



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](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.

### *Publication of responses*

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.**

Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

### *Data protection*

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



## **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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_10>

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

<ESMA\_QUESTION\_11>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE



<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_34>

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

<ESMA\_QUESTION\_35>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_35>

**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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_59>

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

<ESMA\_QUESTION\_60>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_60>

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

<ESMA\_QUESTION\_61>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>



TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_71>

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

<ESMA\_QUESTION\_72>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_75>

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

<ESMA\_QUESTION\_76>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_76>

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

<ESMA\_QUESTION\_77>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_95>

## **2.20.**

### **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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>

## **2.24. Product intervention**

**Q107: Do you agree with the criteria proposed?**

<ESMA\_QUESTION\_107>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_107>

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

<ESMA\_QUESTION\_108>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE

<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_143>

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

<ESMA\_QUESTION\_144>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_144>

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

<ESMA\_QUESTION\_145>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_146>

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

<ESMA\_QUESTION\_147>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_150>

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

<ESMA\_QUESTION\_151>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_152>

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

<ESMA\_QUESTION\_153>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>

TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_156>

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

<ESMA\_QUESTION\_157>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_157>

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

<ESMA\_QUESTION\_158>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_162>

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

<ESMA\_QUESTION\_163>  
TYPE YOUR TEXT HERE  
<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_165>

**Q166: If yes, in which circumstances?**

<ESMA\_QUESTION\_166>

TYPE YOUR TEXT HERE

<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_167>

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

<ESMA\_QUESTION\_168>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_170>

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

<ESMA\_QUESTION\_171>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_177>

**Q178: Do you agree with the approach described above (in the box Chyba! Nenalezen zdroj odkazů.), that only falling below the qualifying 50% threshold for a number of three consecutive years could lead to deregistration as a SME-GM or should the period be limited to two years?**

<ESMA\_QUESTION\_178>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_178>

**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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_185>

**Q186: Do you agree with** Chyba! Nenalezen zdroj odkazů., Chyba! Nenalezen zdroj odkazů. **or** Chyba! Nenalezen zdroj odkazů. Chyba! Nenalezen zdroj odkazů.?

<ESMA\_QUESTION\_186>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE

<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_192>

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

<ESMA\_QUESTION\_193>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_195>

**Q196: Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph Chyba! Nenalezen zdroj odkazů.) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?**

<ESMA\_QUESTION\_196>

TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_196>

**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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_197>

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

<ESMA\_QUESTION\_198>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_198>

**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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_202>

**Q203: Do you agree that NCAs would also need to consider the criteria described in paragraph Chyba! Nenalezen zdroj odkazů. Chyba! Nenalezen zdroj odkazů. and Chyba! Nenalezen zdroj odkazů., when making an assessment of relevant costs or risks?**

<ESMA\_QUESTION\_203>

TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_203>

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

<ESMA\_QUESTION\_204>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_204>

### **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.

Principally, we would like to underline that any differentiation as set out by ESMA should not preclude to consider contracts that do not include the possibility to replace physical delivery with cash settlement to be considered as 'must be physically settled'.

We would like to mention that the differentiation of "can" and "must" be physically settled can be confusing for those wholesale energy products and energy derivatives that *are* eventually settled physically where transfer of ownership takes place. Therefore legal certainty is essential in this area for market participants.

In relation to the draft technical advice we understand the 'waterfall' of the definitions in a way that contracts which are excluded from the definition of financial instruments under Annex I Section C.6 (must be physically settled wholesale energy products and traded on a OTF) or which have been granted a transitional exemption (C.6 energy derivatives), are not required to be tested further against the criteria defined in C.7 and the related implementing regulation. The wording "*not otherwise mentioned in C.6*" included in C.7 of Section C of Annex I highlights that C.6 prevails over C.7.

The exemption under C.6 would be deprived of its purpose if contracts that are not defined as derivative financial instruments under C.6 would need to be tested against the requirements stipulated under C.7.

<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.

However, we would like to point out the need for revision in the wording of the Draft Technical Advice in some parts.

Firstly, the terms '*unrestricted and unconditional right to physically delivery*' may create legal uncertainty. According to the Recital 10 of MiFID II mentioned by ESMA (point 11, p.279 CP), the contracts must have an 'enforceable and binding obligation to physically deliver which cannot be unwound'. This must be understood to uphold that the exemption is defined in a way that an enforceable and binding obligation of physical delivery is a rule which allows for certain exceptions, but excludes an option to pay or receive cash instead of fulfilling the obligation to physically deliver. The terms used in the Recital are more appropriate from the legal point of view compared with the proposal of the draft technical advice. It is also desirable to relate this obligation to the methods of physical delivery as listed under point 4.

