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Public consultation on the review of the MiFID II/MiFIR regulatory framework

Fields marked with * are mandatory.

Introduction

SECTIONS 1 and 3 of this consultation are also available in other 22 European Union languages.

SECTION 2 will be available in English only.

If you wish to respond in another language than English, please **use the language selector above to choose your language**.

Background of this public consultation

As stated by President von der Leyen in her political guidelines for the new Commission, "*our people and our business can only thrive if the economy works for them*". To that effect, it is essential to complete the Capital Markets Union ('CMU'), to deepen the Economic and Monetary Union ('EMU') and to offer an economic environment where small and medium-sized enterprises ('SMEs') can grow.

In the light of the mission letter to Executive Vice President Dombrovskis, the Commission services are speeding up the work towards a CMU to diversify sources of finance for companies and tackle the barriers to the flow of capital. The Action Plan on the **Capital Markets Union** as announced in Commission Work Program for 2020 will aim at better integrating national capital markets and ensuring equal access to investments and funding opportunities for citizens and businesses across the EU.

In addition, the new **Digital Finance Strategy** for the EU aims to deepen the Single Market for digital financial services, promoting a data-driven financial sector in the EU while addressing its risks and ensuring a true level playing field via enhanced supervisory approaches. And the revamped Sustainable Finance Strategy will aim to redirect private capital flows to green investments.

Finally, in the context of the Communication on the **International role of the euro**, the Commission has published a recommendations on how to increase the role of the euro in the field of energy. Furthermore, the Commission consulted market participants to understand better what makes the euro attractive in the global arena. Based on those consultations, the Commission has produced a Staff Working Document that provides an update on initiatives, and raises considerations for specific sectors such as commodity markets.

The Directive and Regulation on Markets in Financial Instruments (respectively MiFID II – Directive 2014/65/EU – and MiFIR – Regulation (EU) No 600/2014) are cornerstones of the EU regulation of financial markets. They promote financial markets that are fair, transparent, efficient and integrated, including through strong rules on investor protection. In doing so, MiFID II and MiFIR support the objectives of the CMU, the Digital Finance agenda, and the Sustainable Finance agenda.

Responding to this consultation and follow up to the consultation

In this context and in line with the Better Regulation principles, the Commission has decided to launch an open public consultation to gather stakeholders' views.

The Commission's consultation and separate ESMA consultations on the functioning of certain aspects of the MiFID II /MiFIR framework are complementary and should by no means be considered mutually exclusive. The Commission and ESMA consult stakeholders with respect to their specific area of competence and responsibility and with the objective to gather important guidance for any future course of action on respective sides. Both the ESMA reports and this consultation will inform the review reports for the European Parliament and the Council (see Article 90 of MiFID II and Article 52 of MiFIR), including legislative proposals where considered necessary.

This consultation document contains three sections.

The first section aims to gather views from all stakeholders (including non-specialists) on the experience of two years of application of MiFID II/MiFIR. In particular, it will gather feedback from stakeholders on whether a targeted review of MiFID II/MiFIR with an ambitious timeline would be appropriate to address the most urgent shortcomings.

The second section will seek views of stakeholders on technical aspects of the current MiFID II/MiFIR regime. It will allow the Commission to assess the impact of possible changes to EU legislation on the basis of proposals already put forward by stakeholders in the context of previous public consultations and studies (e.g. study on the effects of the unbundling regime on the availability and quality of research reports on SMEs and study on the digitalisation of the marketing and distance selling of retail financial service) and in the context of exchanges with experts (e.g. in the European Securities Committee or in workshops, such as the workshop on the scope and functioning of the consolidated tape). This second section focuses on a number of well-defined issues.

The third section invites stakeholders to draw the attention of the Commission to any further regulatory aspects or identified issues not mentioned in the first and second sections.

This consultation is open until 18 May 2020.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-mifid-r-review@ec.europa.eu.

More information:

- on this consultation
- on the consultation document
- on the protection of personal data regime for this consultation

About you

* Language of my contribution

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English
- ○ Estonian
- ○ Finnish
- ○ French
- ○ Gaelic
- ○ German
- ○ Greek
- ○ Hungarian
- ○ Italian
- ○ Latvian
- ○ Lithuanian
- ○ Maltese
- ○ Polish
- ○ Portuguese
- ○ Romanian
- ○ Slovak
- ○ Slovenian
- ○ Spanish
- ○ Swedish

* I am giving my contribution as

- ○ Academic/research institution
- ◉ Business association
- ○ Company/business organisation
- ○ Consumer organisation
- ○ EU citizen
- ○ Environmental organisation
- ○ Non-EU citizen
- ○ Non-governmental organisation (NGO)
- ○ Public authority
- ○ Trade union
- ○ Other

* First name

Michael

* Surname

Sterzenbach

* Email (this won't be published)

m.sterzenbach@bwf-verband.de

* Organisation name

255 character(s) maximum

Bundesverband der Wertpapierfirmen e.V. (bwf)

* Organisation size

- (•) Micro (1 to 9 employees)
- ( ) Small (10 to 49 employees)
- ( ) Medium (50 to 249 employees)
- ( ) Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

258694016925-01

* Country of origin

Please add your country of origin, or that of your organisation.

- ( ) Afghanistan
- ( ) Åland Islands
- ( ) Albania
- ( ) Algeria
- ( ) American Samoa
- ( ) Andorra
- ( ) Angola
- ( ) Anguilla
- ( ) Antarctica
- ( ) Antigua and Barbuda
- ( ) Djibouti
- ( ) Dominica
- ( ) Dominican Republic
- ( ) Ecuador
- ( ) Egypt
- ( ) El Salvador
- ( ) Equatorial Guinea
- ( ) Eritrea
- ( ) Estonia
- ( ) Eswatini
- ( ) Libya
- ( ) Liechtenstein
- ( ) Lithuania
- ( ) Luxembourg
- ( ) Macau
- ( ) Madagascar
- ( ) Malawi
- ( ) Malaysia
- ( ) Maldives
- ( ) Mali
- ( ) Saint Martin
- ( ) Saint Pierre and Miquelon
- ( ) Saint Vincent and the Grenadines
- ( ) Samoa
- ( ) San Marino
- ( ) São Tomé and Príncipe
- ( ) Saudi Arabia
- ( ) Senegal
- ( ) Serbia
- ( ) Seychelles

- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey

- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

* Field of activity or sector (if applicable):

at least 1 choice(s)

- [ ] Operator of a trading venue (regulated market, MTF, OTF)
- [x] Systematic internaliser
- [ ] Data reporting service provider
- [ ] Data vendor
- [ ] Operator of market infrastructure other than trading venue (clearing house, central security depositary, etc)
- [x] Investment bank, broker, independent research provider, sell-side firm

- [x] Fund manager (e.g. asset manager, hedge funds, private equity funds, venture capital funds, money market funds, institutional investors), buy-side entity
- [ ] Benchmark administrator
- [ ] Corporate, issuer
- [ ] Consumer association
- [ ] Accounting, auditing, credit rating agency
- [x] Other
- [ ] Not applicable

* Please specify your activity field(s) or sector(s):

Other: energy trading

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- ( ) **Anonymous**
  Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.
- (•) **Public**
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

[x] I agree with the personal data protection provisions

Choose your questionnaire

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* **Please indicate whether you wish to respond to the short version (7 questions) or full version (94 questions) of the questionnaire**.

The **short version** only covers the **general aspects of the MiFID II/MiFIR regime**

The **full version** comprises 87 additional questions addressing **more technical features**.
The full questionnaire is only available in English.

( ) I want to respond only to the **short version** of the questionnaire

- (●) I want to respond to the **full version** of the questionnaire

Section 1. General questions on the overall functioning of the regulatory framework

The EU established a comprehensive set of rules on investment services and activities with the aim of promoting financial markets that are fair, transparent, efficient and integrated. The first comprehensive set of rules adopted by the EU (MiFID I - Directive 2004/39/EC.) helped to increase the competitiveness of financial markets by creating a single market for investment services and activities. In the wake of the financial crisis, shortcomings were exposed. MiFID II and MiFIR, in application since 3 January 2018, reinforce the rules applicable to securities markets to increase transparency and foster competition. They also strengthen the protection of investors by introducing requirements on the organisation and conduct of actors in these markets.

After two years, the main goal of a MiFID II/MiFIR targeted review is to increase the transparency of European public markets and, linked thereto, their attractiveness for investors. The Commission aims to ensure that European Union's share and bond markets work for the people and businesses alike. All companies, both small and large, need access to the capital markets. The regulatory regime for financial markets and financial services needs to be fit for the new digital era and financial markets need to work to the benefit of everyone, especially retail clients.

Question 1. To what extent are you satisfied with your overall experience with the implementation of the MiFID II/MiFIR framework?

- ( ) 1 - Very unsatisfied
- (●) 2 - Unsatisfied
- ( ) 3 - Neutral
- ( ) 4 - Satisfied
- ( ) 5 - Very satisfied
- ( ) Don't know / no opinion / not relevant

Question 1.1 Please explain your answer to question 1 and specify in which areas would you consider the opportunity (or need) for improvements:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

To put it in a nutshell: In the unanimous opinion of bwf member firms and their clients, MiFID II / MiFIR has dramatically increased the administrative burden for all providers of investment services without creating any adequate, tangible benefit for their clients and professional and retail investors alike.
Due to the flood of the additional information, documentation, and reporting requirements and publication obligations for all parties concerned, the implementation of the extremely complex and extensive MiFID II /MiFIR regulations has created a tremendous additional internal administrative burden and significant external costs, especially in the area of legal advice and IT-services. This holds in particular true for the predominantly small and medium-sized investment firms organized within the bwf.
On the other hand, it is not yet apparent that the numerous measures introduced by MiFID II/MiFIR in the areas of market and cost transparency, product governance, rules of conduct and consumer protection have led to greater market efficiency, an increase in the confidence of private investors in the financial market, an improved financing situation for companies or generally to a positive stimulus for economic development.
On the contrary, the overly detailed and rigid requirements and additional regulations which make access to the capital market more difficult for investors and issuers alike are increasingly perceived by investors and the real economy as an excessive bureaucratic burden and paternalism.
Furthermore MiFID II/MiFIR has failed to achieve some of its core objectives, most notably to bring more trading on lit and regulated markets. In fact, the contrary is the case, the trading landscape within the Union today, is even more fragmented and the level of trading on regulated markets lies significantly below the level before MiFID II/MiFIR were implemented.
We therefore emphatically urge the Commission and all parties involved in the legislative process to insure that the upcoming review of MiFID II/MiFIR is guided by the following fundamental principles:

- Strengthening of Level I and reduction of exuberant Level II & III measures,
- Avoidance of complexity and unnecessary detail to the highest extent possible and return to a more principles based regulatory approach,
- Any changes and amendments to the existing framework must be strictly evidence based, take cost /benefit considerations effectively into account,
- Foster the principle of proportionality and enable investment firms of all sizes to for the benefit of all kinds of issuers and investors,
- Reintroduction of the idea of a self-reliant responsible (retail) investor (corresponding to the idea of a responsible citizen) and avoidance of confusing investor protection with paternalism,
- Insure coherence with the Capital Market Union reform and improve the competitiveness of the EU financial sector.

