data is disseminated in a non-discriminatory way in a format that facilitates the consolidation of the information with similar data from other sources. The IMA considers that this is only achievable through centrally dictated compulsory data standards.

ESMA should mandate standards so as to facilitate the consolidation of data such that they are:

- Comprehensively adopted;
- Consistently applied;
- Cost effectively administered;

by market participants, execution venues and infrastructure providers across the EU market place.
<ESMA_QUESTION_149>

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

<ESMA_QUESTION_150>
We agree with this proposal.
<ESMA_QUESTION_150>

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

<ESMA_QUESTION_151>
We agree with the stated requirements. It will be important to ensure the definition of Reasonable Commercial Basis (RCB) is appropriately calibrated in order to ensure that the publication is genuinely 'easily accessible'. Please see our response to Q154 about what needs to be considered for RCB.
<ESMA_QUESTION_151>

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

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

<ESMA_QUESTION_152>
It is our view that publication of unexecuted orders through a data reporting service or through an investment firm's website would not effectively facilitate execution of client limit orders.
<ESMA_QUESTION_152>

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

<ESMA_QUESTION_153>
The IMA agrees that client limit orders which have not been immediately executed under prevailing market conditions can be considered as being available to the public when they have been sent to a regulated market, multilateral trading facility (MTF) or Organised Trading Facilities (OTF).
<ESMA_QUESTION_153>

4.3. Reasonable commercial basis (RCB)

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

<ESMA_QUESTION_154>
As the Commission states in its mandate to ESMA, the IMA considers that data charges in the EU are too high, particularly in comparison to the US. There is a clear public good argument for regulatory intervention on this issue.

Transparent disclosure by venues of their data pricing will be a valuable addition to constraining the rising costs of data across the EU. This measure will enable our members to compare the relative metrics per venue. Such enhanced transparency will act as a material break on increasing data costs.

To engender enhanced competition, it will be important to isolate the cost of data for each venue. There should not be cross subsidy within venues between the business and data services.

In addition, the IMA supports ESMA's proposition in the draft technical advice that the Commission should review the operation of the definition of reasonable commercial basis three years after its introduction. At that point it would be appropriate to review the outcomes provided by the market and consider whether a usable consolidated data stream has been created.
<ESMA_QUESTION_154>

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

<ESMA_QUESTION_155>
No
<ESMA_QUESTION_155>

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

<ESMA_QUESTION_156>
As outlined in our response to Q154 above, transparency represents a valuable addition to the current landscape. However in isolation from other measures this will not result in the desired reduction in costs. The IMA considers that additional transparency is a necessary but not sufficient condition to tackle excessive market data costs.
<ESMA_QUESTION_156>

Q157: 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>
The IMA considers that this is not the appropriate option. However the *share of revenue that market data services represents* is a useful indicator, when compared across venues. It is our view that this should be added to the list of metrics required to be published by venues on ESMA's website. This would also serve to highlight any outliers.

Those venues where market data services revenue is significantly out of line with their competitors would be forced to explain their model to market participants.

<ESMA_QUESTION_157>

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

<ESMA_QUESTION_158>
As outlined in our response to Q157, each venue should be required to publish the share of revenue that market data services represents on the ESMA website. ESMA should not set a limit, publication of the figures themselves is sufficient.
<ESMA_QUESTION_158>

Q159: If the definition of "*reasonable commercial basis*" is to be based on costs, do you agree that LRIC+ is the most appropriate measure? If not what measure do you think should be used?

<ESMA_QUESTION_159>
Yes we support the introduction of LRIC+ for venues. However ESMA should create an rules architecture to ensure there is not avoidance activity by venues or excessive padding of incremental costs.
<ESMA_QUESTION_159>

Q160: Do you agree that suppliers should be required to maintain a cost model as the basis of setting prices against LRIC+? If not how do you think the definition should be implemented?

<ESMA_QUESTION_160>
Yes we support this proposition. In addition venues should be required to have an external independent third party audit their figures on an annual basis to ensure they conform to both the spirit and letter of the regulations.

In order to drive genuine price competition hard ratios are required. Transparency and high level principles are important aspects of improving the costs of market data services but are not sufficient in and of themselves.
<ESMA_QUESTION_160>

Q161: Do you believe that if there are excessive prices in any of the other markets, the same definition of "*reasonable commercial basis*" would be appropriate, or that they should be treated differently? If the latter, what definition should be used?