Moreover, exceptions should be made clear in case of default and termination events, including the right to pay financial compensation in case of default. The Draft Technical Advice should clearly state that the default provisions are not to be characterized as an option for one party to replace the physical delivery by cash settlement. In civil law a cash payment obligation as compensation for loss caused by a failure to deliver or accept the relevant commodity is considered as a damage compensation payment and not a cash settlement – and merely a secondary obligation as opposed to a primary obligation of physical settlement agreed in the contract.

Most importantly, whilst we appreciate the consideration of ESMA about '*operational netting*' (see answer to Q216) in power and gas markets we highlight In this context that the offset of deliveries for operational reasons in the gas and electricity markets is normally an obligation stemming from the transmission systems operators' operational rules and it should not be understood to be a "right to offset transactions". Similarly, the right to net payments obligations should be acknowledged without compromising the status of the contract as "must be physically settled". Having in mind the above mentioned arguments, we suggest the following amendments to the Draft Technical Advice: In consideration of the comments above, we suggest the following amendments to the Draft Technical Advice:

*1. In accordance with Article 4.2(a) of Directive 2014/65/EU, a contract shall be considered as 'must be physically' settled if it satisfies the following conditions:*

*i. it establishes the enforceable and binding obligation to physically deliver the commodity;*

*ii. it does not include a right to cash settle or to offset transactions, except in the case of force majeure, default or any other contractually agreed termination event;*

*2. The existence of force majeure provisions does not prevent a contract from being characterised as "must be physically settled"*

*3. The existence of other bona fide clauses rendering it impossible to perform the contract on a physical settlement basis does not prevent a contract from being characterised as "must be physically settled"*

*3a. The offset of deliveries for operational reasons or a right to net payments are not to be considered a right to offset transactions within the meaning of paragraph (1)(ii).*

*4. For the purpose of Section C.6 and C.7 of Annex I to Directive 2014/65/EU contracts that are physically settled including but not limited to the following delivery methods:*

*i. physical delivery of the commodities;*

*ii. a transfer of title of the commodities, including the delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned (such as a bill of lading or a warehouse warrant); or*

*iii. any other method of transferring the title to the commodities or rights of an ownership nature in relation to the relevant quantity of the commodities including notification, scheduling or nomination to the operator of an energy supply network,) that entitles the recipient to the relevant quantity of the commodities*

These amendments are suggested to ensure that terms used are appropriate and provide sufficient legal certainty and consistency for market participants

<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>

We appreciate that ESMA acknowledges that operational netting in power and gas markets is distinct from cash settlement. We also agree that neither operational netting nor obligations to submit net schedules should cause a contract to be excluded from the definition of “must be physically settled”.

Physically settled transactions in gas and electricity contracts involve the delivery of the underlying commodity and the change in the ownership of the commodity. These contracts include spot products (where delivery is within a short time period) and forward contracts (for delivery at some point in the future).

The operational arrangements for delivery in gas and power markets may produce an offset of physical deliveries, however no netting takes place between contracts or transactions that can be considered equivalent to cash settlement or offset of transactions as the obligation under each individual contract to physically deliver and transfer rights of title is legally binding and enforceable. In gas and power physical markets participants have to enter into contractual arrangements with system operators, as transportation pipelines/transmission lines, in order to become network/system users and being able to deliver the energy produced or acquired to wholesale counterparties or retail consumers at specific notional delivery/trading points.

Market participants may have direct access to energy production facilities (e.g. power plant) or may acquire energy from other market participants. The acquisition (and sales) of energy at wholesale level takes place through contractual agreements (e.g. EFET master agreements) which 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, including on a net basis.

### **How market participants perform the execution of physical contracts**

A market participant may buy and/or sell energy for delivery in a specific day or hour at a specific delivery/trading point several times with several counterparties over time before the actual delivery takes place, depending on the portfolio of its commercial activities (e.g. production of energy, sales of energy) and a series of factors (e.g. weather forecast, price forecasts, availability of infrastructures etc.). In order to manage risks related to the availability of the underlying and price fluctuations, transactions may be entered into also many years ahead of the period of delivery, therefore a market participant has to deal with uncertainty about the final needs, which is implicit for all market participants in gas and electricity markets.

Upon delivery, market participants are required to balance inputs and outputs in the energy network on a relevant period basis (hourly or daily) and submit respective nominations of inputs and outputs for each system and/or delivery point (trading point) where the market participant is active. Nominations must be entered into TSOs' IT systems within deadlines defined in operational rules (e.g. 2 PM on the day before the 'delivery period' starts) and are subsequently matched by them along the chain. Any inconsistency must be rectified before the delivery period occurs.

Therefore in gas and power markets nominations are executions of delivery. They may be required for each contract and/or facility (e.g. in case of the Italian or Spanish power production) or aggregated (total inputs and outputs for a single market area, like in Germany).