We see room for improvement and recalibration in particular in the following fields:

- Market structure (recalibration of the share trading obligation, protecting well established market models, further strengthening of regulated markets),
- Market data pricing and quality (finding a more balanced approach to the structural imbalances between monopolistic/oligopolistic data providers and aggregators and mandatory – and therefore demand-/price-inelastic data consumers, defining a feasible and economically sound framework for a consolidated tape for different asset classes),
- Greater consideration of the specificities of wholesale markets (lifting unnecessary cost and charges provisions for professionals and eligible counterparties, elimination of “opt out” possibilities for “born” eligible counterparties at the cost of smaller market participants),
- Leaner and better coordinated product governance (removing unnecessary product governance provisions for “plain vanilla” instruments like shares and bonds, insure a coherence between MiFID and a (revised) PRIIPs regulation and provide a clarification that market makers as liquidity providers are neither manufacturers nor distributors of financial instruments).

Question 2. Please specify to what extent you agree with the statements below regarding the overall experience with the implementation of the MiFID II /MiFIR framework?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The EU intervention has been successful in achieving or progressing towards its MiFID II /MiFIR objectives (fair, transparent, efficient and integrated markets).	◉	○	○	○	○	○
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	◉	○	○	○	○	○
The different components of the framework operate well together to achieve the MiFID II/MiFIR objectives.	○	○	◉	○	○	○
The MiFID II/MiFIR objectives correspond with the needs and problems in EU financial markets.	◉	○	○	○	○	○
The MiFID II/MiFIR has provided EU added value.	◉	○	○	○	○	○

Question 2.1 Please provide qualitative elements to explain your answers to question 2:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Not only but in particular for small and medium-sized investment firms, the sheer flood of text and the associated complexity of the regulatory framework itself on "Levels I-III", with the coexistence of directives and regulations, technical and regulatory standards and guidelines, and even an increasing flood of "Q&As", whose emergence are not transparent and whose legally binding nature is ultimately questionable and which, moreover, are not translated into the official languages of the Union; leads – despite all good will – almost inevitably to repeated uncertainty with regard to regulatory requirements and legally compliant conduct in individual situations.
Even for experts the rules, provisions and technical requirements stipulated by MiFID II / MiFIR and its subordinated regulations are often simply no longer manageable. National Competent Authorities also seem to be quite often simply overwhelmed by the flood of detailed regulations to be incorporated into national regulatory structures and legal frameworks on a member state level. As a result, this often leads to a highly divergent handling of regulatory content, for example in the question of whether the requirements formulated

in guidelines are integrated into the respective national regulations of the member states or are simply presented to the addressees of the standards as quasi-independent regulations
It is clear that this does not promote supervisory convergence and we are still far from a "single rulebook" worthy of the name. Furthermore, irrespective of the questions of manageability, questions of legislative legitimacy arise when an ever greater proportion of the practice-relevant rules are only concretized at "Level II" or "Level III". Although the described systematic legal problems do not only occur in the MiFID II/MiFIR area, the MiFID II/MiFIR regulatory universe appears to be a prime example of the problem described.
It is even more regrettable that on the other hand, it is not yet apparent that the numerous measures introduced by MiFID II/MiFIR in the areas of market and cost transparency, product governance, rules of conduct and consumer protection have led to greater market efficiency, an increase in the confidence of private investors in the financial market, an improved financing situation for companies or generally to a positive stimulus for economic development.

Question 3. Do you see impediments to the effective implementation of MiFID II/MiFIR arising from national legislation or existing market practices?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don’t know / no opinion / not relevant

Question 3.1 Please explain your answer to question 3:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Despite all efforts to create a Capital Market Union, financial market remain among the most inhomogeneous economic sectors with many remaining national specificities.
Furthermore, in many member states, there is still an ambition for “gold plating” on the one hand and to protect “national champions” on the other hand.
However, there are also impediments of effective implementation within the MiFIDII/MiFIR framework itself, e. g. insufficient flexibility with respect to certain formats or standards to be used with the often non-obtainable, non-existing or outdated “issuer-LEI” as one of the prominent examples.
Last but not least, the conceptual and practical differences in various legal fields as well as with respect to taxation frameworks, further hinder a better harmonized and coherent implementation of financial market legislation like MiFIDII/MiFIR.

Question 4. Do you believe that MiFID II/MiFIR has increased pre- and post-trade transparency for financial instruments in the EU?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don’t know / no opinion / not relevant

Question 4.1 Please explain your answer to question 4:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Despite the fact that increasing pre- and post-trade transparency and extending transparency requirement to asset classes other than shares has been a core objective of MiFID II/MiFIR, the overall effect was rather limited. From the perspective of market participants, there is a variety of reasons for this rather dissatisfying conclusion. Among these are the ongoing fragmentation of the securities markets in Europe, pricing models of certain APAs which might be prohibitive for certain market participants, the intensive use of transparency waivers and deferred publication in certain market segments as well as the presentation of data in different formats and by using different models of machine readability which significantly impedes the aggregation of transparency data from different sources.
A problem of its own which has a negative impact on the overall market transparency is, as mentioned before, the pricing of market data. Here it is in particular the provision that market data should be made available on “a reasonable commercial basis” which has proven impractical. With trading venues being organized as for profit entities, facing strong competition with respect to trading fees among each other, it is only too understandable that the try to compensate the reduced margins for trading by mark up strategies when selling market data. This is possible because, even though different venues might trade the same securities, the sets of market data are still unique and trading venues in this respect “natural monopolies”. In other words, there simply is no such thing as a natural “reasonable commercial basis”.

Question 5. Do you believe that MiFID II/MiFIR has levelled the playing field between different categories of execution venues such as, in particular, trading venues and investment firms operating as systematic internalisers?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don’t know / no opinion / not relevant

Question 5.1 Please explain your answer to question 5:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

One very significant development which to a large extend was driven by regulatory change introduced with MiFID II/MiFIR was the strong growth of the number of systemic internalisers (SIs) which are now competing with other trading venues like regulated markets, MTFs or OTFs. Since different investors have different needs and preferences and there is no “perfect” market model which suits everybody, the variety of different legal and technological forms of trading venues is to be welcomed in principle.
However, there are different views in the market to which extent the competition among these different venues takes place on a level playing field or not. E.g. one unjustified competitive advantage for SIs which just recently was corrected by legislative change, could be seen in the fact that the “tick-size” regime originally did not apply to SIs.
Since the business model of SIs can be seen as a combination of the operation of a trading venue and a market making activity (which generates revenues from trading spreads), SIs might be able to offer trading at

lower (and sometimes “zero”) fees than their competitors to the extent that they are able to cross-subsidise lower trading fees by higher earnings from their market-making activities.

Question 6. Have you identified barriers that would prevent investors from accessing the widest possible range of financial instruments meeting their investment needs?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don’t know / no opinion / not relevant

Question 6.1 If you have identified such barriers, please explain what they would be:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

One clearly negative effect of MiFID II/MiFIR lies in the fact that as a result of dramatically increased compliance costs, many – in particular but not only smaller – banks and investment firms have reduced the variety of investment services they were used to offer to retail investors. In some cases banks and investment firms even decided not to provide investment service anymore or to offer those services to professional clients and eligible counterparts only. Furthermore, those market participants who continued to offer investment services to retail clients very often drastically reduced the variety of services and decided to offer a much narrower and standardized product portfolio which inevitably reduces the universe of financial instruments available to retail investors.
It therefore must be stated clearly that the “barrier” which prevents in particular retail investors from accessing the widest possible range of financial instruments meeting their investment needs, is regulation itself. As already mentioned in our answer to question one, the provisions of MiFID II/MiFIR are no longer based on the idea of a responsible investor who in general is able to make his own informed decision and who accordingly can determine his own “risk appetite”.
As a result of the introduction of rigid product governance rules in particular with respect to the target-market concept and an overly paternalistic approach to consumer protection, today’s retail investor find it increasingly difficult to access a sufficiently diverse universe of financial instruments and investment opportunities to choose from.
From a technological point of view, the target-market definition is a “flag” in a set of reference data for a specific security. To the extent that banks often buy those reference data from the same or only a very limited number of third party providers, the restriction to retail investors have to face today, might be more or less the same, no matter which bank or investment firm they use.
Furthermore, the treatment of investment research as an inducement hast dramatically reduced the availability of investment research for retail investors which very obviously limits their ability to make their own informed investment decisions and consequently reduce the universe of financial instrument they might consider for an investment.
Finally, a very drastic example for the negative impact of regulation itself can be seen in the excessively wide interpretation of the PRIIPs regulation by classifying “plain vanilla” corporate bonds falsely as “packed” or otherwise “complex” instruments, in particular if they include a so called “make whole clause”. This had a dramatic impact on the retail bond market in the EU by de facto depriving retail investors from profitable investments.

