esma 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>
Bundesverband der Wertpapierfirmen (bwf) comment:

According to Paragraph 1 (ii) of ESMA's draft technical advice, an investment service to be deemed to be provided in an incidental manner must not "aim to provide a systematic source of income".

However, when the investment service provided in an incidental manner, according to the Commission's request for advice, has an "intrinsic connection to the main area of the profession", it is hard to understand that it shall not provide a "systematic source of income" – no matter how large or small the revenue from this investment service might be.

In order to avoid this semantic ambiguity, we suggest to replace "systematic" by "substantial".
<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>
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<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>
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<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>
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<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>
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<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>
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<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

We strictly disagree with ESMA's proposal for information addressed to or likely to be received by professional clients since it would in this respect de facto spread and level any differences between professional- and retail clients. This is neither in line with the objectives of MiFID II nor is ESMA authorized to do so. In fact, to some extent, the requirements when dealing with retail clients would even exceed those proposed for retail investors. While the "accuracy" requirement in ESMA's draft technical advice in Paragraph 4.(iii.) Chapter 2.12 CP for professional clients is missing in the otherwise identical provision for retail clients in ESMA's draft technical advice in Paragraph 2.(iv.) Chapter 2.12 CP, the requirements presented in ESMA's draft technical advice in Paragraph 4.(ii.) Chapter 2.12 CP for information provided to professional clients (not to "disguise, diminish or obscure important items, statements or warnings") have no equivalence in the requirements to be fulfilled when dealing with retail investors.

Furthermore, the fact that MiFID II calls for information provided to be "fair, clear and not misleading" no matter whether the addressee is a retail- or professional investor must not be misunderstood in a way which ignores that it can be reasonably assumed that professional investors have a much broader basis of knowledge, information and understanding of financial products and the risks associated. Imposing investment firms to the same or even higher information obligations when dealing with professional compared to requirements designed for retail clients therefore would be clearly inappropriate and also completely impractical.

Information addressed to professional clients therefore should contain warnings and indications of relevant risks only to the extent that an investment firm, under exceptional circumstances, has clear indications that it cannot be reasonably expected that a particular client to has not sufficient knowledge and experience to make his own judgment regarding the risks involved with an investment decision. Therefore, a more practical and appropriate general way forward would be to oblige investment firms when setting up a client relationship with professional clients to inform these clients that they can and should request additional information whenever they do not feel properly informed in the course of investment services being provided to them.
<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>
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<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>
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<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

We do not agree with ESMAS assumption that investment research provided by an investment firm as a part of its execution service should be seen as an "inducement" to the client. While it is apparently clear that investment research is not a "monetary benefit" distributed to a client it is also not a "non monetary benefit" simply because it is a service paid for as an implicit part of the execution fee. Furthermore, we cannot see any political intention expressed on Level I which could justify such a substantial intervention into a well established and widely accepted market practice.

Investment research as a part of the overall execution service provided, is as much a product enrichment as order execution employing SOR-technology or an order worked manually by a trader in the market. Furthermore, investment firms providing order execution services usually charge clients different levels of execution fees, depending of the service level agreed. Accordingly, buy-side firms (and though investors) can choose from different service levels at different prices, running from "no frills" or "plain vanilla" order execution to more sophisticated service levels which can be enriched by technology (e.g. SOR services) or intelligence, on which trading decisions can be based on (e.g. investment research and related information based services). Since various pricing levels are available in the market for different service levels, no evidence of improper influence on a client's decision to buy a service tailored to its needs can be insinuated.

Assuming that the economic value of research, from a buy-side perspective, can be described as a function of the volume of transactions executed (which result in investments), pricing research into the transaction fee can be seen as a fair distribution scheme which enables also smaller buy-side firms to base their investment decisions on the access to investment research which they most likely could not afford if the product would be distributed on a non proportional "cover price" scheme.

Without such a proportional indirect pricing scheme for investment research, not only smaller buy-side firms would be faced with a severe competitive disadvantage but the overall supply of research would be significantly reduced with the – already comparably – low level of coverage of SME-issuers most likely to be further decreased in particular. In fact, we expect that a large part of research coverage for SME-issuers will cease to exist if "unbundling" would become mandatory. Against the background that MiFID II expressly calls for a promotion of SME markets, ESMA's assessment which intends to treat research and related services as inducements appears to be even more incomprehensible. Furthermore, we think that it would be also grossly negligent to intervene into long established market structures in such an extensive way without undertaking a comprehensive ex ante impact study.

Aside from our general view pointed out above, we think that even from the stance of ESMA's current restrictive opinion, so called "morning letters" and similar periodic publications, published by banks and investment firms usually on a daily basis as a newsflash for clients but also for their own employees, should not be regarded as an inducement or as one of "minor non-monetary benefit". These types of publications typically include an educated guess on the general market sentiment for the trading day, a wrap-up of the latest published macroeconomic and statistical data, a calendar with upcoming corporate events and similar type of information. According to the general nature of these briefings, they are not "tailored or bespoke", likely to become "accessible to a large number of persons" and it can be reasonably assumed that they do not bear any risk to impair a recipients' duty to act in the best interests of its clients.

Last but not least, the participation in conferences, seminars and similar events which are clearly "professional" in nature and do not bear the characteristics of an "incentive" as well as hospitality of a reasonable value provided in the course of such events or for other business meeting should be clearly categorized as "minor non-monetary benefits" as long as there is no vested evidence of the recipient's behaviour being influenced in any way that is detrimental to the interests of the relevant client. Otherwise, ESMA would foster a "depersonalisation" of communication between investment firms and its clients which would be neither desirable nor is it asked for at any point in the Level I text.
<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>
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<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.

2.21. 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>

2.22. 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>
Bundesverband der Wertpapierfirmen (bwf) comment:

With respect to the requirement stipulated in Article 27(2) MiFID II that "an investment firm shall not receive any remuneration, discount or non-monetary benefit for routing client orders to a particular trading venue or execution venue which would infringe the requirements on conflicts of interest or inducements set out in paragraph 1 of this Article and Article 16(3) and Articles 23 and 24" we would consider it helpful if ESMA could provide some clarification regarding the intention and scope of the provision. In particular, it should be straightened that Article 27(2) MiFID II does not intend to prohibit the service of order routing as such and therefore fees paid by the client himself for using an order routing service (e.g. a bank which has no direct excess to a specific market may pay an investment firm for providing this access by order routing) are clearly outside the scope of this provision.
<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>

2.23. 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>
Bundesverband der Wertpapierfirmen (bwf) comment:

We are not aware of any issues which would call for an alteration of Articles 47, 48 and 49 of the MiFID Implementing Directive.
<ESMA_QUESTION_103>

2.24. 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>

Bundesverband der Wertpapierfirmen (bwf) comment:

We do not support ESMA's proposal to disable undertakings that are not large in scale to opt-in as eligible counterparts under the conditions of Article 50(1) Subparagraph 2 of the MiFID Implementing Directive.