<ESMA_QUESTION_161>
In order to enable cross market comparison, as outlined above, the IMA considers that all venues should be required to publish relevant data pricing metrics in a consistent manner on the ESMA website.
<ESMA_QUESTION_161>

Q162: Within the options A, B and C, do you favour one of them, a combination of A+B or A+C or A+B+C? Please explain your reasons.

<ESMA_QUESTION_162>
As outlined the answers to questions above, the IMA considers that a combination of options A+B+C should be mandated by ESMA. That is, additional transparency (Ref Option A) , publication of revenue share (Ref Option B) and implementation of LRIC (Ref Option C).

Market participants must be able to ascertain the variables used in the creation of the price being charged by the data providers. An important outcome of these proposals will be to limit the monopolistic behaviours of data providers and trading venues.

There must be a risk that with the reduction of transaction costs, trading venues will come to overtly rely on market data revenue to buttress their income without any improvements in service provision.
<ESMA_QUESTION_162>

Q163: What are your views on the costs of the different approaches?

<ESMA_QUESTION_163>
The LRIC pricing model may be more expensive to operate. It is important that venues do not simply pass these costs on to their customers or use the opportunity to inflate their incremental costs.
<ESMA_QUESTION_163>

Q164: Is there some other approach you believe would be better? Why?

<ESMA_QUESTION_164>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_164>

Q165: Do you think that the offering of a 'per-user' pricing model designed to prevent multiple charging for the same information should be mandatory?

<ESMA_QUESTION_165>
The IMA supports ESMA's proposal to mandate a 'per-user' pricing model that sits side by side with venues existing models. Unbundling of current packages would have a beneficial effect as firms will be able to tailor what they purchase to their specific requirements without paying for the same data multiple times.
<ESMA_QUESTION_165>

Q166: If yes, in which circumstances?

<ESMA_QUESTION_166>
All venues should be required to offer a per-user pricing model on an equivalent basis to their current pricing packages. That is, venues should not be allowed to offer a per-user pricing model which is excessively priced such that it is not a genuine option for firms.
<ESMA_QUESTION_166>

5. Micro-structural issues

5.1. Algorithmic and high frequency trading (HFT)

Q167: Which would be your preferred option? Why?

<ESMA_QUESTION_167>
IMA considers that, of the two proposed definitions, Option 1 is well defined, has absolute criteria, is similar to what has been implemented in Germany and does not allow a market participant's status to be impacted or determined by the activity of other market participants. For all of these reasons, Option 1 appears to be better suited to the perceived purpose and represents a more practical alternative for implementation.

The proposed definition of Algorithmic Trading is very broad and it covers even executions tools, which are very simple synthetic order types that are generally regarded as standard order types. Examples are a timed start time for an order, a stop loss order and an Iceberg order that breaks down large orders and enters them in smaller clips into the market only entering a new clip once the previous one is fully filled. Given these order types are widespread their use is prolific and they are available in a wide range member provided, 3rd party and proprietary end client platforms and should be captured by the HFT definition.
<ESMA_QUESTION_167>

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

<ESMA_QUESTION_168>
Option 1 has been implemented in some form already and would require less effort for firms who comply with existing German requirements. We would suggest ESMA keep the definition of HFT under review to reflect the take up and ubiquity of HFT going forwards.

Option 1 uses a bandwidth measurement. However, an advantage in speed - rather than bandwidth - is key for HF traders. As such, the definition should reference the fastest connection available: "The participant/member uses the fastest connection offered by the respective trading venue."

Option 2 proposes to set the boundary for the third condition of defining HFT (the message-related factor) at a threshold which would include participants who have an average order lifetime shorter than the median for the entire liquid market where trading occurs (i.e. below average order persistence). However, both market volumes and message rates vary widely between liquid products and between venues. This creates an uneven and shifting element to the definition, which will likely only capture very high volume participants who are market makers and already captured by regulations. In addition, average message rates vary by participant, these rates are not visible to each other, and the data may change dramatically over time, creating further inconsistencies. This element, when viewed by venue, may not include participants with low order persistence in single liquid products, but who are not involved in other liquid products with even lower order persistence. We are concerned that shifting definitions which capture participants unexpectedly would cause participants to avoid the risk of being captured by the definition by avoiding increased levels of participation and as a result would decrease liquidity.

Option 2 will be challenging to implement because market participants are not ultimately in control of their status as a registrant, and this status can be impacted and influenced by activity of other market participants. We also believe it would be challenging for firms to maintain awareness of their status during periods of growth and change.
<ESMA_QUESTION_168>

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

<ESMA_QUESTION_169>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_169>

Q170: If you prefer Option 2, please advise ESMA whether for the calculation of the median daily lifetime of the orders of the member/participant, you would take into account only the orders sent for liquid instruments or all the activity in the trading venue.