Since a “make whole clause” sets an additional cash compensation an issuer has to pay to an investor in the case of early redemption, every bond with such a “make whole clause” is always more beneficial for the investor since an otherwise identical bond without such a clause. There might be no better example to demonstrate investor’s nightmare of over-regulation but this interpretation of the PRIIPs regulation which prohibits retail investors for the sake of “consumer protection” (sic!) to invest in financial instruments which are objectively less risky than comparable instruments which they are allowed to buy.

Section 2. Specific questions on the existing regulatory framework

The EU has a competitive trading environment but investors and their intermediaries often lack a consolidated view of where financial instruments are traded, how much is traded and at what price. Except for the largest or most sophisticated market players (who can purchase consolidated data pertaining to the different execution venues from data vendors or build their own aggregated view of the market), investors have no overall picture of a fragmented trading landscape: while the trading often used to be concentrated on one national exchange, notably in equities, investors can now choose between multiple competing trading venues, which results in a more fragmented and hence more complex trading landscape. At the same time, fragmentation per se should not be discarded as it is inherent to the introduction of alternative trading systems (MTFs, OTFs) which has led to a significant increase in competition between trading venues with positive effects on trading costs and increased execution quality. This section seeks stakeholders’ feedback on how to improve investors’ visibility in the current trading environment via the establishment of a consolidated tape.

In order to optimise the trading experience, a single price comparison tool consolidating trading data across the EU - referred to as the consolidated tape (‘CT’) - would help brokers to locate liquidity at the best price available in the European markets, and increase investors’ capacity to evaluate the quality of their broker’s performance in executing an order. A European CT could also be one major step towards “democratising” access to “market data” so that all investors can see what the best price is to buy or sell a particular share. A CT may not only prove useful for equities but also for exchange-traded funds (ETFs), bond or other non-equity instruments. Practical experience with a consolidated tape is already available in the United States, where a consolidated tape has been mandated for shares (consolidating pre- and post-trade data) and bonds (post-trade data).

A European CT could, for a reasonable fee, provide a real-time feed of information, not only for transactions that have taken place (post-trade information), but also for orders resting in the public markets (pre-trade information). MiFID II /MiFIR already provides for a consolidated tape framework for equity and non-equity instruments but no consolidated tape has yet emerged, for various reasons that are explored in this consultation. On 5 December 2019 ESMA submitted to the Commission a report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments. This report included recommendations relating to the provision of market data and the establishment of a post-trade consolidated tape for equities. In the following sections the Commission, taking into account the conclusions from ESMA, welcomes views on how a European CT should be designed: what information it should consolidate (e.g. pre- and/or post-trade transparency), what financial instruments should be included (e.g. shares, bonds, derivatives), what characteristics should be retained for its optimal functioning (e.g. funding, governance, technical specifications). Finally, the last subsection analyses possible amendments to certain MiFID II /MiFIR provisions (share trading obligation and transparency requirements) with a possible link to the CT.

[1] The review clauses in Article 90 paragraphs (1)(g) and (2) of MiFID II and Article 52 paragraphs (1), (2), (3), (5) and (7) of MiFIR are covered by this section.

PART ONE: PRIORITY AREAS FOR REVIEW

The issues in PART ONE are identified by the Commission services as priority areas for the review based on the experience gathered in the two years of implementation of MiFID II/MiFIR. Many of them are listed in the review clauses of MiFID II and MiFIR which means that the Commission needs input to assess the merit of amending the provisions to make them more effective and operational. When applicable, references are made to the applicable review clause.

Other topics not listed in the review clauses stem from the many contributions received from stakeholders, including public authorities, on possible shortcomings of the existing framework. A number of questions in subsection II on investor protection in particular fall in the latter category

I. The establishment of an EU consolidated tape[1]

1. Current state of play

This section discusses the absence of a CT under the current MiFID II/MiFIR framework, the issues of availability of market data for market participants and the use cases for setting up a CT.

1.1. Reasons why a consolidated tape has not emerged

Article 65 of MIFID II provides for a framework for a post-trade CT in equity and non-equity instruments further detailed in regulatory technical standards. The framework specifies key functioning features that a potential CT should adhere to, such as the content of the information that a CT should consolidate as well as its organisational and governance arrangements.

Since no CT provider has emerged so far, there is a lack of practical experience with the CT framework under MiFID II /MiFIR. Several reasons have been put forward to explain the absence of a CT.

Question 7. What are in your view the reasons why an EU consolidated tape has not yet emerged?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Lack of financial incentives for the running a CT	○	○	○	◉	○	○
Overly strict regulatory requirements for providing a CT	○	◉	○	○	○	○
Competition by non-regulated entities such as data vendors	○	○	○	○	◉	○

Lack of sufficient data quality, in particular for OTC transactions and transactions on systematic internalisers	○	○	○	◉	○	○
Other	○	○	○	○	○	◉

Question 7.1 Please explain your answers to question 7:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned before, today's market for market data can be described as mixture of natural monopolies (the trading venues where market data is generated) and an otherwise oligopolistic structure of aggregators and vendors of such data. Collecting, aggregating and dismantling such data is a complex, technologically sophisticated and time-critical process.
In other words, there are realistically only a very limited number of companies who would be technologically capable to operate a consolidated tape which are the current "big players" in the market for market data. To the extent that a consolidated tape could help – at least for some use cases and applications – to make market data available at more affordable or "reasonable" prices from a user perspective, the introduction of a TP could have a cannibalizing effect on the business models of those players who currently share the market for market data in an obviously highly profitable way.
Therefore, we consider it to be highly unlikely that a European consolidated tape would emerge, unless its mandatory implementation will be stipulated by law.

Question 8. Should an EU consolidated tape be mandated under a new dedicated legal framework, what parts of the current consolidated tape framework (Article 65 of MiFID II and the relevant technical standards (Regulation (EU) 2017/571)) would you consider appropriate to incorporate in the future consolidated tape framework?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

With respect to the technological requirements, the current legal framework stipulated by Article 65 of MiFID II and the relevant technical standards described in the Commission Delegated Regulation (EU) 2017/571 can be regarded as a sound basis for discussion of the technical design of a future consolidated tape. However, further considerations how to organize the data feeds to the tape and how to insure high data quality in terms of speed and accuracy from a technological as well as legal perspective will be necessary. Here, we widely agree with the proposals on a potential technical and governance structure of a consolidated tape as presented by the ICMA MiFID II Consolidated Tape Taskforce (EU Consolidated Tape for Bond Markets - Final report for the European Commission). While the report as such is focused on a CT for bond markets only, it contains valuable considerations which can be generalized for CTs for other asset classes as well.
We are in particular supportive for the proposals made by ICMA on the mandatory provision of data by trading venues and self-reporting firms, who should be obliged to provide post-trade data to the CT on a non-licencing basis as soon as technically possible, as well as the proposed distribution of raw-data on a

minimum-cost basis combined with a revenue sharing with APAs and trading venues.
However, the remaining problem to set a “reasonable price” makes it paramount that the CT must have a balanced governance and effective cost model.

1.2. Availability and price of market data

In its report submitted on 5 December 2019 to the Commission, ESMA considers that so far MiFID II/MiFIR has not delivered on its objective to reduce the price of market data and the Reasonable Commercial Basis (‘RCB’) provisions have not delivered on their objectives to enable users to understand market data policies and how the price for market data is set.

ESMA recommends, in addition to working on supervisory guidance on how the RCB requirements should be complied with, a number of targeted changes to either the Level 1 or Level 2 texts to strengthen the overall concept that market data should be charged based on the costs of producing and disseminating the information:

- add a mandate to the Level 1 text empowering ESMA to develop Level 2 measures specifying the content, format and terminology of the RCB information; and
- move the provision to provide market data on the basis of costs (Article 85 of CDR 2017/565 and Article 7 of CDR 2017/567) to the Level 1 text;
- add a requirement in the Level 1 text for trading venues, APAs, SIs and CTPs to share information on the actual costs of producing and disseminating market data as well as on the margins with CAs and ESMA together with an empowerment to develop Level 2 measures specifying the frequency, content and format of such information;
- delete Article 86(2) of CDR 2017/565 and Article 8(2) of CDR 2017/567 allowing trading venues, APAs, CTPs and SIs to charge for market data proportionate to the value the data represents to users.

Question 9. Do you agree with the above targeted amendments recommended by ESMA to address market data concerns?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Here, we agree with all of the proposed changes in so far as they could be regarded as an improvement compared with the current situation.
However, as mentioned previously, we are of the opinion that the RCB approach is generally unsuitable to solve the problem of a market imbalance in the market for market data caused by a monopolistic/oligopolistic supply-side combined with price-inelastic demand, caused not only by economic factors but by regulation itself.
Since the CT data, as a – most likely - post-trade data stream only, will not be suitable for all applications and therefore will not replace direct data feeds from trading venues completely, it is equally important that the obviously improper “RCB” concept of MiFID II/MiFIR will be amended by more prescriptive provisions from the price regulatory toolbox.
The RCB concept has failed to deliver because there is simply no objective, let alone mandatory and effectively enforceable criterion what “reasonable” in this context should mean. In a market economy it is not the task of a for-profit enterprise to limit its revenues but a result of competition or – where competition might be ineffective in particular because of imbalanced market structures – a result of sufficiently clear and generally binding regulatory intervention.
The prevailing lack of – or at least the very limited – regulatory intervention with respect to a fair pricing of

market-data seems to be astonishing in so far as price regulation in the light of apparent structural market imbalances are a well-accepted an practiced policy instrument in various segments of the Economy (e.g. telecommunication, airport and harbor fees or electricity grids, to give only a few examples) but in the area of financial markets - which are otherwise one of the highest regulated economic segments - one hesitates so far to adequately address an obvious problem.
However, while we consider the implementation of an appropriate system of price control in the field of market data to be desirable and necessary, it would be a clearly unintended consequence if this would lead to a further enervation of the competitiveness of smaller trading venues. We therefore strongly advocate that any scheme of price regulation for market data should also contain an element of proportionality which protects smaller venues from implementation and operational costs which would be clearly disproportionate. Furthermore, since smaller venues with their limited market power are normally not responsible for the observed strong price increases. We think that a very simple but effective measure to shield smaller venues from disproportional costs would be the implementation of a relevance-threshold. In other words, trading venues should only be subject to active price regulation, if the revenue from supplying market data exceeds a certain, to be defined, threshold. Since the relevance of revenues from disseminating of market data is likely to increase also for smaller venues, we think that an absolute relevance-threshold would be more practical and appropriate than a relative one.
For a more detailed discussion of this topic, please refer to our response to ESMA's Consultation Paper: MiFID II/MiFIR review report on the development in prices for pre- and pos-trade data and on the consolidated tape for equity instruments of 12 July 2019 (ESMA-156-1471).