While we agree in principle with the assessment of Recital 104 of MiFID II that "the financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments", it must be remembered and emphasised that it was in particular the misjudgement of very large institutions with respect to their on- and off-balance-sheet risks which became the catalyst and accelerant of the financial crisis.

Furthermore, according to the "level playing field " paradigm of European financial market regulation, for long years even very small investment firms are categorised as "fully fledged" Basel III "trading book institutions" without any contestable evidence that these firms would have been less efficient in managing their risks. In the contrary, examples can be easily found that the "toxic asset contamination", in many cases was even highly positively correlated to the size of the institution.

Accordingly, since the European financial regulatory framework classifies even very small investment firms as "born" eligible counterparties, we cannot follow ESMA's underlying assumption that "size" per se would be a meaningful parameter which should disqualify somebody to be voluntarily treated as an eligible counterparty, if he so prefers.
<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>

2.25. 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>
Bundesverband der Wertpapierfirmen (bwf) comment:

We assume that the reference to Article 14(3) MiFIR in Paragraph 2 of Chapter 3.4. CP is a clerical error and should read Article 15(3) MiFIR.

For the sake of clarity and uniformity of provisions, the definition of "portfolio trades" and "conditions other than the current market price" should be aligned to the largest extent possible between Article 15(3) MiFIR and Article 23(3) MiFIR. However, while Article 15(3) MiFIR refers to "orders", Article 23(3) MiFIR is applicable to all "trades". Therefore, while the execution of an order results in a trade, there might be trades, e.g. bilateral proprietary trading transactions or transactions purely technical in nature, which are not based on an order. To our understanding, this means that Article 23(3) MiFIR has a wider scope than Article 15(3) MiFIR.

While the draft technical advice in Chapter 3.4. CP defines a "Portfolio trade" as a transaction "that involves 10 or more financial instruments", Paragraph 13(ii)(b) of Chapter 3.4. DP defines a "Portfolio trade" as a "transaction in more than one financial instrument where those financial instruments are traded in a single lot against a specific benchmark". While we do not agree with the benchmark requirement, simply because there are portfolio- or basket trades which do not reflect the composition of a specific benchmark and therefore are not priced on such a basis, we think that the definition "more than one financial instrument where those financial instruments are traded in a single lot" is appropriate and in line with the Level I text in both circumstances. Accordingly, this definition should be also used in ESMA's advice given with respect to Article 15(3) MiFIR.

Otherwise, we agree with ESMA's proposal, since the other examples for "conditions other than the current market price" given in the context of Chapter 3.4. DP might not be relevant for the activities of systematic internalisers and the general clause in Paragraph 2(iii) of ESMA's draft technical advice provides for an appropriate level of flexibility regarding the application of Article 15(3) MiFIR.
<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

We agree in principle with ESMA's list of exceptional circumstances which appears appropriate and at least in principle seeks to establish a "level playing field between off- and on-venue execution.

However, we are highly sceptical about the proportionality and regulatory usefulness of the proposed requirement for systematic internalisers to inform their NCA "immediately" if a quote is withdrawn. Here we think it would be sufficient and appropriate if the compliance with the relevant provisions is monitored by a firms compliance function and internal and external audit.
<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

When defining requirements for systematic internalisers, the guiding principle should be to create a level playing field with market makers active on a trading venue, since from an individual perspective, these business models might be regarded as interchangeable or alternatives to some degree. Therefore, no undue incentive should be given for one or the other.

Against this background, we think that "regular and continuous" should be measured against the same benchmark as the quoting obligation for firms falling under Article 17(3) MiFID II (please refer also to our answer to question 271 DP).

In this conext, an 80% availability of quotes requirement which would be in line with the requirements for market makers under Regulation (EU) 236/2012 on short selling and certain aspects of credit default swaps, could be considered to be appropriate.
<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

In order to avoid any ambiguity, ESMA's draft technical advice in Paragraph 9(ii) should refer to "quotes" in a uniform way, whereby the current version of the text mixes the terms "quotes" and "orders" (while a systematic internaliser publishes "quotes", he receives "orders" from its clients).
<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

At this point, we would like to bring to ESMA's attention an editorial error in Paragraph 4 of Chapter 4.2. CP which falsely suggests to add "OTFs" to the list of venues where unexecuted limit orders on shares could be transmitted.

We do not wish to overemphasise this issue and we are well aware that the tight over all timeline of the legislative process does not lie in ESMA's responsibility. Nevertheless, since the option of OTFs for equi-

ties was deleted from the Level I text completely, we think that this easy to detect mistake clearly exemplifies the inherent dangers of "fast track legislation".
<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 you views on controlling charges by fixing a limit on the share of revenue that market data services can represent?

<ESMA_QUESTION_157>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_157>

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>
Bundesverband der Wertpapierfirmen (bwf) comment:

In this context we are well aware that the problem of clarifying the meaning and finding a clear demarcation for the scope of high frequency trading to a large extent results from the Level I text which was redrafted several time. The remaining set of parameters for systems and proceedings which shall give evidence for high frequency trading are rather general and unsatisfying. We therefore principally appreciate ESMA's endeavours to compensate for the lack of clarity in the Level 1 text by developing a more stringent technical definition based on specific thresholds. However, the proposed calibrations and methods of calculation need further improvement in several ways.

When discussing the two proposed options on a general level, we would like to note that focusing on the "life time of orders" for the purpose of identifying HFT activities, as Option 2 suggests, has a strong attractiveness at first sight since it tries to define high frequency trading directly by its result, whereby Option 1 focuses strongly on secondary technical parameters with an inherent danger of delivering "false positive" test results. In particular "high bandwidth" and "high intraday message rates" may also result from trading activities, e.g. traditional market making, which do not constitute HFT.

Unfortunately, the implementation of a "life time of orders" concept would face a number of difficulties in practice. The major problem, very obviously, lies in the definition of an appropriate threshold which needs to be effective and insusceptible to manipulation at the same time.

ESMA has proposed to use for this purpose the overall "median daily lifetime of the orders (having been modified or cancelled) in a given trading venue" as a benchmark. We think that such a relative threshold is rather impractical and might deliver improper results. The greatest weakness of this approach lies in the fact that the median daily lifetime of orders in any trading venue will be directly biased by the percentage of HFT traders active on this venue. Equally dissatisfying, even participants on a venue which does not allow high frequency trading, would still be defined as "HFT" when a simple relative benchmark as the median is applied.

In order to avoid these unsatisfactory results, we are of the opinion that a meaningful and fair application of a lifetime of orders would require to set an absolute threshold which is based on the current level of trading technology and which therefore would require a periodic recalibration. As an estimated guess, we suggest that a lifetime of orders having been modified or cancelled within 250ms could be a starting point for discussion and further evaluation. In order to avoid an undue burden for market participant to proof that they do not fall into the HFT category, it would be important that the calculation of the lifetime of orders being modified or cancelled should be undertaken by the trading venue.