<ESMA_QUESTION_170>
We do not prefer Option 2 and believe that it could result in business disruption and an uneven regulatory prohibition. The proposed benchmark will cause shifting registration and a higher cost for compliance - the perception of which will create avoidance if there is flexibility and or uncertainty.
<ESMA_QUESTION_170>

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

<ESMA_QUESTION_171>
It is our understanding that all investment firms participating in automated trading will be required to register. We agree that once a market participant triggers the HFT definition for one strategy, the HFT classification can be applied to all strategies conducted by that legal entity.
<ESMA_QUESTION_171>

5.2. Direct electronic access (DEA)

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

<ESMA_QUESTION_172>
No, we consider that the existing definitions are adequate.
<ESMA_QUESTION_172>

Q173. Is there any other activity that should be covered by the term "DEA", other than DMA and SA? In particular, should AOR be considered within the DEA definition?

<ESMA_QUESTION_173>
We consider that it would depend upon the level of requirements to be placed on all DEA providers. We consider that unless proportionality relating to requirements on DEA providers is provided for such systems and the risks that they pose, it would be inappropriate to classify Automated Order Routing Systems as DEA for the purposes of MiFID II.
<ESMA_QUESTION_173>

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

<ESMA_QUESTION_174>
No we do not consider that such arrangements constitute DEA.
<ESMA_QUESTION_174>

Q175. Are you aware of any order transmission systems through shared arrangements which would provide an equivalent type of access as the one provided by DEA arrangements?

<ESMA_QUESTION_175>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_175>

6. Requirements applying on and to trading venues

6.1. SME Growth Markets

Q176: Do you support assessing the percentage of issuers on the basis of number of issuers only? If not, what approach would you suggest?

<ESMA_QUESTION_176>
Yes, using the number of issuers is an appropriate option.

<ESMA_QUESTION_176>

Q177: Which of the three different options described in the draft technical advice box above for assessing whether an SME-GM meets the criterion of having at least fifty per cent of SME issuers would you prefer?

<ESMA_QUESTION_177>
We think option iii, is the most accurate of the 3 options, as it takes into account that the amount can vary over the year by averaging over the year.

<ESMA_QUESTION_177>

Q178: 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>
We agree that the 3 years is appropriate.

<ESMA_QUESTION_178>

Q179: Should an SME-GM which falls below the 50% threshold in one calendar year be required to disclose that fact to the market?

<ESMA_QUESTION_179>
Yes, we feel that this will improve transparency. Also it will allow participants to know how close a market is to deregistration as an SME-GM.

<ESMA_QUESTION_179>

Q180: Which of the alternatives described above on how to deal with non-equity issuers for the purposes of the "*at least 50% criterion*" do you consider the most appropriate? Please give reasons for your answer.

<ESMA_QUESTION_180>
We think that option iii) Non-equity issuers should be considered as SMEs for the purpose of determining whether an SME-GM meets the requirement of having at least 50% SME issuers if:

a. the overall outstanding nominal value of the debt securities issued by the issuer does

not exceed €200m; or

b. the annual net turnover of the issuer based on the last published annual accounts does

not exceed €300m; or

c. the issuer is classified as an SME pursuant to Article 2(1)(f) of the Prospectus Directive

This is a more accurate way of defining an SME and is more consistent with how SMEs are defined elsewhere.

<ESMA_QUESTION_180>

Q181: Do you agree that an SME-GM should be able to operate under the models described above, and that the choice of model should be left to the discretion of the operator (under the supervision of its NCA)?

<ESMA_QUESTION_181>
Yes, due to varying nature of markets and how they have developed over time, ESMA should not prescribe one single operating model for an SME-GM. Also, if ESMA are too prescriptive in the designation of model to operators development and innovation will be stifled. Given that the relevant NCA's will supervise the operation of the SME-GM, and investor protection is central in the design and operation, the choice of which model to use should be left to the operator.

<ESMA_QUESTION_181>

Q182: Do you agree that an SME-GM should establish and operate a regime which its NCA has assessed to be effective in ensuring that its issuers are "appropriate"?

<ESMA_QUESTION_182>
Yes, in order to give investors a high degree of confidence in the companies listed on the SME-GM controls need to be in place to ensure that companies on the market reach certain transparent standards such as use of known reporting standards, and controls to keep compliance with the markets rules.