1.3. Use cases for a consolidated tape

Question 10. What do you consider to be the use cases for an EU consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Transaction cost analysis (TCA)	○	○	○	◉	○	○
Ensuring best execution	○	○	○	◉	○	○
Documenting best execution	○	○	○	○	◉	○
Better control of order & execution management	○	○	○	◉	○	○
Regulatory reporting requirements	○	○	○	○	◉	○
Market surveillance	○	○	○	◉	○	○
Liquidity risk management	○	○	○	◉	○	○
Making market data accessible at a reasonable cost	○	○	○	○	◉	○

Identify available liquidity	○	○	○	◉	○	○
Portfolio valuation	○	○	○	○	◉	○
Other	○	○	○	○	○	◉

Question 10.1 Please explain your answers to question 10 and also indicate to what extent the use cases would benefit from a CT:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

A consolidated tape which, as a "golden source" could provide timely, reliable and affordable post trade data for various asset classes would be a welcomed alternative for existing commercial post trade market data arrangements. The use cases for a CT will depend in the first place on the speed by which the data is provided, by its completness (the coverage of as many, ideally all, transactions in a specific instrumen and the reliability, in other words, the quality of the data.
Equally important, the data needs to be presented in a transparent, homogenous, easily accessible, directly observable by human users as well as in a machine readable format.

2. General features of the consolidated tape

This section discusses the general features of a future European CT. The specific scope of the CT in terms of financial instruments (shares, bonds, derivatives) and type of transparency (pre- and/or post-trade) are addressed in the following section.

During the EC workshop, the ESMA consultation, conferences and stakeholder meetings, it became clear that a majority of market participants believe that EU financial markets would benefit from the establishment of a CT. ESMA made the following recommendations[2] which appear very important for the success of an EU consolidated tape:

- ensuring a **high level of data quality** (supervisory guidance complemented with amendments of the Level 1 and 2 texts);
- **mandatory contributions**: trading venues and APAs should provide trading data to the CT free of charge;
- CT to **share revenues with contributing entities** (on the basis of an allocation key that rewards price forming trades);
- contribution of users to funding of the CT, e.g. via **mandatory consumption** of the CT by users to ensure user contributions to the funding of the CT
- **full coverage**: The CT should consolidate 100% of the transactions across all asset classes (with possible targeted exceptions);
- **operation of the CT on an exclusive basis**: ESMA recommends that a CT is appointed for a period of 5-7 years after a competitive appointment process;
- **strong governance framework** to ensure the neutrality of the CT provider, a high level of transparency and accountability and include provisions ensuring the continuity of service.

The EC workshop, conferences and stakeholder meetings revealed that opinions remained divergent on a variety of issues, notably:

- **Whether pre-trade data should be included in CT**: the argument has been made that the US model for a consolidated quotation tape comprises pre-trade quotes because of the **order protection rule** contained in Regulation National Market System (NMS). The order protection rule eliminated the possibility of orders being executed at a suboptimal price compared to orders advertised on exchanges and it established the National Best Bid and Offer (NBBO) requirement that mandates brokers to route orders to venues that offer the best displayed price. Although some stakeholders strongly support a quotation tape, others have expressed reservations, either because there is no order protection rule in the European Union or because they do not support the establishment of such a rule in the EU which could be encouraged by the establishment of a pre-trade tape. Stakeholders also argue that a quotation tape will be very expensive and that latency issues in collecting, consolidating and disseminating transaction data from multiple venues will always lead to a co-existence of the CT and proprietary exchange data feeds.
- **What should be the latency of the tape**: Many stakeholders argue that the tape should be "real-time", implying minimum standards on latency such as a dissemination speed of between 200 and 250 milliseconds ("fast as the eye can see"). Other stakeholders support an end of day tape.
- **How to fund the tape and redistribute its revenues**: stakeholders have mixed views on the optimal funding model. They also caution against some aspects of the US model, where the practice of redistribution of CT revenues has, in their view, provided market participants with an incentive to provide quotes to certain venues that rebate more tape revenue, without necessarily contributing to better execution quality.

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[2] ESMA recommendations are limited to an equity post-trade CT (as foreseen in their legal mandate). The current section however is not limited to pre-trade transparency and equity instruments and stakeholders should express their view on the appropriate scope of transparency (pre- and/or post-trade) and financial instruments covered.

Question 11. Which of the following features, as described above, do you consider important for the creation of an EU consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N.A.
High level of data quality	○	○	○	○	◉	○
Mandatory contributions	○	○	○	○	◉	○
Mandatory consumption	◉	○	○	○	○	○
Full coverage	○	○	○	◉	○	○
Very high coverage (not lower than 90% of the market)	○	○	○	◉	○	○
Real-time (minimum standards on latency)	○	○	○	◉	○	○
The existence of an order protection rule	◉	○	○	○	○	○

Single provider per asset class	○	○	○	○	◉	○
Strong governance framework	○	○	○	○	◉	○
Other	○	○	○	○	○	◉

Question 11.1 Please explain your answers to question 11 and provide if possible detailed suggestions on how the above success factors should be implemented (e.g. how data quality should be improved; what should be the optimal latency and coverage; what should the governance framework include; the optimal number of providers):

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned earlier, the quality and the comprehensiveness of the data provided by a CT will be core for its success and acceptance. From a legal and regulatory point of view, it should be given the status of a generally accepted “golden source”.
However, to the extent that one important aspect of a CT should be to make market data more affordable, the implementation of the tape might be in conflict with the commercial interest of some current large suppliers of market data such as trading venues and data aggregators. We therefore agree with the proposal made by the ICMA MiFID II Consolidated Tape Taskforce in their Final report for the European Commission, dated April 2020, “EU Consolidated Tape for Bond Markets” in which they argue that trading venues, APAs and self-reporting firms shall have an obligation to provide data on a “non-licensing” basis.
We are also in favor of a “non-licensing” approach because it reflects to some extent, the fact that there are sound arguments claiming that market data could be seen similar to a “public good”. In this context, it needs to be remembered that price-data/market-data does not arise from the activities of the trading venue, which - currently - later sells/licenses it, but from the actions and interaction of market participants which are active on a particular venue. While the added value contribution of market participants in generating market data is more than obvious, they are – in most of the cases – currently not economically compensated for their significant contribution to the production function but ironically might find them self in a situation where they are even “buying back” their own price-data as part of the data-stream they purchase from a trading venue or another data-vendor.
We are therefore further supportive of the idea of a “revenue sharing” model proposed by the ICMA report. However, we think that all parties – including market participants, in particular market makers – who de facto and effectively contribute to the creation and/or the collection and dissemination of market data should be able to participate in a revenue sharing scheme.
Against this background, a sound and fair governance for a CT structure becomes paramount. Therefore, we consider the continuous institutionalized involvement of all stakeholder (suppliers, users and to some extent even regulators alike), e.g. in form of committees with appropriate co-decision powers in the standard setting and price determination processes, an essential element of a sound governance structure for such a CT.
Once again, the cited ICMA report gives some alternative practical suggestion which are worthwhile to be discussed, regarding a fair and resilient governance structure of a CT. While the ICMA report focuses on a CT for bonds only, the general design and governance considerations can be easily applied to CTs for other asset classes as well.
While we are clearly in favor of “mandatory contributions” of data to the CT, we are further in accordance with our ICMA colleagues that the consumption of the tape data should be non-mandatory, based on the expectation that “if the quality of the tape is high, affordable and accessible then this in itself will generate demand for the tape, without forcing users to purchase it.”
Regarding the desirable number of CT providers, we are of the opinion that ideally there should be a single

operator and a uniform governance structure for CT covering all asset classes, in order to technologically and economically generate high economies of scale and to insure a uniform implementation. If it is not feasible ore deemed desirable to assign the responsibility for operating the tape to a single entity, various, technically separated CTs could be managed by different operators. However, even then we would suggest that there should be a uniform governance which sets uniform technological standards in order to minimize connection costs and to decide about the pricing of the CT in a transparent, fair, non-discriminatory and harmonized way. CT operators should be selected, based on a public tender process and assigned for e sufficiently large period of time which allows the recovery of the implementation costs plus a margin decided about according by a governance committee, where all stakeholder are appropriately represented.
Finally, we emphatically reject the introduction of an order protection rule since technological market structures as well as economic integration and legal frameworks are different and more diverse than e.g. in the US where an order protection rule has been implemented as a core functionality of the CT.

Question 12. If you support mandatory consumption of the tape, how would you recommend to structure such mandatory consumption?

Please explain your answer and provide if possible detailed suggestions on which users should be mandated to consume the tape and how this should be organised:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 13. In your view, what link should there be between the CT and best execution obligations?

Please explain your answer and provide if possible detailed suggestions (e.g. simplifying the best execution reporting through the use of an EBBO reference price benchmark):

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We assume that data from a CT can help to facilitate best execution assessments by providing a set of comprehensive and reliable post-trade data for different classes of financial instruments. However, best execution requirements are and will remain more complex than referencing to price information alone and best execution requirements will remain to vary between different types of clients.
Once again, it should be remembered that in the absence of an order protection rule, the function of a CT

from a best execution perspective will remain fundamentally different as in countries, most notably the US, which have an order protection rule in place.