Furthermore, as a de minimis rule, an absolute threshold with respect to the number of orders falling into this category should be defined for the purpose of identifying HFT activities. An absolute threshold would be more appropriate than a relative one, since any statistical measure would be prone to manipulation by sending non executable "dummie" orders in order to move the median or mean into a desired direction. A statistically weighted threshold would also be dysfunctional for identifying HFT activities when high frequency trading only accounts for a certain percentage of the overall trading activities of a

market participant. For the purpose of identifying regular HFT activities, we suggest that such a threshold could be set at a relatively low level, e.g. 1.000 orders per day falling into the defined category.

In contrast to Option 2, the requirements proposed under Option 1 are intended to identify HFT activities by a broader, more indirect assessment of a firms trading environment. As already mentioned above, the shortcoming of this approach lies in the fact that, the "high bandwidth" and the "high message intraday rates" thresholds are likely to be met by numerous other market participants which can not considered to be "HFT". The need for bandwidth and the emergence of a high number of intraday messages may simply result from the overall level of trading activities, either because the market participant is large in scale or because of a certain business pattern, most notably market making. Accordingly, while this approach looks differentiated at first glance, only the "proximity" arrangements, according to current trading practices, can be seen as a comparably reliable indication of HFT activities.

In this context, it should be further noted that the proposed threshold of at least 2 messages per second for the purpose of defining "high message intraday rates" would be completely inappropriate. First of all, any meaningful threshold would have to be set on an instrument by instrument level, otherwise the pure size of a market participant would have an undue impact on the assessment. Furthermore, even on an instrument by instrument level, the proposed threshold would be very likely to be easily exceeded by any "high latency" traditional market making activity. Therefore, the proposed threshold urgently calls for recalibration. However, even with a significantly increased threshold on an instrument by instrument basis, a significant danger of "false positive" test results would remain.

Against this background, we would propose either the use of a modified Option 2 approach or for a combination of both options whereby a modified lifetime of orders test would become an additional requirement within the proposed catalogue of conditions under Option 1 to be fulfilled by a market participant to be considered "HFT".
<ESMA_QUESTION_167>

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

<ESMA_QUESTION_168>
Bundesverband der Wertpapierfirmen (bwf) comment:

Please refer to our answer to question 167 CP.
<ESMA_QUESTION_168>

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

<ESMA_QUESTION_169>
Bundesverband der Wertpapierfirmen (bwf) comment:

If ESMA should decide to make use of Option 1 (without an additional lifetime of orders test), in order to mitigate the risk of "false positive" classifications, a market participant should be given the opportunity to demonstrate that he is not active in high frequency trading, e.g. on the basis of a periodic historic report of his lifetime of orders patterns provided by the trading venue.
<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

While we have certain sympathies for Option 2, we think that the statistical median would be an improper benchmark as already elaborated in detail in our answer to question 167 CP.

<ESMA_QUESTION_170>

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

<ESMA_QUESTION_171>
Bundesverband der Wertpapierfirmen (bwf) comment:

Dissenting from ESMA's preliminary view presented in Paragraph 20 of Chapter 5.1. CP, we are of the opinion that a firm being considered to undertake HFT on one venue should not automatically fall into this category on any other venue where it is active. Unfortunately, ESMA does not give any explanation for his view. Therefore, all we can add at this point is the general comment that any legal definition and its application should be as precise as possible. Furthermore, since some venues prohibit algorithmic trading completely, it would be hard to argue that some of its members should be categorised as "HFT" nevertheless.
<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

We support ESMA's principle view that "shared connectivity arrangements" using a "common connectivity channel" should remain outside the scope of DEA as long as no dedicated bandwidth is allocated to a customer or a specific latency is provided as part of the service level agreement. In other words, as long as a client shares the same "pipeline" with all other comparable clients, the client orders passes the same limit controls as if the order would have been entered manually by the investment firms personnel and the order "queues up" with other orders, depending on when it was transmitted, we think that the order should be regarded to be intermediated and outside the scope of DEA.

In this context, the question whether the order might have been generated by an algorithm on the side of the client, is neither fully controllable by the executing investment firm, nor does it seem to be relevant to the investment firm (notwithstanding any regulatory requirements which might arise for the client from originating algorithmic orders).

However, we are aware that this view might not be shared by all NCAs. Nevertheless, we think that extending the scope of DEA beyond "tailor made arrangements" which are a core requirement for dedicated algo-trader and in particular for HFT firms, the extension of the scope will rather lead to ambiguity in the picture but not necessarily to a more effective regulatory regime.
<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>
Bundesverband der Wertpapierfirmen (bwf) comment:

Here, the definition of "equivalence" cannot be meaningful assessed without the needs and expectations of the client originating the order being taken into account. For a client without specific latency requirements, DEA will be widely equivalent to any "shared connectivity arrangements" but not vice-versa.
<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 Fehler! Verweisquelle konnte nicht gefunden werden.**), 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 Fehler! Verweisquelle konnte nicht gefunden werden.**,** Fehler! Verweisquelle konnte nicht gefunden werden. **or** Fehler! Verweisquelle konnte nicht gefunden werden. Fehler! Verweisquelle konnte nicht gefunden werden.**?**

<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 Fehler! Verweisquelle konnte nicht gefunden werden.**) 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 Fehler! Verweisquelle konnte nicht gefunden werden. Fehler! Verweisquelle konnte nicht gefunden werden. **and** Fehler! Verweisquelle konnte nicht gefunden werden.**, 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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"EFET generally agrees with the approach proposed by ESMA. However, EFET would like to clarify that the distinction between 'can' and 'must' be physically settled may be difficult to assess upon entry into a contract for those wholesale energy products and energy derivatives that *are* eventually settled physically where transfer of ownership takes place upon execution.
In any case the understanding of EFET is that:

- Where contracts must be settled in cash or have an option to be settled in cash at the option of one of the parties, these should be assessed under C.5;

- Only contracts without (option for) cash settlement that 'can be' or 'must be' physically settled need to be assessed under C.6 or C.7, depending on the place of execution and the other conditions set out in these sections. However when cash settlement takes place 'by reason of default or other termination events', this should not give reason to any assessment under Annex I Section C, as this is merely an exception to the normal settlement of the contract. The wording in C5 and the spirit of C6 and C7 confirm this understanding.

- A commodity derivative contract that is cash-settled by mutual consent must explicitly contain provisions for cash-settlement by mutual agreement. In the experience of EFET this does not happen very frequently. In any case it is most likely that if mutual agreement between the parties to cash settle is reached, this would result in the contract being categorised as falling under section C.5

In legal terms, primary and secondary contractual obligations have to be distinguished. A contract is classified as a derivative financial instrument within the meaning of C.5, if a party has the primary contractual right to cash settle or opt for a cash settlement. In contrast, if cash settlement takes place because of early termination or because of an event of default, the compensation for damages is a secondary obligation which replaces the primary obligation.

In relation to the draft technical advice, EFET understands from the 'waterfall' of 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), are not be required to be tested further against the criteria defined in C.7 and the related implementing rules. The wording "*not otherwise mentioned in point 6*" included in C.7 highlights that C.6 prevails over C.7 in this regards. Similarly, EFET expects that the transitional exemption for energy derivatives in coal and oil according to article 95 is valid also for those contracts that *must* be physically settled and that are traded bilaterally.