<ESMA_QUESTION_182>

Q183: Do you agree with the factors to which a NCA should have regard when assessing if an SME-GM's regulatory regime is effective?

<ESMA_QUESTION_183>
Yes these factors are appropriate, but are not an exhaustive list.

<ESMA_QUESTION_183>

Q184: Do you think that there should be an appropriateness test for an SME-GM issuer's management and board in order to confirm that they fulfil the responsibilities of a publicly quoted company?

<ESMA_QUESTION_184>
Yes, in order to ensure that investors have confidence in the companies listed it is important to ensure there is transparency in the issuers management and board. However, any appropriateness test should be left to each individual SME-GM to determine; but could include such aspects as directors not been insolvent or disqualified from being a director in that market. The exact determination should be left to each market and NCA to determine what they think are the appropriate characteristics of a manager or board member. The management and board should confirm they meet these standards.
<ESMA_QUESTION_184>

Q185: Do you think that there should be an appropriateness test for an SME-GM issuer's systems and controls in order to confirm that they provide a reasonable basis for it to comply with its continuing obligations under the rules of the market?

<ESMA_QUESTION_185>
Yes, we agree with ESMA's proposal that issuers should meet an appropriateness test for systems and controls. What these standards are should be left to the discretion of each SME-GM under the supervision of their NCA.

<ESMA_QUESTION_185>

Q186: 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>
i. An SME-GM issuer should be required to disclose whether or not it has sufficient working capital and if not how it proposes to make up this shortfall.

ii. An SME-GM issuer should be required to have sufficient working capital to meet its needs for a minimum period.

iii. The future Level 2 Regulation should remain silent on the adequacy of an issuer's working capital.

The IMA considers greater disclosure leads to improved transparency and more efficient decisions by investors. Therefore we support proposal i) , as it allows investors to make informed decisions both on the current position of the company as well as the strategy of the management and board.

<ESMA_QUESTION_186>

Q187: Are there any other criteria that should be set for the initial and on-going admission of financial instruments of issuers to SME-GMs?

<ESMA_QUESTION_187>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_187>

Q188: Should the SME-GM regime apply a general principle that an admission document should contain sufficient information for an investor to make an informed assessment of the financial position and prospects of the issuer and the rights attaching to its securities?

<ESMA_QUESTION_188>
Yes, each individual SME-GM should outline what it means by 'sufficient information' to ensure consistency between issuers applying for admission.

<ESMA_QUESTION_188>

Q189: Do you agree that SME-GMs should be able to take either a 'top down' or a 'bottom up' approach to their admission documents where a Prospectus is not required?

<ESMA_QUESTION_189>
As is evidenced already in the range of approaches in existing markets, we do not consider it is of primary importance to mandate a particular approach for SME-GMs.

<ESMA_QUESTION_189>

Q190: Do you think that MiFID II should specify the detailed disclosures, or categories of disclosure, that the rules of a SME-GM would need to require, in order for admission documents prepared in accordance with those rules to comply with Article 33(3)(c) of MiFID II? Or do you think this should be the responsibility of the individual market, under the supervision of its NCA?

<ESMA_QUESTION_190>
The IMA considers that at a high level the Commission should set a framework with minimum standards and an expectation of documentation in order to ensure a level playing field.

The drafting of documents should be left to the individual markets however. The Commission has recognised that the cost of producing a prospectus can be overly burdensome for SMEs, so consideration should be given to abolishing the requirement to produce a prospectus for certain classes of issues (e.g. secondary issues).

<ESMA_QUESTION_190>

Q191: If you consider that detailed disclosure requirements should be set at a MiFID level, which specific disclosures would be essential to the proper information of investors? Which elements (if any) of the proportionate schedules set out in Regulation 486/2012 should be dis-applied or modified, in order for an admission document to meet the objectives of the SME-GM framework (as long as there is no public offer requiring that a Prospectus will be drafted under the rules of the Prospectus Directive)?

<ESMA_QUESTION_191>
As stated above we think that the commission should set a high level minimum framework of standards but that the details should be the responsibility of individual markets under the supervision of their NCAs.

<ESMA_QUESTION_191>

Q192: Should the future Level 2 Regulation require an SME-GM to make arrangements for an appropriate review of an admission document, designed to ensure that the information it contains is complete?

<ESMA_QUESTION_192>
Yes, we consider this will be important to ensure that the information that companies provide to investors when coming to the market can be relied upon. Thus a mechanism for an appropriate review must be in place.

<ESMA_QUESTION_192>

Q193: Do you agree with this initial assessment by ESMA?