Question 14. Do you agree with the following features in relation to the provision, governance and funding of the consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The CT should be funded on the basis of user fees	○	○	○	○	◉	○
Fees should be differentiated according to type of use	○	○	○	○	◉	○
Revenue should be redistributed among contributing venues	○	○	◉	○	○	○
In redistributing revenue, price-forming trades should be compensated at a higher rate than other trades	○	○	○	○	◉	○
The position of CTP should be put up for tender every 5-7 years	○	○	○	○	◉	○
Other	○	○	○	○	○	◉

Question 14.1 Please explain your answers to question 14 and provide if possible detailed suggestions on how the above features should be implemented (e.g. according to which methodology the CT revenues should be redistributed; how price forming trades should be rewarded, alternative funding models):

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned before, a fair and transparent governance-structure, which adequately represents suppliers /contributers, the operator and the users of the CT is paramount fort he functioning and acceptance of a CT. Economically it should operate on a cost-recovery/revenue-sharing model whose technical and economical details (including an appropriate margin) for the operator of the CT should be the outcome of a negotiation process among the stakeholders represented in the CTs governance committee, whereby accepted pricing models from the price regulatory toolbox as they are applied and accepted in other industry sectors for a

long time(e.g. Long run incremental cost (LRIC) or revenue cap models), should be given due consideration and applied if deemed helpful.
In any way, it must be insured that the operator of the CT will be prevented from monopolistic rent seeking, since the creation of a CT will almost inevitably – and even without mandatory consumption – contain elements of a (synthetic) monopoly.
With respect to the revenue distribution scheme, not only the trading venues collecting trade data but also market participants , whose price forming trades (e.g. but not exclusively market-makers) "create" market data in the first place should be rewarded by revenue redistribution according to the number and volume of price forming trades they undertake.

3. The scope of the consolidated tape

3.1. Pre- and post-trade transparency and asset class coverage

This section discusses the scope of the CT: what asset classes should be covered and what trade transparency data it should include. This section also discusses how to delineate, within an asset class, the exact scope of financial instruments that should be included in the CT.

Question 15. For which asset classes do you consider that an EU consolidated tape should be created?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Shares pre-trade[3]	○	○	○	○	◉	○
Shares post-trade	○	○	○	○	◉	○
ETFs pre-trade	○	○	○	○	◉	○
ETFs post-trade	○	○	○	○	◉	○
Corporate bonds pre-trade	○	○	○	○	◉	○
Corporate bonds post-trade	○	○	○	○	◉	○
Government bonds pre-trade	○	○	○	○	◉	○
Government bonds post-trade	○	○	○	○	◉	○
Interest rate swaps pre-trade	○	○	○	○	◉	○

Interest rate swaps post-trade	○	○	○	○	◉	○
Credit default swaps pre-trade	○	○	○	○	◉	○
Credit default swaps post-trade	○	○	○	○	◉	○
Other	○	○	○	○	◉	○

[3] Pre-trade would not be executable but delivered at the same latency as the post-trade data. Pre-trade market data is understood to be order book quote data for at least the five best bid and offer price levels. Post-trade market data is understood to be transaction data.

Please specify for which other asset classes you consider that an EU consolidated tape should be created?

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As can be read from the table above, we are supportive for a CT which covers a wide range of asset classes.

Question 15.1 Please explain your answers to question 15:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In our view, a CT could be beneficial in principal for all asset classes and therefore should cover a universe of financial instruments as wide as possible. However, with respect to anticipate the practical problems in implementing such a tape, a sequenced, phase-in approach which starts with a single or only a limited number of asset classes might be advised.

Another important element in the design of the CT will be to determine the exact content of the information that a pre- and/or post-trade CT should consolidate in relation to the information already disseminated under the MiFIR pre- and post-trade transparency requirements. While Article 65 of MIFID II and the relevant regulatory technical standards specify the exact content of the post-trade information a CT should consolidate under the current framework, there is no such specification for pre-trade information.

Question 16. In your view, what information published under the MiFID II /MiFIR pre- and post-trade transparency should be consolidated in the tape (all information or a subset, any additional information)?

Please explain your answer, distinguishing if necessary by asset class and pre- and post-trade. Please also explain, if relevant, how you would identify the relevant types of transactions or trading interests to be consolidated by a CT:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In order to answer the question which information should be published in the tape, a decision needs to be made first whether the tape should provide pre- and post-trade transparency or should function as a stream of post-trade information only.
In case that pre-trade information in form of market-maker quotes and orders resting in order books of different trading venues shall be included, it would be important that the format of the tape would be flexible enough to reflect the different levels and forms of pre-trade transparency information resulting from different, accepted trading models (in particular, auction-based, quote-driven or hybrid market models) as defined in Table 1 of Annex 1 of RTS 1and Annex 1 of RTS 2. This would be, without any doubt a very challenging task while its economic benefit to the market might remain limited, as long as trading venues will continue to publish (and to sell/"license") their own pre-trade data which necessarily will always have an advantage in terms of latency compared to a CT which aggregates data from various sources.
The content of post-trade transparency data of a CT should be designed based on the revisited requirements currently in place and described in the Annexes of RTS1 and RTS 2. We further suggest a periodic review process of technical standards, field definition and format by a joint committee of representatives from regulators and the industry.

3.2. The Official List of financial instruments in scope of the CT

To provide market participants with legal clarity, a CT would benefit from a list setting out, within a given asset class, the exact scope of financial instruments that need to be reported to the CT. This section discusses, for each asset class, how to best create an "**Official List**" of financial instruments that would feature in the CT, having regard to the feasibility of producing such a list.

Shares

There are different categories of shares traded on EU trading venues, including: (i) shares admitted to trading on a Regulated Market (RM) - for which a prospectus is mandatory; (ii) shares admitted to trading on an Multilateral Trading Facility (MTF) (e.g. small cap company listed on the small cap MTF) with a prospectus approved in an EU Member State; (iii) shares traded on an EU MTF without a prospectus approved in a EU Member State (e.g. US blue chip company listed on a US exchange but also traded on a EU MTF). While the first two categories have a clear EU footprint and should be considered for inclusion in the CT, the inclusion of the latter category is more questionable because it consists of thousands of international shares for which the admission's venue or the main centre of liquidity is not in the EU.

Question 17. What shares should in your view be included in the Official List of shares defining the scope of the EU consolidated tape?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Shares admitted to trading on a RM	○	○	○	○	◉	○
Shares admitted to trading on an MTF with a prospectus approved in an EU Member State	○	○	○	○	◉	○
Other	○	○	○	○	○	◉

Question 17.1 Please explain your answers to question 17:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Many of our members are market makers in non EU shares, admitted for trading on EU venues (often in form of an MTF operated by a regulated market). There is a uniform view among all our members which are active in this field that all shares which are traded on a EU trading venue (including SIs) should be included in the Official List of shares defining the scope of the European CT.

Question 18. In your view, should the Official List take into account any additional criteria (e.g. liquidity filter to capture only sufficiently liquid shares) to capture the relevant subset of shares traded in the EU for inclusion in the consolidated tape?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Most of the use cases for CT data are identical, no matter whether shares traded are listed in the EU or only admitted for trading. Therefore we see no rationale to exclude any category of shares which are traded within the EU from the scope of a European CT. Therefore, we do not advocate the use of liquidity or other filters.
However, if deemed necessary for practical reasons a phase-in approach based on a liquidity threshold could be considered. The CT then would start with a limited set of liquid shares, with the scope being gradually extended of time.

Question 19. What flexibility should be provided to permit the inclusion in the EU consolidated tape of shares not (or not only) admitted to an EU regulated

m a r k e t o r E U M T F ?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned before, we are of the opinion that ideally, all shares listed and/or admitted for trading on a European trading venue (including SIs), should fall within the scope of the CT.

ETFs, Bonds, Derivatives and other financial instruments

Question 20. What do you consider to be the most appropriate way of determining the Official List of ETFs, bonds and derivatives defining the scope of the EU consolidated tape?

Please explain your answer and provide details by asset class:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Ideally, the scope of a European CT should cover all financial instruments issued, listed and or admitted for trading within the Union.
However, if deemed necessary for practical reasons a phase-in approach based on a liquidity threshold could be considered. The CT then would start with a limited set of liquid financial instruments, with the scope being gradually extended of time.

4. Other MiFID II/MiFIR provisions with a link to the consolidated tape

4.1. Equity trading and price formation

The share trading obligation ('STO') requires that EU investment firms only trade shares on eligible execution venues, unless the trades are non-systematic, ad-hoc, irregular and infrequent ("*de minimis*" exception) or do not contribute to the price discovery process. The STO can pose an issue when EU investment firms wish to trade international shares admitted to a stock exchange outside the EU as not all stock exchanges outside the EU are recognised as equivalent.

The European Commission recognised as equivalent certain stock exchanges located in the United States, Hong Kong and Australia, with the consequence that those stock exchanges are eligible execution venues for fulfilling the STO. In addition, ESMA provided, in coordination with the Commission, further guidance on the scope of the STO.

Question 21. What is your appraisal of the impact of the share trading obligation on the transparency of share trading and the competitiveness of EU exchanges and market participants?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The requirement under Article 23 MiFIR that shares admitted to trading in the European Union must be traded exclusively on trading venues within the European Union, as long as no trading venue in a third country classified by the Commission as "equivalent" exists, has not proved effective in its present generalising form. We expressly support the objective of the regulation, namely that as much of the securities trading as possible should take place on regulated trading venues within the EU; however, the regulation overshoots the target and is associated with negative unintended consequences for investors.
In particular market maker-based share trading on EU trading venues offers retail-investors attractive access to a broad universe of European and non-European shares and other securities, in view of the transaction costs to be anticipated. Investment firms which act as liquidity providers in non EU shares, enable investors to trade at any time, even in smaller volumes, which would often not be economically feasible on the respective domestic market due to the transaction costs to be anticipated in cross-border business. However, this diversity of offers is hindered to the detriment of investors if the investment firms acting as market makers on the local trading venues are no longer able to cover or unwind their positions on the respective home market for third-country shares because of the Trading Obligation.
The problem was mitigated to a certain extent shortly before MiFID II/MiFIR came into force, in particular by the announcement made by ESMA in a statement on 17 November 2017, when ESMA stated that for third countries for which the Commission is currently not preparing an equivalence decision, it is generally assumed that trading of securities from the group of the former third countries within the Union is not systematic, regular and frequent and that the securities concerned are therefore excluded from the application of the Trading Obligation. However, even though this was a clever legal workaround for the moment, the resulting situation is not comprehensively satisfying in the long run. This is not only because it is not a binding legal text and in this respect considerable legal uncertainties remain, but also because in the light of the withdrawal of the United Kingdom from the European Union ("Brexit") - in the absence of a declaration of equivalence by the Commission - the problem has been dramatically exacerbated.
We therefore fully agree with the German Ministry of Finance which, in its position paper dated September 2019, pointed out:
“The scope of the share trading obligation is overly broad and leads to legal uncertainties and unintended consequences. The intended benefits and the shortcomings of the share trading obligation should be thoroughly analysed. On this basis the requirement should be recalibrated or repealed if necessary.At least Art. 23 MiFIR should be modified to focus its application on shares that are listed in the EU. Shares listed in third countries should become subject to the share trading obligation only in very limited and clearly defined cases. In addition, equivalence decisions should be principle-based focusing on an overall assessment of the requirements in third countries.”