The carve-out in C.6 for wholesale energy products would be deprived of their purpose if the same contracts would have to be assessed against the requirements of 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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"The Directive 2014/65/EU does not restrict the definition of oil products to a subset of contracts. Thus, the term 'oil' should encompass crude oils, any other refinery feedstocks, as well as all grades of refined petroleum and related products traded in the commodity markets including liquefied petroleum gas, fuel oil, middle distillates, gas to liquids fuels, jet, kerosene, avgas, mo.gas. (or motor gasoline), biofuels, base oils, chemical feedstocks and chemicals. EFET would suggest the following definition: 'mineral oil, of any description and petroleum gases, whether in liquid or vapour form, including products, components and derivatives of oil and oil transport fuels'. Such a definition of oil would be consistent with the rationale expressed in other sections of the Consultation/Discussion Papers, e.g. ancillary activity section, which do not disaggregate the 'oil' asset class. In addition, this approach and definition would be in line with national legislation, such as the UK FCA Handbook and the 2008 Glossary Amendment Instrument which include bio-fuels within the scope of 'oil market activity'. It will be important, too, that oil transportation fuels, relating to oil including biofuels, are included in the definition, considering that biofuels are a mandated component of gasoline and diesel.

If the products, components and derivatives of oil and transportation fuels are excluded from the scope of C.6 energy derivative contracts, there are likely to be significant additional cost and liquidity implications for these markets and for end consumers. This is because many firms would have to clear this physical business and pay a significant resulting daily risk margin (initial and variation). This would reduce working capital for commercial and industrial activities.

In addition, EFET notes that the hedging exemption provided by the European Market Infrastructure Regulation (EMIR) to non-financial counterparties (NFCs) would not solve the problem as it applies to the calculation of the threshold (used to identify NFC+), but not to the clearing obligation when this is triggered. Participants who are NFC+ by virtue of other activities would still have to clear or margin all derivative transactions.

If these oil derivates products are not excluded or are included on a restricted basis of interpretation, the regulatory burden on trading energy commodities would significantly increase discouraging market participation and depressing liquidity."
<ESMA_QUESTION_214>

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

<ESMA_QUESTION_215>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"Yes, in general EFET agrees with the approach proposed by ESMA. However, the wording proposed by ESMA does not acknowledge fully the obligation for physical settlement applicable under standard contracts, nor does it reflect the concepts expressed in Recital 10 of MiFID II, which defines the conditions of an enforceable and binding obligation for physical delivery. EFET offers some drafting suggestions at the end of this answer.

Firstly, the terms 'unrestricted and unconditional right to physical delivery' may create legal uncertainty. According to 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 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 a legal point of view more closely in line with the level I text compared with the proposals of the draft technical advice.

Moreover, exceptions should be made clear in case of default and termination events, including the right to pay financial compensation for an event of default. The draft technical advice should clearly state that default provisions are to not be understood as an option for one party to replace physical delivery with cash settlement. In civil law a cash payment obligation as compensation for damage 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 as a secondary obligation as opposed to a primary obligation of physical settlement agreed in the contract. It would be inconsistent to apply a different standard in the implementing rules for C.6 (and C.7) which define physically settled commodity derivative financial instruments.

Most importantly, whilst EFET appreciates ESMA's consideration of the implications of 'operational netting' in power and gas markets, our association highlights 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'.
In consideration of the comments above, EFET suggests 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.

[to be added to the definitions and subject to further refinements] 'Offset of deliveries': means the obligation of counterparties to a physical trading agreement to submit net nominations and/or schedules to the system operators of the facility at which the title of ownership is transferred in accordance with the rules and guidelines of operations of such system operators

These amendments are suggested to ensure that the terms used are appropriate and provide sufficient legal certainty and consistency."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"EFET is delighted that ESMA acknowledges that operational netting in power and gas markets is distinct from cash settlement. EFET also agrees 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 gas and electricity transactions involve the delivery of the underlying commodity and the change in the ownership of the commodity. These contracts include spot products (where delivery occurs 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 which could be considered equivalent to cash settlement: as the obligation under each individual contract to physically deliver and transfer title remains legally binding and enforceable. In this and the next answers the terms nomination and scheduling are used as synonymous.

Nominations/Schedules timelines to TSOs
In gas and power markets, participants have to enter into contractual arrangements with system operators of transportation pipelines/transmission lines in order to become network/system users and be able to deliver the energy produced or acquired to wholesale counterparties or retail consumers. Network codes, General Terms & Conditions of Transport/Transmission and the technical annexes are the main contractual and operational documents regulating the relationship between network/ users (or market participants) and the Transmission System Operators or (or TSOs).

Users may have direct access to energy production facilities (e.g. a power plant) or may acquire energy from other users. In all cases, the acquisition (and sale) of energy at a 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 of title, including on a net basis (see for example EFET General Agreement concerning the delivery and acceptance of Natural Gas §4). Such a stipulation can also arise by virtue of the market structure itself.

A user must notify the TSO of how much energy it intends to deliver or accept at each entry and exit point to the system in each time unit (day or hour) and from whom it will receive or to whom it will deliver the energy at such a point (a unique identification code for each user must be provided for this purpose). Generally TSOs require an initial nomination or schedule to be made by the user on the day before delivery and, depending on the system, these nominations or schedules can be updated throughout the relevant day of delivery (renominations), up to the hour before delivery in most energy markets.

A user may buy and/or sell energy for delivery on a specific day or hour at a specific delivery point on numerous occasions with different counterparties in the 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.). Therefore, depending on their trading patterns, two users may end up with more than one trade between them at a particular delivery point for a delivery period and these may include both ”buys” and ”sells”. TSOs or service providers, who are responsible for the management and secure operations of the transportation networks on a physical and commercial point of view, process the information received and match the schedules submitted by each counterparty also to ensure that the instructions of sellers and buyers are consistent in order to take into account the flows required by each network user (or group of network users). Any inconsistency must be rectified before the delivery period occurs.

Some TSOs (for example National Grid Gas in the UK) simply require each pair of users to give them notice (by nominating) of every trade between them and the TSO will then aggregate the trades and set the buys off against the sells (if applicable) to produce a net position for the pair for each delivery period and delivery point. Other TSOs, for reasons of administrative convenience only, require the users to calculate the net position and to nominate or schedule such a net number to them.

It must be noted that failure by a user to nominate or schedule correctly and in time to a TSO constitutes a default under the trading contact as it will lead to incorrect quantities of energy being delivered and consequently damages being payable to the counterparty. This may also lead to imbalances in the energy system (see below).

As a result, in gas and power markets delivery is performed by submitting the nominations of the injections into/withdrawals from the energy system and the transactions with other wholesale counterparties to the operator of the designated delivery point.

An example on how nominations works in electricity markets can be found at this link, referring to the Belgian electricity system: http://www.elia.be/~/media/files/Elia/Products-and-services/ProductSheets/E-Evenwicht/E3_E_E-Nomination.pdf

For Gas for example:
http://www.grtgaz.com/fileadmin/clients/fournisseurs/documents/en/operationnel/1_Find_out_more_about_nominations_confirmations.pdf
(http://www.grtgaz.com/en/acces-direct/customer/shipper-trader/peg.html#tabs3)

For completeness EFET would like to provide some background information on how the framework for balancing supply and demand in gas and electricity markets as this is an essential element of liberalised markets.