<ESMA_QUESTION_193>
Yes, periodic and regular reporting is essential for a functioning SME-GM.

<ESMA_QUESTION_193>

Q194: In your view which reports should be included in the on-going periodic financial reporting by an issuer whose financial instruments are admitted to trading on an SME-GM?

<ESMA_QUESTION_194>

We consider that the annual report and half-annual report (adapted to the local accounting requirements) should be included.

<ESMA_QUESTION_194>

Q195: How and by which means should SME-GMs ensure that the reporting obligations are fulfilled by the issuers?

<ESMA_QUESTION_195>
In order to ensure reporting obligations are met by issuers it will be important to track when the deadline for each issuers reports are due by. Also there should be a requirement that in addition to reports been provided to the market place a copy should be filed at the SME-GM's offices.

<ESMA_QUESTION_195>

Q196: 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>
As already happens with the AIM market in the UK we consider that the shorter 6 months period for Annual reports and 3 months for half-yearly reports under the Transparency Directive are sufficient time for an SME. <ESMA_QUESTION_196>

Q197: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements/additional relief to those envisaged by MAR?

<ESMA_QUESTION_197>
Yes, we agree that in order to effectively combat market abuse MAR should apply to SME-GM and that the reliefs already contained within MAR on SME-GM are sufficient.

<ESMA_QUESTION_197>

Q198: What is your view on the possible requirements for the dissemination and storage of information?

<ESMA_QUESTION_198>
We agree that information should be kept for at least 5 years to ensure sufficient history for investors.

SME-GMs should, if permitted under MAR, publish regulatory information on their website.

<ESMA_QUESTION_198>

Q199: How and by which means should trading venues ensure that the dissemination and storage requirements are fulfilled by the issuers and which of the options described above do you prefer?

<ESMA_QUESTION_199>
Trading venues should ensure the storage and dissemination requirements are fulfilled by issuers via an annual check. Trading venues should have adequate processes in place to fulfil this.

<ESMA_QUESTION_199>

Q200: How long should the information be stored from your point of view? Do you agree with the proposed period of 5 years or would you prefer a different one (e.g., 3 years)?

<ESMA_QUESTION_200>
We consider that 5 years is an appropriate timeframe to ensure that investors have access to a range of historical information. Any shorter and comparisons/trends over time will become more difficult to make.
<ESMA_QUESTION_200>

Q201: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements to those presented in MAR?

<ESMA_QUESTION_201>
Yes we agree that In order to maintain consistency of rules applying across all MiFID II trading venues no additional specifications to the rules laid down in MAR and MiFID II for MTFs should be implemented specifically for SME growth markets.

<ESMA_QUESTION_201>

6.2. Suspension and removal of financial instruments from trading

Q202: Do you agree that an approach based on a non-exhaustive list of examples provides an appropriate balance between facilitating a consistent application of the exception, while allowing appropriate judgements to be made on a case by case basis?

<ESMA_QUESTION_202>
Yes we support this proposal.
<ESMA_QUESTION_202>

Q203: Do you agree that NCAs would also need to consider the criteria described in paragraph 6 iii & iv when making an assessment of relevant costs or risks?

<ESMA_QUESTION_203>
The IMA supports this approach.
<ESMA_QUESTION_203>

Q204: Which specific circumstances would you include in the list? Do you agree with the proposed examples?

<ESMA_QUESTION_204>
We agree with the proposed examples.
<ESMA_QUESTION_204>

6.3. Substantial importance of a trading venue in a host Member State

Q205: Do you consider that the criteria established by Article 16 of MiFID Implementing Regulation remain appropriate for regulated markets?

<ESMA_QUESTION_205>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_205>

Q206: Do you agree with the additional criteria for establishing the substantial importance in the cases of MTFs and OTFs?

<ESMA_QUESTION_206>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_206>

6.4. Monitoring of compliance – information requirements for trading venues

Q207: Which circumstances would you include in this list? Do you agree with the circumstances described in the draft technical advice? What other circumstances do you think should be included in the list?

<ESMA_QUESTION_207>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_207>

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

Q208: Do you support the approach suggested by ESMA?

<ESMA_QUESTION_208>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_208>

Q209: Is there any limitation to the ability of the operator of several trading venues to identify a potentially abusive conduct affecting related financial instruments?

<ESMA_QUESTION_209>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_209>

Q210: What can be the implications for trading venues to make use of all information publicly available to complement their internal analysis of the potential abusive conduct to report such as managers' dealings or major shareholders' notifications)? Are there other public sources of information that could be useful for this purpose?