Question 22. Do you believe there is sufficient clarity on the scope of the trades included or exempted from the STO, in particular having regards to shares not (or not only) admitted to an EU regulated market or EU MTF?

- 1 - Not at all
- 2 - Not really
- 3 - Neutral
- 4 - Partially
- 5 - Totally
- Don’t know / no opinion / not relevant

Question 22.1 Please explain your answer to question 22:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Despite the ESMA statement from 17 November 2017, which was intended to further clarify the scope of the share trading obligation, the overall situation remained opaque with an unsatisfactory level of legal certainty which can be demonstrated in particular by the uncertainty resulting from the EU Commission’s decision not to extend the equivalence declaration for the Swiss Stockexchange.

Question 23. What is your evaluation of the general policy options listed below as regards the future of the STO?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Maintain the STO (status quo)	◉	○	○	○	○	○
Maintain the STO with adjustments (please specify)	○	○	○	○	◉	○
Repeal the STO altogether	○	○	◉	○	○	○

Question 23.1 Please explain your answers to question 23:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Based on feedback from our member firms, the STO in general is not considered to be a necessary or particular helpful policy instrument. Therefore, we would not mind, if it would be repealed altogether.
However, in case it would be maintained, it would be absolutely necessary to make amendments in order to prevent currently prevailing competitive disadvantages for stock-markets within the EU:
As mentioned above, the general and clear rule under a revised STO-regime should be that only shares which have their most liquid market within the EU should principally be within the scope of the share trading obligation.

Price formation is an important aspect of equity trading which is recognised with the requirement under the STO to execute price-forming trades on eligible venues. At the same time, there is a debate about the status of systematic internalisers ('SIs') as eligible venues under the STO.

Question 24. Do you consider that the status of systematic internalisers, which are eligible venues for compliance with the STO, should be revisited and how?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
SIs should keep the same current status under the STO	○	○	○	○	◉	○
SIs should no longer be eligible execution venues under the STO	◉	○	○	○	○	○
Other	○	○	○	○	○	◉

Question 24.1 Please explain your answers to question 24:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Our general approach is that the level of regulation should be basically the same for all forms of trading, including SIs. In reverse, SIs should also qualify as eligible venues with respect to the STO as well as other regulatory provisions.

Question 25. Do you consider that other aspects of the regulatory framework applying to systematic internalisers should be revisited and how?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we do not propose a specific changes to the regulatory framework applying to SIs, we would like to mention that there are different views among bwf member firms whether the growing proliferation of SIs within the EU should be regarded beneficial or rather skeptical from a regulatory and market structural point of view.

Question 26. What would you consider to be appropriate steps to ensure a level-playing field between trading venues and systematic internalisers?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In order to ensure a level playing field between different forms of trading venues and Systematic Internalisers, the regulatory framework for different forms of trading should be harmonized as much as reasonably possible. Here, the recent introduction of the Tick-Size regime for SIs – even though we remain skeptical with respect to the benefits of the tick-size regime in general – is a good example.

More generally, there are questions raised as to whether the current MiFID II/MiFIR framework is sufficiently conducive of the price discovery process in equity trading, in light of various elements of complexity (e.g. fragmentation of trading, multiplicity of order types, exceptions to transparency requirements, variety of trading protocols).

Question 27. In your view, what would merit attention to further promote the price discovery process in equity trading?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

According to feedback from bwf member firms which are active in share trading, in particular as market makers, the quality of the price discovery process in shares within the EU in general does not give rise to regulatory concern.

4.2. Aligning the scope of the STO and of the transparency regime with the scope of the consolidated tape

For shares, in light of the strong parallel between the scope of the STO and the scope of the CT (see section “Official List”), there may be merit in aligning the two. At the same time, should the scope of the STO be the same as the scope of the CT, special consideration should be given to the treatment of international shares.

Question 28. Do you believe that the scope of the STO should be aligned with the scope of the consolidated tape?

- (●) 1 - Disagree
- ( ) 2 - Rather not agree
- ( ) 3 - Neutral
- ( ) 4 - Rather agree
- ( ) 5 - Fully agree
- ( ) Don’t know / no opinion / not relevant

Question 28.1 Please explain your answer to question 28:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In our view, the regulatory purpose of the STO and a CT are quite different and should not be confused. While we strongly advocate that the scope of the STO should be narrowed to shares which have their most liquid market within the EU, the cope of a CT should be as wide as technically possible. Therefore we do not support to align the scope of the STO and the envisaged CT.

Similarly, both for equity and non-equity instruments, there may also be merit in aligning, where possible, the scope of financial instruments covered by the CT with the scope of financial instruments subject to the transparency regime.

Question 29. Do you consider, for asset classes where a consolidated tape would be mandated, that the scope of financial instruments subject to pre- and post-trade requirements should be aligned with the list of instruments in scope of the consolidated tape?

- ( ) 1 - Disagree
- ( ) 2 - Rather not agree
- ( ) 3 - Neutral
- ( ) 4 - Rather agree
- (●) 5 - Fully agree
- ( ) Don’t know / no opinion / not relevant

Question 29.1 Please explain your answer to question 29:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In our view, it is self-evident that a harmonized approach with respect to asset classes where a consolidated tape shall be mandated and those financial instruments for which pre- and post-trade transparency requirements apply is desirable

4.3. Post-trade transparency regime for non-equities

For non-equity instruments, MiFID II/MiFIR currently allows a deferred publication of up to 2 days for post-trade information (including information on the transaction price), with the possibility of an extended period of deferral of 4 weeks for the disclosure of the volume of the transaction. In addition, national competent authorities have exercised their discretion available under Article 11(3) of MiFIR. This resulted in a fragmented post-trade transparency regime within the Union. Stakeholders raised concerns that the length of deferrals and the complexity of the regime would hamper the success of a CT.

Question 30. Which of the following measures could in your view be appropriate to ensure the availability of data of sufficient value and quality to create a consolidated tape for bonds and derivatives?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
Abolition of post-trade transparency deferrals	◉	○	○	○	○	○
Shortening of the 2-day deferral period for the price information	◉	○	○	○	○	○
Shortening of the 4-week deferral period for the volume information	○	◉	○	○	○	○
Harmonisation of national deferral regimes	○	○	○	◉	○	○
Keeping the current regime	○	○	◉	○	○	○
Other	○	○	○	○	○	◉

Question 30.1 Please explain your answer to question 30:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 30 and 30.1, we agree with our colleagues of the International Capital Market Association (ICMA), whose comments we adopt:
For more information on ICMA's Taskforce view on harmonisation of deferral regimes, see section 9.3 (Timing of Reporting) in ICMA's final report for the European Commission on EU consolidated tape for bond markets (https://www.icmagroup.org/assets/documents/Regulatory/MiFID-Review/EU-Consolidated-Tape-for-Bond-Markets-Final-report-for-the-European-Commission-290420v2.pdf). Also for reference, the table describing the supplementary deferral regime at the discretion of the Competent Authority.
Keeping the current [deferral] regime: Some ICMA members are in favour of shorter deferral periods than the regime we have today, while some are in favour of keeping the current deferral regime.
Harmonisation of MiFID II deferral regimes.
The timing of reporting should be in line with the existing MiFID II/R post-trade transparency regime. However, harmonisation of MiFID II deferral regimes (including aggregation and omission) across the EU should be considered in order to avoid fragmentation (see diagram below) and ensure a level playing field for all EU market participants.
Please note, a consolidated tape cannot aggregate 'aggregated' data. Weekly aggregated data would need to be reviewed and reworked (potentially deleting) when considering harmonising the deferral regime.
A better understanding of the difference between transparency and consolidation:
• The subjects of the tape and the transparency regime rules are two distinct subjects.
- Consolidated tape = aggregation of transparency from TV and from investment firms / APAs
- Transparency regime = rules governing the transparency, mainly deferrals regimes, SSTI and LIS thresholds, list of liquid instruments.
• A good quality consolidated bond tape will bring:
- more industry / regulatory interactions, data reporting standardisation and data quality
- and therefore, the expected outcome of visibility to additional and potential participants, liquidity and market resilience.
Transparency regime
• MiFID 2 / MiFIR already introduced the largest transparency regime in the world in term of scope of asset classes and products.
- The aim for transparency calibration should be:
- Allowing liquidity providers to play their role, providing liquidity and hedging their risk
- Providing protection for investment firms, acting on behalf of investors.

II. Investor protection[4]

Investor protection rules should strike the right balance between boosting participation in capital markets and ensuring that the interests of investors are safeguarded at all times during the investment process. Maintaining a high level of transparency is one important element to enhance the trust of investors into the financial market.

In December 2019, the Council conclusions on the Deepening of the Capital Markets Union invited the Commission to consider introducing new categories of clients and optimising requirements for simple financial instruments where this is proportionate and justified, as well as ensuring that the information available to investors is not excessive or overlapping in quantity and content.

Based on, but not limited to, the review requirements laid down in Article 90 of MiFID II, this consultation therefore aims at getting a more precise picture of the challenges that different categories of investors are confronted with when purchasing financial instruments in the EU, in order to evaluate where adjustments would be needed.

[4] The review clause in Article 90 paragraph (1)(h) of MiFID II is covered by this section.