Balancing of demand and supply in gas and electricity markets
In the daily activity of submitting nominations/schedules to system operators all individual contracts traded either on platforms or bilaterally are physical for settlement purposes.

It is important to note that in addition to bilateral contractual obligations to other market parties, users of the gas and electricity systems are obliged or incentivised to "balance" their inputs to and outputs from the transmission system in each hour or day, otherwise the TSO will levy penalties on them. This is a fundamental operational principal of the modern European energy systems.

In the period following the actual flows (a few days or months), the TSOs calculate the energy inputs and outputs attributable to each network user for each relevant period. Differences between the final nominations and the actual intakes/offtakes are charged at a specific 'balancing price', usually structured in a way to incentivise network users to stay 'in balance' during each period. This ensures that the inputs and outputs of the system are commercially and physically balanced.

It is important to note that nominations and schedules are simply users' intended deliveries and acceptances. What is actually delivered/accepted is what is allocated by the TSO after the delivery period. If more or less energy is physically transferred at a delivery point than the aggregate confirmed nominations of all users, then the resulting excess or shortage of energy is either attribute to the party causing the problem, if this can be identified or smeared across all users according to system rules (e.g. on a pro rata basis to nominations) as part of the TSO's allocation process. Users may under or over deliver or accept on their contractual obligations and the remedies clause of the relevant bilateral deal between them will then apply.
For instance, the EFET contracts contains terms that apply in the case of more than one trade between the parties at a delivery point in a delivery period to apportion the Allocated (i.e. delivered) quantity notified by the TSO for the delivery point and delivered period between the trades. This is important as it allows the parties to check that they have delivered and accepted the correct delivery quantity for each trade and, if not, to apply the damages/remedies clauses for failure to deliver or accept a trade, as well as to invoice for the amounts delivered under each trade.

Conclusion
The most relevant aspect is that operational arrangements do not involve the netting of contracts or transactions which remain separate and provide title transfer. Physical settlement is legally binding and enforceable. The offset of deliveries is merely the result of Nominations/Schedules submitted to TSOs according to their instructions and operational rules. Netting arrangements based on essential operational activities must be acknowledged and remain outside of the scope of derivative financial instruments. Indeed:

- The submission of nominations according to the operational rules provided by system operators is the way in which counterparties perform the obligation to settle physically their contracts.
- Conversely, contracts that are not for physical settlement do not require entering into contractual arrangements with system operators, do not require the submission of schedules nominations and are not subject to balancing rules.

These are significant elements. Failure to recognise operational netting practices as a means of physical delivery within 'must' be physically settled contracts would render the exclusion for physically settled wholesale energy products traded on an OTF, as defined in level 1, void.

Therefore, EFET urges ESMA to consider such substantial characteristics when compiling the draft technical advice to the EU Commission for the delegated acts on the definition of commodity derivative."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"**Power and natural gas**
Bilateral trading standard agreements in gas and electricity include contracts such as:

- The EFET General Agreements concerning the Delivery and Acceptance of Natural Gas / Electricity, including their annexes and appendices;
- Trading Terms & Conditions Short Term Flat NBP 1997 (NBP 1997, UK Gas);
- Zeebrugge Hub Natural Gas Trading Terms & Conditions (ZBT 2004, Belgian Gas);
- Grid Trade Master Agreement 2004 (GTMA 2004, UK Power);
- Standard Terms and Conditions for Sale and Purchase of Natural Gas for UK Short Term Deliveries at the Beach (Beach 2000, UK Gas);
- ISDA Master Agreement (1992/2002) with physical trading annexes (GTMA Transactions; NBP; ZBT);
- Any long form confirmation referring to the above mentioned master agreements.

These are examples of standard contracts for physical delivery used by parties that are trading bilaterally, including when trading through brokers. These Master Agreements stipulate the primary obligation for the selling party to a forward transaction to physically deliver and transfer the title in the respective commodity and the obligation of the buying party to accept such delivery and transfer of title.

Fulfilling such an obligation of delivery requires that the counterparties to a transaction have a separate 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 arranged by submitting the schedules of the transactions to the operator of the designated delivery point.

Key terms of the Trading Contracts

- Obligation under each trade to physically deliver and transfer rights of title in the agreed quantity of the relevant commodity by the means applicable at the relevant delivery point. In order to deliver or accept the parties are obliged to nominate/schedule accurately and on a timely basis. There is no 'ca,sh 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 a commodity. Remedies for failure to deliver or accept the correct contract quantity in each delivery period for each trade – generally calculated as the difference between the contract price and the price paid or received by the non-defaulting party in replacing short positions or selling long positions caused by the defaulting party.

- Force majeure – 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 makes it impossible for one of the parties to perform its obligations according to the contract terms.
- In a natural gas contract, what happens in the event that Off Specification natural gas is delivered.
- Invoicing and payment – the quantities delivered under each trade are separately invoiced on a monthly in arrears basis and VAT paid (or the reverse charge applied) to such amounts.
- Credit and security requirements.
- Termination rights – The Framework Agreement and the Individual Contracts can only be terminated ordinary or early in the event of specified material reasons. An ordinary termination does not affect the existing Individual Contracts and the existing delivery obligation. In the case of material default such as accrued failures to pay, the insolvency of the counterparty or the failure of credit support, the non-defaulting party generally seeks to have the right to terminate all outstanding trades and to claim damages for both quantities already delivered but not paid for and its future losses arising from losing the contract early i.e. for its loss of bargain (Mark to Market losses). In practice these clauses are usually only invoked on the insolvency of the counterparty and whether they are enforceable depends on the insolvency laws of the country of incorporation of the party that is insolvent (NB: the laws of many countries prevent the termination of contracts on the grounds of insolvency). Contracts often provide an intermediate right for the non-defaulting party to suspend deliveries in the event of material default by the other party before invoking termination rights. If all trades are so terminated, the non-defaulting party must calculate its losses or gains in respect of each trade and aggregate and offset these, i.e. it cannot just claim for its losses whilst benefiting from its gains.

Some of these master agreements may provide for an option to elect early termination without a notice requirement (Automatic Termination), usually in case of insolvency or similar conditions endangering the claims of a party, in which the EFET General Agreement itself and all Individual Contracts terminate automatically at a pre-defined point in time if automatic early termination has been elected in the Election Sheet. The background of the Automatic Termination is the different national legislation on insolvency with respect to close out netting as explained above.

Trades can be entered into bilaterally by means of the parties contacting each other (i.e. without the intermediation of a broker) or via brokers by voice/screen services (e.g. Prebon, Spectron). Even if trades are entered into via a broker, the parties to the trade are the buyer and the seller who must have access to and the ability to move physical energy to or from the relevant delivery point. The broker merely matches the two parties up and has nothing to do with physical delivery. Our current understanding is that energy brokers may classify as Organised Trading Facilities according to MiFID II.