<ESMA_QUESTION_210>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_210>

Q211: Do you agree that the signals listed in the Annex contained in the draft advice constitute appropriate indicators to be considered by operators of trading venues? Do you see other signals that could be relevant to include in the list?

<ESMA_QUESTION_211>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_211>

Q212: Do you consider that front running should be considered in relation to the duty for operators of trading venues to report possible abusive conduct? If so, what could be the possible signal(s) to include in the list?

<ESMA_QUESTION_212>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_212>

7. Commodity derivatives

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

Q213: Do you agree with ESMA's approach on specifying contracts that "must" be physically settled and contracts that "can" be physically settled?

<ESMA_QUESTION_213>
Yes, we generally agree with the approach proposed by ESMA, however we would note that the differentiation of 'can' and 'must' be physically settled is confusing for those contracts that *are* eventually settled physically and transfer of ownership takes place.
<ESMA_QUESTION_213>

Q214: Which oil products in your view should be caught by the definition of C6 energy derivatives contracts and therefore be within the scope of the exemption? Please give reasons for your view stating, in particular, any practical repercussions of including or excluding products from the scope.

<ESMA_QUESTION_214>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_214>

Q215: Do you agree with ESMA's approach on specifying contracts that must be physically settled?

<ESMA_QUESTION_215>
Yes, in general we agree with the approach. We suggest an exception should be added in case of default. The Draft Technical Advice at point 1. ii, would result in: *'ii. there is no option for either party to replace physical delivery with cash settlement* ***except by reason of default'***
<ESMA_QUESTION_215>

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

<ESMA_QUESTION_216>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_216>

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

<ESMA_QUESTION_217>
Master agreements such as the EFET General Agreements, NBP97, NBP2002, for gas and electricity are examples of contracts that *must* be physically settled. These standard contracts stipulate the obligation for the selling party to a transaction to physically deliver and transfer the rights of title in the respective commodity and the obligation of the buying party to accept such delivery and transfer title.
Fulfilling such obligation of delivery requires that the counterparties of a transaction have a contractual relationship with operators of transmission systems or transportation networks and/or service providers responsible for the management and operations of the nomination platforms.

Delivery is performed by submitting the schedules of the transactions to the operator of the designated trading point.

According to such standard agreements the obligation under each Individual Contract to physically deliver and transfer rights of title in the relevant commodity is legally binding and enforceable. A contracting party is only released from such obligation in case of force majeure, default of due payment or inadequate performance assurance or credit support document or in cases of early termination. A transaction can be terminated early under specific circumstances, i.e. in the event of default by the counterparty.

There is no ‘cash out’ or ‘book out’ option whereby a party can elect to pay cash or liquidated damages to the other party in lieu of fulfilling its obligations to deliver or accept commodity. This can happen only as compensation for damages in case of a failure to deliver or accept (electricity) or in case of under delivery, under acceptance, over delivery or over acceptance (natural gas).

The standard agreements contain terms to ensure that quantities delivered are allocated to the correct trade and there is a contractual obligation to deliver each trade and trades are invoiced and accounted for VAT individually on a trade by trade basis.

In the circumstance that the counterparties mutually agree to amend the standard terms of such agreements e.g. to include an option for cash settlement, the contracts are consequently classified. Buying and selling parties of such contracts are brought together through the support of energy brokers and their IT facilities. Such contracts may also be traded bilaterally.
<ESMA_QUESTION_217>

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

<ESMA_QUESTION_218>
In this context the concept of *force majeure* can be intended as an occurrence beyond the reasonable control of one of the parties which it could not reasonably have avoided or overcome and which it makes impossible for one of the parties to perform according to the contract terms. In case of gas and electricity markets this may include failure of communication or IT systems of the relevant network or system operator or an unplanned outage.

In such a circumstance, no breach or default is deemed to have occurred and the counterparty claiming the force majeure is released from the contractual obligations for the period of time that force majeure prevents its performance.

Other bona fide inabilities may include default of due payment or inadequate performance assurance or credit support document or in cases of early termination due to specific circumstances such as the default by the counterparty, but also other events that do not entail a fault of one of the parties to perform according to its obligations.