Question 31. Please specify to what extent you agree with the statements below regarding the experience with the implementation of the investor protection rules?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The EU intervention has been successful in achieving or progressing towards more investor protection.	○	◉	○	○	○	○
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	◉	○	○	○	○	○
The different components of the framework operate well together to achieve more investor protection.	○	◉	○	○	○	○
More investor protection corresponds with the needs and problems in EU financial markets.	○	○	◉	○	○	○
The investor protection rules in MiFID II/MiFIR have provided EU added value.	◉	○	○	○	○	○

Question 31.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

Quantitative elements for question 31.1:

	Estimate (in €)
Benefits	
Costs	

Qualitative elements for question 31.1:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Despite very high implementation costs which easily can reach several million Euro per firm, it is not yet apparent that the numerous measures introduced by MiFID II/MiFIR in the areas of market and cost transparency, product governance, rules of conduct and consumer protection have led to greater market efficiency, an increase in the confidence of private investors in the financial market, an improved financing situation for companies or generally to a positive stimulus for economic development.
While it is to be welcomed that investor protection has become a core regulatory objective, we also get the impression that investors and in particular retail investors increasingly feel patronized and confronted with an incomprehensible amount of bureaucratic burden if they wish to have access to investment services.
At the same time, many information on financial product and reports, e.g. on best execution are perceived to be of little or no benefit to investors while they became huge cost drivers for firms providing investment services. Not surprisingly, in particular smaller banks, mainly because a tremendous increase in compliance costs, have drastically reduced or even ceased the supply of investment services and investment products offered to retail clients as a direct result of MiFID II/MiFIR.
One example of the excessive and current regulations can be found in the annual publication obligation of the five most important trading venues in terms of trading volume and to be determined for each asset class pursuant to Art. 27 para. 6 MIFID II. Compliance with this provision is associated with considerable technical effort for the companies concerned and, especially for smaller investment firms, with disproportionately high costs, without it being possible to see what concrete, exploitable benefit such a retrospective, purely percentage-based evaluation would have for the client of the investment firm and investors in general.
Not only for economic reasons, but also for reasons of data protection law, the MiFID II/MiFIR Review should therefore examine, wherever data are collected, stored and evaluated, whether the scope and the resulting technical and economic effort are necessary and appropriate and how existing rules can be recalibrated in a reasonable way.
A completely different aspect of a misconceived investor protection rule is the possibility for “born” eligible counterparties like banks or investment funds to “obt out” and to require their contractual partner to treat them as a “retail client” from a legal point of view.
In our view, this regulation has not proved to be successful. It is neither required from an investor protection nor from a market integrity perspective and for easily understandable reasons susceptible to abuse. In practice larger firms, e.g. investment funds, might require smaller investment firms, e.g. execution brokers, to regroup them as “professional” or even “retail” clients, simply to obtain freeriding option with respect to their strengthened legal position in case of dispute.
It goes without saying that the requesting firm does not like to be treated like a retail investor in practice but continuous to expect a service-level typical for institutional clients. Even though, the investment firm does not have to comply with this regrouping request. However, in case of rejection, they might risk to lose an important customer. For the reasons provided above, we think that the “opt out” option for “born” eligible counterparties should be deleted.

Question 32. Which MiFID II/MiFIR requirements should be amended in order to ensure that simple investment products are more easily accessible to retail clients?

	Yes	No	N.A.

Product and governance requirements	◉	○	○
Costs and charges requirements	◉	○	○
Conduct requirements	◉	○	○
Other	◉	○	○

1. Easier access to simple and transparent products

The CMU is striving to improve the funding of the EU economy and to foster retail investments into capital markets. The Commission is therefore trying to improve the direct access to simple investment products (e.g. certain plain-vanilla bonds, index ETFs and UCITS funds). On the other hand, adequate protection has to be provided to retail investors as regards all products, but in particular complex products.

Please specify which other MiFID II/MiFIR requirements should be amended:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The product governance as well as the costs and charges requirements under MiFID II/MiFIR are clearly disproportionate and as a result may even discourage retail investors to engage in financial markets and seek alternative forms of investment (e.g. in real estate) instead. A result, which is clearly incoherent with the objectives of the Capital Market Union.
Therefore, the product governance rules in should be applied in a more proportionate manner, taking the type of client, financial instrument and investment service into account. Today, the retail client gets too much standardized and sometimes even inconsistent information in form of product information sheets which are considered to be of very little or no benefit or unnecessary repeated information on the same costs and charges he or she already has been informed about in the past, while access to valuable, more sophisticated information which might be a helpful guidance for better informed investment decisions, in particular in form of investment research is hardly available to retail investors anymore.
Also the concept target market (and negative target markets) and the interaction and responsibilities shared between “manufacturers” and “distributers” seem to be overly detailed and prescriptive. It should be also clarified which participants in the investment services value chain are neither “manufacturers” nor “distributers”, e.g. market makers which are simply providing liquidity to the market by posting two side quotes on a continuous basis. Furthermore, more proportionality should be introduced in the way product governance requirements apply to ordinary shares and bonds, notably where traded in the secondary market.
It is equally important to take the type of investment service into account when applying the product governance framework. E.g., with respect to individual portfolio management, the relevant target market should be determined by the characteristics of the portfolio mandate granted by the client to the portfolio manager and not on an individual financial instrument. Accordingly, Retail clients who appoint a portfolio manager acting on the basis of a discretionary mandate should have the opportunity to access financial instruments whose target market is “professional” only. The other way round, why should somebody seek – and pay for – professional advice, if this would not open up more sophisticated investment opportunities.
Therefore, we fully agree with the evaluation and judgement by the German Ministry of Finance stated in their position paper by September 2019:
“A thorough analysis should be conducted to identify the extent to which the product governance provisions are achieving investor protection objectives and whether these provisions can be simplified or revoked, since adequate protection could possibly be achieved through other provisions, in particular the suitability test. In

any case, further clarification regarding the application of these provisions is needed."
Last but not least, a stronger alignment and coherence with other investor protection rules, in particular a revised PRIIPs regulation is urgently required and once more we fully agree with the assessment by the German Ministry of Finance in the paper cited above:
"Due do the Commission's current interpretation regarding the scope of PRIIPS a significant volume of plain vanilla bonds with make-whole clauses traded on German trading venues is not available to non-professional clients. Bonds should not become packaged products simply by adding a make-whole clause. Therefore, it should be specified that PRIIPS does not apply to plain vanilla corporate bonds, including bonds with a make-whole clause (e.g.bonds with the amount repayable directly linked to an interest rate index). Additionally, in our view, the trading of these products does not lead to significant investor protection issues."

Question 32.1 Please explain your answer to question 32:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please refer to our answer to Question 32.

Question 33. Do you agree that the MiFID II/MiFIR requirements provide adequate protection for retail investors regarding complex products?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 33.1 Please explain your answer to question 33:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In fact we think that investors are "overprocted" in some cases and that the concept of "complex products" in the context of investor protection rules needs to be fundamentally reassessed and recalibrated within MiFID II /MiFIR as within the PRIIPs regulation alike. Complexity per se is not a problem. In the contrary, a diversified portfolio, or a financial product representing a diversified portfolio are necessarily more "complex" than the single financial instruments of which the portfolio consists. However, the "riskiness" of the comparably complex portfolio might be much lower and therefore the portfolio more suitable for a retail investor than a "simple" financial instrument in isolation. Another example is a "make whole clause" of a bond, which makes the structure of the bond more complex but the investment in this bond less risky than the investment in an otherwise identical – less complex – bond without a make whole clause. As a result, only where complexity leads to significantly increased risk, e.g. in case of highly leveraged products, complexity should give rise to regulatory concern.

2. Relevance and accessibility of adequate information

Information should be short, simple, comparable, and thereby easy to understand for investors. One challenge that has been raised with the Commission are the diverging requirements on the information documents across sectors.

One aspect is the usefulness of information documents received by professional clients and eligible counterparties ('ECPs') before making a transaction ('ex-ante cost disclosure'). Currently, the ex-ante cost information on execution services apply to retail, professional and eligible clients alike. With regard to wholesale transactions a wide range of stakeholders consider certain information requirements a mere administrative burden as they claim to be aware of the current market and pricing conditions.

Question 34. Should all clients, namely retail, professional clients per se and on request and ECPs be allowed to opt-out unilaterally from ex-ante cost information obligations, and if so, under which conditions?

	Yes	No	N. A.
Professional clients and ECPs should be exempted without specific conditions.	◉	○	○
Only ECPs should be able to opt-out unilaterally.	○	◉	○
Professional clients and ECPs should be able to opt-out if specific conditions are met.	○	○	◉
All client categories should be able to opt out if specific conditions are met.	◉	○	○
Other	○	○	◉

Question 34.1 Please explain your answer to question 34 and in particular the conditions that should apply:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

According to the unanimous perception of our members and their professional clients and eligible counterparts, the costs and charges disclosure requirements have not proven successful for them and are regarded to be completely inappropriate and needless for institutional, non-retail clients.
The main task of the cost transparency rules is to protect investors and to pro-vide them with the relevant information in order to make informed investment decisions or to review them afterwards. Taking into account the volume and structure of business and trading frequency in the wholesale market, MiFID II provisions related to costs and charges disclosure are – even under the relieved conditions applicable to these types of clients – usually not reasonably practicable, sometimes even technically impossible to fulfil and do not create any demonstrable benefit.
Institutional clients have the expertise and the necessary sources of information (or they are be able to negotiate an appropriate mechanism of information provision) to make informed and responsible investment decisions. Accordingly, they do not need and equally important, they do not want this form of "protection" which is not considered helpful but de facto hindering established business processes. Therefore, they

should not be forced under a regime which for them is burdensome and useless at the same time.
To say it pointedly, from the perspective of the service provider and their professional clients and eligible counterparts alike, the costs and charges disclosure requirements are perceived as a typical “solution is looking for a problem” peace of regulation.
For the reasons provided above, we would like to emphatically urge legislators to erase the costs and charges disclosure provisions for professional clients and eligible counterparties completely in the course of the MiFID II review. If no political consensus could be obtained then at least the group of eligible counterparties should be exempt completely while other non-retail clients should be given the possibility to “opt out”.
We also think, that also retail-clients should be given to “opt-out” based on an express consent. At a minimum, there should be also an option to “opt out” from repeatedly receiving the same ex ante cost disclosures for products and services which the retail client previously has bought or consumed.