The standard trading agreements mentioned in this answer are not available to non-sophisticated counterparties or to trading of non-standard/ non-liquid physical products (such as trading of gas directly from production wells, for example). Any non-standard energy trading agreement entered into bilaterally between two counterparties, which reflects terms similar or equivalent to those key terms listed above and provides for a binding primary obligation to physically delivery, should also be considered as a "contract that must be physically settled" within the meaning of C.6.

Finally, consideration should be given to those contracts in gas and electricity that must be physically settled and are concluded through an OTF (located in the EU) and whose delivery takes place outside of the EU, especially within Europe. In fact, such contracts are not strictly wholesale energy products i.e. 'contracts for the supply of electricity or natural gas where deliver is in the Union' (Article 2.4, Regulation 1227/2011/EC). However, it would be illogical to include them into the definition of derivative financial instrument.

Oil, oil products and coal

The vast majority of transactions in the physical oil markets are concluded on a bespoke basis between the parties incorporating seller's General Terms & Conditions (GT&Cs) appropriate to the transaction structure in question (i.e. FOB/CIF/DES). Examples of such GT&C's include those produced by Shell and BP, which are widely used in the industry. The parties have the obligation to make and receive physical delivery of the commodity at the specified location in the absence of an event of force majeure or other event of default giving rise to the normal contractual remedies and with no unilateral right for either party to replace its physical performance obligations with a cash settlement. In liquid markets where 'chains' of sales occur for operational convenience (i.e. X sells to Y which on-sells to Z) delivery of the physical cargo will be made directly to the location of the ultimate buyer in the chain, but the obligation to deliver and receive the commodity as well as the documents of title (i.e. bills of lading) are nevertheless transferred from each party to the next in the chain of linked sales and purchases.

Such contracts may be traded on the Platts e-Window and through the support of energy brokers which do not have the characteristics of multilateral trading facilities, e.g. via voice brokering. Such contracts may also be traded bilaterally.

The North Sea Brent, Forties, Oseberg Ekofisk (BFOE) traded crude oil market trades full cargo crude oil contracts on a forward basis. Forward full BFOE cargoes are physical trades and in the normal course will be placed into a nominated cargo chain with obligation for physical delivery and acceptance in the relevant terminal delivery programme. Where a chain of sale and purchases in relation to a full cargo BFOE delivery involves two or more of the same parties at different stages of the chain, the parties may enter into a subsequent and separate agreement and book out their obligations on the basis of net payment. Such agreement would be assessed according to the relevant applicable definitions.

These arrangements are necessary for the efficient operation of the North Sea physical crude markets. It is important that regulation construes them properly to ensure the status of the BFOE contract as a trading instrument for the delivery of physical cargoes of crude oil is preserved effectively. All BFOE Partials and Full Cargoes are governed by SUKO 90 15 Day Brent GTC's with updated amendments (now 25 day Brent).

In case of Coal, the most used standard contract is the 'Standard Coal Trading Agreement' (SCoTA)."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"**Force Majeure** is generally defined as an occurrence beyond the reasonable control of one of the parties which it could not have reasonably 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 established. 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, default, other termination event or other contractual event is deemed to have occurred and the counterparty claiming the Force Majeure is released from its contractual obligations for the period of time during which 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.

Force Majeure provisions are not be characterized as an option for one party to replace physical delivery with cash settlement. This also follows from C.5 which defines the cash settled commodity derivatives which qualify as financial instrument under MiFID II by including all derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties "other than by reason of default or other termination event". It would be inconsistent to apply a deviating standard in the implementing rules for C.6 (and C.7) which require the assessment of physically settled contracts.

Other bona fide inabilities to perform should be understood, instead, as any circumstance whereby the performance of a physical delivery or off-take does not take place for reasons that do not qualify as Force Majeure or for reasons of default or another termination event and which are objectively measurable as reasons defined in the contract terms for parties not to perform their obligations and set the contract aside. These other bona fide inabilities to perform may include condition precedent clauses or other circumstances that may suspend – but not terminate – the execution of the contract, annihilate ab initio or void and set aside the contract.

Civil law and common law list a number of such reasons (e.g. because the essential conditions for the formation of an agreement are not met, because of duress, because of conditions precedent, because of novations) which are accommodated through contractual clauses which can be qualified as bona fide inabilities to perform.

In all these cases, the bona fide clauses which comply with the civil/common law rules of the formation of agreements do not change the nature of the contracts which are still to be considered as 'must be physically settled', because the related clauses are only intended to protect the counterparties in cases where the underlying governing law prescribes the contract to be set aside and circumstances thus do not allow the ordinary execution of the contract, i.e. delivery of the commodity.

Events of Default are objective circumstances designated in contracts as termination events, material reason, events of default or any other terms that may be chosen freely by the parties which may lead to the early termination of a physical trading agreement, thus excusing the delivery (and often providing for a secondary compensation obligation to step into the place of the primary unexecuted delivery obligation). These events of default or early termination events are consistently used in the industry agreements for the trading of physical commodities in Europe (whether these are standard master agreements, customised master agreements or non-standard trading agreements).

Therefore, in all the cases mentioned above and namely Force Majeure, bona fide inabilities to perform and events of default/other termination events the physical delivery may be excused without changing at all the nature of contracts that 'must be physically settled'.

The examples mentioned in this answer should be intended only as illustrative and not exhaustive or conclusive because the main purpose of such concepts is to be sufficiently broad to accommodate unforeseen events impacting the commodity markets in question. 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 (see for instance the differences between the gas and oil markets referred to above).
In other words, it is impossible to provide a definitive list of reasons preventing the physical settlement of contracts as they can vary from case to case and similar outcomes for occasions of contractual non-completion may have fundamentally different drivers."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"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. Therefore, EFET does not agree with most of the changes proposed in the draft technical advice as they may create confusion and legal uncertainty.

EFET believes that the standardisation criterion should be better specified and EFET suggests a reference to 'listed contracts' to limit an interpretation that can be otherwise subjective.

Also, EFET has some technical but substantial suggestions on the text of the technical advice that EFET urges ESMA to consider them:

- The wording 'as far as contracts are within the scope of C.6' does not seem to be technically appropriate, since contracts in the scope of C.6 are by definition not subject to C.7. Therefore, a general approach is preferable to include OTF-traded contracts and explicitly mentioning the exception.
- The case of third country venues performing similar functions to an OTF for wholesale energy contracts, should be treated similarly as under MiFID I.