The examples provided above should be intended only as illustrative and not exhaustive or conclusive because the main purpose of such concepts is that they can be sufficiently broad to accommodate unforeseen events. Any attempt to define such cases in a granular way for all commodities would lead to additional legal uncertainty because the operational arrangements and practices in commodity markets differ extensively.
<ESMA_QUESTION_218>

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

<ESMA_QUESTION_219>
We believe that article 38 of Regulation No 1287/2006 has worked well as it has provided sufficient guidance to identify the objective characteristics of contracts falling under C.7 of Annex I, Section C of Directive 39/2004/EC.
<ESMA_QUESTION_219>

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

<ESMA_QUESTION_220>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_220>

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

<ESMA_QUESTION_221>
The definition of a contract for commercial purposes is largely still valid.

Nevertheless we suggest ESMA improves the definition in order to make the concept of 'commercial purpose' applicable in different contexts and commodities.

For instance we believe that the approach taken under the U.K. legislation can be helpful. Please refer to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (2001 No. 544). In this case the legislation provides explicitly some indications that a contract is made for commercial purposes, namely: (a) one or more of the parties is a producer of the commodity or other property, or uses it in his business; (b) the seller delivers or intends to deliver the property or the purchaser takes or intends to take delivery of it.
<ESMA_QUESTION_221>

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

<ESMA_QUESTION_222>
Yes we agree. The clearing condition is not a relevant determinant of the definition of a derivative due to the way in which the clearing obligation under EMIR is constructed. Nevertheless we believe that full fungibility of contracts entered into with regulated markets (and centrally cleared by CCPs) is a key characteristic of derivative financial instruments.
<ESMA_QUESTION_222>

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

<ESMA_QUESTION_223>

Standardisation of contract terms is common practice of market development. Efforts to enhance standardisation should be promoted as the use of standard terms reduces legal uncertainty.
<ESMA_QUESTION_223>

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

<ESMA_QUESTION_224>
Yes, we partially agree with the proposal to maintain the alternatives for trading contracts. However we believe that to ensure consistency with the level 1 text a specific and equivalent treatment should be provided for contracts that are traded or are expressly stated to be traded on a third country trading venue that performs a similar function to an OTF and that must be physically settled, namely energy derivatives and wholesale energy products.
<ESMA_QUESTION_224>

Q 225: 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>
Yes, we partially agree. We agree with the proposal to maintain the text of article 38(3) or Reg. 1287/2006 broadly the same. However we believe that to ensure consistency with the Level 1 text a specific and equivalent treatment should be provided for contracts that are traded or are expressly stated to be traded on a third country trading venue that performs a similar function to an OTF and that must be physically settled, namely for contracts listed currently in article 38(4) that are energy derivatives or wholesale energy products.
<ESMA_QUESTION_225>

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

<ESMA_QUESTION_226>
Yes, we agree.
<ESMA_QUESTION_226>

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

<ESMA_QUESTION_227>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_227>

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

<ESMA_QUESTION_228>
The terms 'by reason of default or other termination event' should be understood differently from force majeure and a subset of the general case of bona fine inability to perform.

In this context the concept of *force majeure* should be intended as an occurrence beyond the reasonable control of one of the parties which it could not reasonably have avoided or overcome and which it makes impossible for one of the parties to perform according to the contract terms. In case of gas and electricity markets this may include failure of communication or IT systems of the relevant network or system operator.

Default or termination events may be specific cases of inability to perform of one of the counterparties, however other *inabilities to perform* may include also other cases like inadequate performance assurance or credit support documentation that determines the inability to perform the contract.

However as outlined above, our view is that these examples should be intended only as illustrative and not exhaustive or conclusive because the main purpose of such concepts is to remain sufficiently broad to accommodate unforeseen events. Any attempt to define these cases in a granular way for all commodities would lead to additional legal uncertainty.
<ESMA_QUESTION_228>

7.2. Position reporting thresholds

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

<ESMA_QUESTION_229>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_229>

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

<ESMA_QUESTION_230>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_230>

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

<ESMA_QUESTION_231>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_231>

7.3. Position management powers of ESMA

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

<ESMA_QUESTION_232>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_232>

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

<ESMA_QUESTION_233>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_233>

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

<ESMA_QUESTION_234>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_234>

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

<ESMA_QUESTION_235>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_235>

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

<ESMA_QUESTION_236>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_236>

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

<ESMA_QUESTION_237>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_237>

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

<ESMA_QUESTION_238>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_238>

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

<ESMA_QUESTION_239>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_239>

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

<ESMA_QUESTION_240>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_240>

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

<ESMA_QUESTION_241>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_241>

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

<ESMA_QUESTION_242>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_242>

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

<ESMA_QUESTION_243>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_243>

8. Portfolio compression

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

<ESMA_QUESTION_244>
Methods of portfolio compression

We would note that today there are robust solutions for multilateral compression operating in the market. In this regard, generally speaking the criteria for compression outlined in the consultation paper are in line with the services offered by compression service providers.