In case market participants have more than one trade of opposite 'sign' (buy and sell) between them at a particular delivery/trading point and for the same delivery period, nominations may be required to be submitted on a net basis for administrative convenience i.e. to avoid the need for the operator to aggregate and handle multiple nominations.

In summary, operational netting **arrangements do not involve the netting of contracts or transactions. The offset of deliveries is merely the result of the nominations submitted to system operators:**

- nominations according to the operational rules set up by system operators is the way in which counterparties perform the obligation to settle physically their contracts.
- 
- contrary to this, contracts that are not for physical settlement do not require entering into contractual arrangements with system operators, registering contracts with system operators, or submitting nominations and are not subject to balancing rules. These are substantial differences.

An example on how nominations work in gas and electricity market can be found at this link, referring to the Czech market: [Annual Report on the Electricity and Gas Markets in the Czech Republic \(2013\) — OTE, a.s.](http://www.ote-cr.cz/about-ote/files-annual-reports/technical-report-2013.pdf) ( <http://www.ote-cr.cz/about-ote/files-annual-reports/technical-report-2013.pdf>, see Chapters related to electricity (p.12-30 and related to gas market, p.31-33).  
<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 agreement such as the *EFET General Agreements* for gas and power, including its annexes and appendices, is example of contract that *must* be physically settled. This is an example of standard contract for physical delivery used by parties that are trading bilaterally, including when trading through brokers. This Master Agreement stipulates the obligation for the selling party to a forward 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 and acceptance requires that the counterparties of a transaction have a contractual relationship with transmission system operators and/or service providers responsible for the management and operations of the nomination platforms. Delivery is performed through nominations 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 and to accept such delivery and title transfer is legally binding and enforceable. A contracting party is only released from such obligation in case of force majeure, default of due payment or the occurrence of specified material reasons that lead to early termination.

The EFET General Agreements do not provide for an option of a party to an Individual Contract to unilaterally elect to pay cash or liquidated damages to the other party or to receive cash or liquidated damages from the other party instead of fulfilling an obligation to deliver or accept the relevant commodity. The EFET General Agreements only stipulate cash payment obligations as compensation for resulting losses in case of a failure to deliver or accept electricity (EFET General Agreement Electricity) or in case of under delivery, under acceptance, over delivery or over acceptance (EFET General Agreement Gas). These reflect the difference between the contract price and the price the non-defaulting party pays/receives to buy/sell the shortfall/excess commodity it has been left with due to the defaulting party's default.

In addition, although under the EFET General Agreements an ordinary termination does not affect existing contractual obligation of the parties, in case of an early termination following the occurrence of a 'material reason' all further payments and performance in respect of all Individual Contracts as well as the EFET General Agreement itself are released and all existing duties and obligations settled through the payment of a termination amount (i.e. according to the aggregated and netted settlement amounts for individual outstanding contracts). The EFET General Agreements define such material reason as certain cases of non-performance, cross default and acceleration, winding-up, insolvency or attachment, failure to deliver or accept and incorrect representation of warranty.

Furthermore, to reduce the counterparty risk, the EFET General Agreements provide for an option to elect early termination without notice requirement in case of insolvency or similar conditions endangering the claims of a party, in which all Individual Contracts as well as the EFET General Agreement itself terminate automatically at a pre-defined point.

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 energy brokers and trading terminals which do not have the characteristics of multilateral trading 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>

Force Majeure is generally defined 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 its obligations according to the contract terms. Please note that this definition is subject to national civil laws and case law and might evolve subject to new legislation being adopted or case law being made. In case of liquid gas and electricity markets for example, depending on the delivery point, this may be limited to failure of communication or IT systems of the relevant network (within system balancing points) or an unplanned physical outages or failures of pipelines, terminals and transmission systems. In the case of the oil markets it may include a broad range of marine, port, pipeline or storage related events affecting the transmission and handling of cargoes of crude oil or refined products by sea and by pipeline.

In such circumstances, no breach or default is deemed to have occurred and the counterparty claiming the force majeure is released from its contractual obligations for the period of time that force majeure prevents its performance. In practice this means that the defaulting party is not required to pay the damages that would otherwise be payable for a failure to deliver or accept the correct contract quantity under a trade.

Other bona fide clauses we would define as: any circumstance whereby the performance of a physical delivery of offtake doesn't take place for reasons that do not qualify as Force Majeure and which are objectively measurable as reasons defined in the contract terms for parties not to perform their obligations.

<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>

TYPE YOUR TEXT HERE

<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_224>

**Q225: Do you agree that the existing provision in Article 38(3) of Regulation (EC) No 1287/2006 for determining whether derivative contracts within the scope of Section C(10) of Annex I should be classified as financial instruments should be updated as necessary but overall be maintained? If not, which elements in your view require amendments?**

<ESMA\_QUESTION\_225>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_225>

**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>  
TYPE YOUR TEXT HERE  
<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>





TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_245>