In consideration of the comments above EFET suggests the following amendments:

5. For the purposes of Section C(7) of Annex I to Directive 2014/65/EU, a contract which is not:

- a spot contract within the meaning of paragraph [6],

- a contract for commercial purposes within the meaning of paragraph xx, or

- otherwise mentioned in section C(6) of Annex I to Directive 2014/65/EU (meaning carved out from the definition of financial instrument under the terms of C.6)

shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes if it satisfies all the following conditions:

(a) it is standardised so that in particular the price, the lot, the delivery date, the product quality specifications of the underlying, the delivery location and other terms are determined by reference to regularly published prices of listed contracts, standard lots or standard delivery dates, standard product specifications, benchmark grades, or delivery locations and other standardised terms

(b) it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;

(c) it meets one of the following sets of criteria:

i. it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF except for wholesale energy contracts or energy derivative contracts that must be physically settled and that are traded on an OTF or a third country trading venue that performs a similar function to an OTF;

ii. it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF except for wholesale energy contracts or energy derivative contracts that must be physically settled and that are traded on an OTF or a third country trading venue that performs a similar function to an OTF; or

iii. it is equivalent to a contract traded on a regulated market, an MTF, an OTF except for wholesale energy contracts or energy derivative contracts that must be physically settled and that are traded on an OTF or a third country trading venue that performs a similar function to an OTF, with regards to the price, the lot, the delivery date and other terms including equivalent margining and netting treatment to contracts that are traded on a trading venue."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"The definition of a contract for commercial purposes is valid but too narrow. ESMA should improve it in order to make the concept of 'commercial purpose' applicable in different contexts and for different commodities.

This need also results from ESMA's suggestion to remove both the reference to "commercial purpose" from the original article 38(1) and the reference to "characteristics of other derivative financial instruments" from article 38(4). Although this proposal is not explicitly commented on or explained, and EFET disagrees with it, one can deduce from it that ESMA has the intention of giving a different definition of "commercial purpose". Other than contracts entered into for the purpose of balancing the supplies and uses of energy, it should also include for instance contracts entered into for the purpose of meeting regulatory requirements, such as Compulsory Stock Obligations (CSOs) and the Renewable Transport Fuel Obligation (RTFO).

In this sense, EFET recommends that ESMA should take into consideration the approach adopted under the U.K. legislation. The legislation makes explicit provisions for indications to be used to evaluate whether a contract is made for commercial purposes, namely: (a) where one or more of the parties is a producer of the commodity or other property, or uses the commodity in its business; (b) the seller delivers or intends to deliver the commodity or the purchaser takes or intends to take delivery of it.

This type has worked well in practice at the national level and EFET strongly recommends that ESMA should adopt a similar approach, in order to avoid the circumstance in which - by giving a

closed and specific list of contracts to be defined as having a commercial purpose - other contracts remain out of the definition without appropriate justification.

Further, EFET notes that paragraph 4 of Article 38 of Regulation (EC) 1287/2006 refers both to C.7 and to C.10. This is missing in the draft technical advice proposed by ESMA on the 'commercial purpose'.

It should be reinstate as it reflects the existing policy that contracts entered into for commercial purpose should also be regarded as not having the characteristics of other derivative financial instruments for the purposes of C.10 and, without evidence of any legislative intent to change this policy, should be carried forward into MiFID II.

A potential text that cover the cases mentioned above and applies also to C.10 contracts is the following:
"A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2014/65/EU, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, if it is entered into:

1. with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time;

2. for the purpose of meeting regulatory requirements to purchase, sell, hold or deliver a commodity;

3. where one or more of the parties is a producer of the commodity or other property, or uses it in his business; or

4. the seller delivers or intends to deliver the property or the purchaser takes or intends to take delivery of it.""
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"The definition of a contract for commercial purposes is valid but too narrow. ESMA should improve it in order to make the concept of 'commercial purpose' applicable in different contexts and for different commodities.

This need also results from ESMA's suggestion to remove both the reference to "commercial purpose" from the original article 38(1) and the reference to "characteristics of other derivative

financial instruments" from article 38(4). Although this proposal is not explicitly commented on or explained, and EFET disagrees with it, one can deduce from it that ESMA has the intention of giving a different definition of "commercial purpose". Other than contracts entered into for the purpose of balancing the supplies and uses of energy, it should also include for instance contracts entered into for the purpose of meeting regulatory requirements, such as Compulsory Stock Obligations (CSOs) and the Renewable Transport Fuel Obligation (RTFO).

In this sense, EFET recommends that ESMA should take into consideration the approach adopted under the U.K. legislation. The legislation makes explicit provisions for indications to be used to evaluate whether a contract is made for commercial purposes, namely: (a) where one or more of the parties is a producer of the commodity or other property, or uses the commodity in its business; (b) the seller delivers or intends to deliver the commodity or the purchaser takes or intends to take delivery of it.

This type has worked well in practice at the national level and EFET strongly recommends that ESMA should adopt a similar approach, in order to avoid the circumstance in which - by giving a closed and specific list of contracts to be defined as having a commercial purpose - other contracts remain out of the definition without appropriate justification.

Further, EFET notes that paragraph 4 of Article 38 of Regulation (EC) 1287/2006 refers both to C.7 and to C.10. This is missing in the draft technical advice proposed by ESMA on the 'commercial purpose'.

It should be reinstate as it reflects the existing policy that contracts entered into for commercial purpose should also be regarded as not having the characteristics of other derivative financial instruments for the purposes of C.10 and, without evidence of any legislative intent to change this policy, should be carried forward into MiFID II.

A potential text that cover the cases mentioned above and applies also to C.10 contracts is the following:
"A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2014/65/EU, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, if it is entered into:

1. with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time;

2. for the purpose of meeting regulatory requirements to purchase, sell, hold or deliver a commodity;

3. where one or more of the parties is a producer of the commodity or other property, or uses it in his business; or

4. 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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"No, EFET disagrees. The characteristic of contracts that are centrally cleared by CCPs or similarly margined bilaterally is a key characteristic. In fact, it is MiFID defining which contracts are classified as derivative financial instruments, whilst the clearing obligation under EMIR is only a consequence of such contracts being defined as financial instruments and will apply only to a subset of such contracts, after these have been determined to qualify as derivative financial instruments under MiFID. Hence the circularity mentioned in point 36 between the two pieces of legislation does not exist if the rules are implemented taking into account the hierarchy between MiFID, which prevails, and EMIR."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"Standardisation of contract terms is common practice of market development. Efforts to enhance standardisation should be favoured because the use of standard terms reduces legal uncertainty independently from the fact that the contract may have the characteristics of other derivative financial instruments.

Furthermore, such a criterion should not be the only factor for deciding whether to consider all contracts that satisfy a certain level of standardisation as contracts not having the characteristics of other financial instruments. Also, other than standardisation in price, lot and delivery dates, commodity derivatives are characterised by standardised product specifications for the underlying commodity, or based on benchmark grades of product, to be delivered into pre-specified locations. EFET recommends ESMA to further specify such criterion in the draft technical advice."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"Yes, EFET agrees with the intention to maintain the alternatives and to take into account the introduction of OTFs. However, EFET disagrees with the proposed change to the third limb of the trading criterion from "expressly stated to be equivalent to" to "equivalent to". The current test has worked well to date. The requirement for a contract to be "expressly stated to be equivalent to" a contract traded on a regulated venue provides clarity for all market participants, as it is possible to establish whether or not this criterion is met by looking at the terms of the contract.