However, as compression services have evolved it has become apparent that certain steps in the process are not necessarily required for all compression cycles, for example it is not always necessary to have a dress rehearsal, particularly in bilateral or unilateral compression cycles where the risk parameters are set. Compression is not a price forming event and therefore, we request that any rules related to portfolio compression are not overly prescriptive, rather they provide a suitable framework within which compression service providers can operate a suitably robust compression service. Furthermore, it is important that counterparties retain control over their own risk profiles. Having a prescriptive regulation may not work for all counterparties and we would note that it is important that post trade risk reductions services should not be subject to other regulatory requirements that are designed for price forming transactions.

We would also note that there is not currently a standard industry process for bilateral compression direct between two parties, although we do acknowledge that compression services providers may support compression exercises between just two participants. While we suggest that the criteria and steps for direct bilateral compression activity should be aligned with those for multilateral compressions, adjusted as necessary to reflect the absence of a compression service provider, it should be recognised that bilateral compression exercises will often involve bespoke manual processes which are negotiated and established between the parties. Therefore, we would recommend that any rules related to portfolio compression are sufficiently high level to enable parties to enter into such bespoke arrangements.

Finally, it should also be noted that unilateral compression is also offered in the market today. This allows counterparties to reduce notional values on their books against a CCP. It is important that any regulation recognises unilateral compression as a suitable form of portfolio compression.

Legal Documentation

We agree that it is imperative that relevant legal documentation should be in place between the parties to a compression exercise and that such documentation should adequately cover the activities such as reduction, termination and replacement of derivative transaction as will be caused by the compression process. In our view it is not necessary that the form of that documentation should be prescribed in the rules rather that firms participating in any form of compression exercise should satisfy themselves that the documentation in place is suitable for its purpose We would also note that while compression can result in some derivative transactions being reduced and terminated or terminated and replaced, compression can also (i) result in fewer transactions, without any reduction in notional amounts (e.g. in the case of a compression recouponing exercise) or (ii) involve the addition of new trades with the effect of the risk, notional and/or number of trades is/are reduced overall.

Criteria and process steps:

As noted above we would suggest that any post trade compression service, be it multilateral, bilateral or unilateral, should comply with a set of framework criteria enshrined in legislation. We would suggest the following criteria:

1. the exercise is designed to be overall market risk neutral for each participant;
2. the participants of the exercise do not submit bids and offers to enter into a specific position;
3. the exercise is cycle-based and must be accepted in full by all participants or it will not be executed;
4. the exercise is designed to reduce secondary risks emerging from existing derivatives transactions, such as counterparty credit risk and operational risk.

<ESMA_QUESTION_244>

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

<ESMA_QUESTION_245>
It is important to note that the approach for publishing information related to a compression exercise needs to recognise differences between multilateral, bilateral and unilateral processes. The primary concern of our members is that any information published should not disclose identities of firms and any actual positions. We are aware that on occasion there may only be one firm from a particular participant category participating in a multi-lateral compression exercise and therefore we would suggest that reporting by participant type should not be required by the regulation. Similarly, by their nature, direct bilateral and unilateral compression exercises would disclose information that is attributable to a participating firm. We would therefore caution against requirements to publish this information for these types of compression processes until further consideration has been given to how this can be achieved without unduly disclosing sensitive information. We note this particularly given the information is not price forming.

Regarding the actual information that needs to be reported we suggest that the critical information relates to the notional amount of transactions compressed. We therefore suggest that the information published is restricted to i) the notional amount of transactions submitted (and accepted) to be part of the compression exercise, and ii) the notional amount of transactions terminated as a result of the exercise. This information should include all transactions in the compression cycle irrespective of whether the participant is in scope for EMIR and be published at an aggregated market level by product type and currency for each compression cycle. In the case of product type we suggest that this should be interpreted as per asset class only. Any more granular designation will be more challenging to implement and provide limited added value.

In the context of APA reporting and the time at which transactions subject to portfolio compression were concluded we suggest that this should be the time at which the compression service provider communicates to all participants that the compression exercise proposal has become legally binding. However, it should be noted that the compression exercise can have taken legal effect at another point in time under the compression contract between the compression participants. As previously noted, this information is not price forming and therefore we believe that the information should be published in line with EMIR reporting requirements (i.e. by close of business on the day following the conclusion of the compression exercise).
<ESMA_QUESTION_245>