Whilst EFET understands the ESMA comments, we do not consider that the ESMA proposal achieves a more objective test. A mere concept of 'equivalence' is likely to introduce legal uncertainty since it introduces a subjective test under which the parties may adopt different positions on whether a contract is "equivalent". Implementing regulations should absolutely avoid situations in which counterparties are not able to know whether a contract is a derivative financial instrument or not.

If ESMA wants to avoid that the classification in this respect depends on the choices of the counterparties, EFET suggests either sticking to the previous wording: "expressly stated to be equivalent" or, alternatively, to provide a workable definition of equivalence, in ordering to avoid creating any regulatory uncertainty for market participants.

Also, EFET believes 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 which must be physically settled, namely C.6 energy derivatives and wholesale energy products.

Moreover, EFET reiterates that central clearing or margining of contracts is a relevant and substantial condition to classify contracts which have the characteristics of other derivative financial instruments; if not included as per the suggestion of EFET on 5(b), the existence of clearing/margining arrangements must at least be taken into account when considering the equivalence criterion of 5(c)(iii)."
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"Yes, EFET partially agrees with the proposal to maintain the text of article 38(3) or Regulation 1287/2006 broadly the same.

Firstly, EFET appreciates that ESMA acknowledges that the exclusion under C.6 applies to wholesale energy products, including both contracts for the supply and transportation of electricity or natural gas. Therefore EFET agrees with the suggestions to amend the implementing rules concerning C.10.

However, 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. Also, some technical amendments are necessary.

EFET suggests, therefore, the following amendments:

1. For the purpose of Section C 10 of Annex I of Directive 2014/65/EU, a derivative contract relating to an underlying referred there into, shall be classified as having the characteristics of other derivative financial instruments if one of the following conditions is satisfied:

i. the contract is settled in cash or may be settled in cash at the option of one or more of the parties to the contract, other than by reason of default or other termination event;

ii. the contract is traded on:
a. a regulated market;
b. an MTF; or
c. an OTF except for wholesale energy contracts that must be physically settled and that are traded on an OTF
iii. the contract fulfils the conditions imposed for derivative contracts under Section C 7 of Annex I of Directive 2014/65/EU"
<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"Yes, EFET agrees."

<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>
At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"EFET does not have a firm opinion on this, however EFET does not see the need for introducing such additional type of derivative contract in this context."
<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>

At this point, Bundesverband der Wertpapierfirmen (bwf) fully supports the comment given by the European Federation of Energy Traders (EFET) which reads as follows:

"The terms *'by reason of default or other termination event'* are generally open to interpretation. Although it may be argued that these requirements are restrictive in the sense that they do not include every termination event, a systematic, teleological and historic interpretation speaks in favour of understanding these terms in a way to include each and every termination event.

It should be noted that C.5 defines the cash settled commodity derivatives which qualify as financial instrument under MiFID II by including all derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties "other than by reason of default or other termination event". This is the case also for C.10, which defines the cash settled derivative contracts relating to climatic variables, freight rates or official economic statistics which qualify as financial instruments under MiFID II and alike definitions were already included in C.5 and C.10.

It must be noted also that a right to close-out-net in case of a termination does not at all change the nature of a physically settled derivative into a cash settled derivative if close-out netting, which results in a cash payment extinguishing all future physical delivery obligations, is only possible following termination of the agreement rather than as means to fulfil an obligation under an existing and valid agreement.

Hence, based on this interpretation, these terms should be understood differently from *force majeure and bona fide inability to perform* and should be categorised as being circumstances, which may lead to termination of the contracts. The meaning of *"reason of default or other termination event"* is equivalent in all terms to the meaning of *"default and early termination events"*, in line with the amendment that we suggest on the draft technical advice to C.6. In fact, it would be inconsistent to apply a different standard in the implementing rules for C.6 and C.7 which define physically settled commodity derivative financial instruments.

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 makes it impossible for one of the parties to perform according to the contract terms.

Default or termination events may be specific cases of inability to perform of one of the counterparties, which include cases like inadequate performance assurance, insolvency or credit support documentation that determines the inability to perform the contract (see also below). For instance, according to EFET General Agreements there is the possibility of termination for a material reason': a party may give the other party unilateral notice of early termination and in such a case all further payments and performance in respect of all Individual Contracts as well as the EFET General Agreement itself shall be released and all existing duties and obligations should be replaced by the obligation of one party to pay damages for non-fulfilment to the other party (i.e., as according to the aggregated and netted settlement amounts).

The EFET General Agreements define such a material reason as certain cases of non-performance, cross default and acceleration, winding-up, insolvency or attachment, failure to

deliver or accept and representation of warranty (e.g. failure to deliver agreed guarantee or credit standard downgrading below a certain level).

Furthermore, to reduce the counterparty risk, the EFET General Agreements provide for an option to elect early termination without notice requirement, usually 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 in time if automatic early termination has been elected in the Election Sheet.

EFET provides further examples of events of default or early termination event here below. However, 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.

Events of default/early termination events:

- Breach of Agreement/ non-performance. When a party breaches its obligations under the master agreement (other than failure to deliver). (see e.g. §10.5(a) of the EFET General Agreement for Electricity or Gas)
- Credit Support Default. When a party or its credit support provider (e.g. a guarantor or provider of letter of credit) defaults under a credit support document or the credit support document expires, is terminated or rejected. (see e.g. § 10.5 (a) (ii) and (iii) and § 17(2)(e) and (f) of the EFET General Agreement)
- Misrepresentation. If a representation made by a party under the master agreement proves to be materially incorrect or misleading. (see e.g. § 10(5)(e) of the EFET General Agreement)
- Default under other agreements. If the counterparties to a master agreement are equally bound by another separate agreement and one of the parties defaults under the other separate and specified agreement
- Cross-default. If a party or its guarantor defaults under an agreement it has in place with a third party, generally with respect to repayment of financial indebtedness. (see e.g. Section 10(5)(b) of the EFET General Agreement)
- Bankruptcy/Insolvency. A party experiences a bankruptcy/insolvency event. Typically, a list of events relevant to the jurisdiction of incorporation of the party will be referenced. (see e.g. Section 10(5)(c) of the EFET General Agreement)
- Change in Law / Illegality. As a result of an adoption or change in law, it becomes unlawful for a party to or its credit support provider to perform under the master agreement, or any credit support document (as applicable).
- Tax Events. As a result of a change in tax law, a party's tax position under the master agreement is materially prejudiced (e.g. withholding tax will be applied). (see e.g. § 14.8 of the EFET General Agreement)
- Credit Event upon Merger. If a party merges with or is consolidated into another entity, and the resulting entity is materially less creditworthy than the original entity. (see e.g. § 17(2)(i) of the EFET Power or Gas Agreement)

- Failure to deliver. When a party under a master agreement consistently and over a longer period fails to deliver a contractually agreed volume of commodity. or § 10(5)(d) of the EFET Power or Gas Agreement)
- Material error case. This clause entails the possibility to maintain the validity of the contract whilst material errors may have pre-empted the delivery of the commodity as initially agreed.
- Failure to provide credit support documentation. The failure or delay to provide a guarantee to a counterparty may be defined in contracts as a reason for suspension of the contract or termination."

<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>