Another aspect is the need of paper-based information. This relates also to the Commission's **Green Deal**, the **Sustainable Finance Agenda** and the consideration that more and more people use online tools to access financial markets. Currently, MiFID II/MiFIR requires all information to be provided in a “durable medium”, which includes electronic formats (e.g. e-mail) but also paper-based information.

Question 35. Would you generally support a phase-out of paper based information?

- ○ 1 - Do not support
- ◉ 2 - Rather not support
- ○ 3 - Neutral
- ○ 4 - Rather support
- ○ 5 - Support completely
- ○ Don’t know / no opinion / not relevant

Question 35.1 Please explain your answer to question 35:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we agree that from a sustainability point of view, it is desirable that information is provided in electronical form and accordingly, the use of electronic information channels should be encouraged, we are not supportive for a general and mandatory phase-out of paper based information.
In particular older investors might still have a preference for paper based communication and information and an investment service provider, if he wishes to do so, should be able to comply with such personal preferences of their clients also in the future.

Question 36. How could a phase-out of paper-based information be implemented?

	Yes	No	N. A.
General phase-out within the next 5 years	○	◉	○

General phase out within the next 10 years	○	◉	○
For retail clients, an explicit opt-out of the client shall be required.	◉	○	○
For retail clients, a general phase out shall apply only if the retail client did not expressively require paper based information	◉	○	○
Other	○	○	◉

Question 36.1 Please explain your answer to question 36 and indicate the timing for such phase-out, the cost savings potentially generated within your firm and whether operational conditions should be attached to it:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please see our answer to question 35.

Some retail investors deplore the lack of comparability of the cost information and the absence of an EU-wide database to obtain information on existing investment products.

Question 37. Would you support the development of an EU-wide database (e. g. administered by ESMA) allowing for the comparison between different types of investment products accessible across the EU?

- ○ 1 - Do not support
- ◉ 2 - Rather not support
- ○ 3 - Neutral
- ○ 4 - Rather support
- ○ 5 - Support completely
- ○ Don’t know / no opinion / not relevant

Question 37.1 Please explain your answer to question 37:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we think that the idea of an EU-wide database allowing retail investors to compare different types of investment products accessible across the EU seems to have some attractiveness at first glance, we have considerable doubts with respect to the practical usefulness about such a database in practice.
Among the reasons why we are rather skeptical about are market-structural considerations with respect to the relatively low level of regional, cross boarder integration of European retail markets for investment services (the information about a product does not automatically mean that this product is accessible), as

well very practical factors like language barriers and funding questions.
However, aside from this very general considerations, without being given any conceptual detail it is hardly possible to give a more precise estimate regarding the feasibility and potential usefulness of such a database. Questions would need to be answered first are which products shall be covered (scope), which information shall be provided and in which format in order to insure a practical comparability? Who shall provide the data and keeps it up to date? And equally important, how can the reliability of the information provided be insured. Furthermore, how shall the potential (retail investor be informed about the potential distributors of the product?
All these questions might sound relatively simple but might be difficult to decide about in practice. Here, it might be worthwhile to remember how difficult and still unfinished the discussions regarding existing regulatory approaches to present comparable information about investment products to retail investors, e.g. in form of information sheets are; most notably and possibly most controversial, the “KIT” document introduced with the PRIPPs regulation.
Last but not least – with respect to the proposed operation of such a database by ESMA, we are not consider it to be advisable to put additional stress on ESMA’s IT-resources by mandating it with the implementation of another sophisticated project of this magnitude at the moment, respectively before possible changes to ESMA’s IT infrastructure which might result from the MiFID II/MiFIR review are concluded.
For the reasons presented above, we suggest not to prioritize the proposed database as a part of the MiFID II/MiFIR review process but possibly to think about a more comprehensive feasibility and cost/benefit analysis for such a challenging project in a few years.

Question 38. In your view, which products should be prioritised to be included in an EU-wide database?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N. A.
All transferable securities	○	○	○	○	○	◉
All products that have a PRIIPs KID/ UICTS KIID	○	○	○	○	○	◉
Only PRIIPs	○	○	○	○	○	◉
Other	○	○	○	○	○	◉

Question 38.1 Please explain your answer to question 38:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We have given no answer here since, as argued in our answer to question 37, we do not think that it is the right moment to take this proposal further.
If such a database should be developed in the future, it would be desirable if the universe of the products covered, would be as wide as possible since the purpose of the tool to be used as a comparison tool

between available investment opportunities could not be achieved, if the scope would be limited to a selective, narrow subgroup of products.

Question 39. Do you agree that ESMA would be well placed to develop such a tool?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 39.1 Please explain your answer to question 39:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As already pointed out in our answer to question 37, because of resource constrains and the foreseeable high burden on ESMA's IT-department resulting from adjustments to be made to current systems as a result of the MiFID II/MiFIR review – aside from our general reservations with respect to the proposed database – we would not suggest that it shall be operated by ESMA.

3. Client profiling and classification

MiFID II/MiFIR currently differentiates between retail clients, professional clients and eligible counterparties. In line with the procedure and conditions laid down in the Annex of MiFID II, retail clients can already "opt-up" to be treated as professional clients. Some stakeholders indicated that the creation of an additional client category ('semi-professional investors') might be necessary in order to encourage the participations of wealthy or knowledgeable investors in the capital market. In addition, other concepts related to this classification of investors can be found in the draft Crowdfunding Regulation which further developed the concept of sophisticated investors[5].The CMU-Next group suggested a new category of experienced High Net Worth ("HNW") investors with tailor made investor protection rules[6].

[5] According to the draft of the Crowdfunding Regulation (to be finalised in technical trilogues) a sophisticated investor has either personal gross income of at least EUR 60 000 per fiscal year or a financial instrument portfolio, defined as including cash deposits and financial assets, that exceeds EUR 100 000.

[6] According to the CMU-NEXT group "HNW investors" could be defined as those that have sufficient experience and financial means to understand the risk attached to a more proportionate investor protection regime.

Question 40. Do you consider that MiFID II/MiFIR can be overly protective for retail clients who have sufficient experience with financial markets and who could find themselves constrained by existing client classification rules?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree

- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 40.1 Please explain your answer to question 40:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

There can be no reasonable doubt that there exists a subgroup of formally “retail investors” with comparable knowledge, and sometimes even with access to comparable technological resources, as legally “professional” investors and market participants. These group objectively does not need and subjectively often does not want the level of investor protection – which de facto is limiting the range of investment activities they can undertake – designed and calibrated for presumably less informed typical “retail investors”. Furthermore, even for the typical “retail investor” for which investor protection rules are designed and principally reasonable, we think that these rules have become often overly prescriptive and detailed. As a result – and as argued before – retail investors might feel patronized and might choose to prioritize other forms of investments (e.g. in the real estate sector) which de facto might be even more risky (e.g. buying real estate is typically a highly leveraged investment) than financial instruments but are comparably less regulated.
Therefore, the overall concept of investor protection under MiFID II/MiFIR needs to be revisited and recalibrated under the leading principle of a responsible investor (corsseponding to the picture of a responsible citizen).

Question 41. With regards to professional clients on request, should the threshold for the client’s instrument portfolio of EUR 500 000 (See Annex II of MiFID II) be lowered?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 41.1 Please explain your answer to question 41:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While it is not irrational to expect on average a certain positive correlation between the size of an investor’s portfolio and its level of knowledge, this assumed connection is not imperative and therefore this point is given too much attention.
We therefore would welcome if the current threshold of EUR 500k would lowered at least to EUR 250k or even EUR 100k and we also would not mind if the threshold would be abolished altogether.

Question 42. Would you see benefits in the creation of a new category of semi-professionals clients that would be subject to lighter rules?

- 1 - Disagree
-

2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 42.1 Please explain your answer to question 42:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We fully support that investors which are currently categorized as “retail”, on their express request (and only after a clear written explanation of the consequences of such a decision) should be given the opportunity to waive investor protection rules and to extend the range of activities and the access to investment products typically available for retail investors.
However, we are much less convinced that introducing a new category of “semi-professional” client would be the best way forward since this would further increase the complexity of the regulatory framework and would require significant technological system adjustments and repapering. We further doubt that there an objective, generally agreed demarcation between semi-professional and professional in terms of eligible products and investment activities in a convincing way. We therefore would prefer that the possibility for retail clients to “opt in” voluntarily into the “professional” category should be eased.
Not to be mistaken, we are supportive in principal that the comprehensive and effective set of investor protection rules are in place which are applicable and on which the retail investor can rely on without contractual negotiation. However, we strongly believe that (self)responsible citizen should also principally be allowed to decide which level of protection he desires.
In this respect, we currently see a certain imbalance with “investor protection” being much more restrictive and less flexible than consumer protection with respect to other economic activities. E.g. as a consumer you might enter into an interest rate swap as long as it is called a “financing building agreement” while an any other swap transaction at the financial markets are considered for a professional target market only. Furthermore, without any proof of qualification or understanding of the associated economic risk, anyone is allowed to purchase real estate financed on a mortgage and at a price which often is a double digit multiple of the citizens annual income. He or she is even allowed to risk his or her fortune by visiting an – often state run – casino. But the moment he acts as an investor, his ability to decide which level of protection on the one hand and economic flexibility on the other hand he or she desires are usually very limited.

Question 43. What investor protection rules should be mitigated or adjusted for semi-professionals clients?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
Suitability or appropriateness test	○	○	○	○	◉	○
Information provided on costs and charges	○	○	○	○	◉	○

Product governance	○	○	○	○	◉	○
Other	○	○	○	○	○	◉

Question 43.1 Please explain your answer to question 43:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Aside from our general reservation with respect to the introduction of new category of semi-professional clients, we think that the table presented in question 43 contains the most relevant investor protection rules which would need to be mitigated.

Question 44. How would your answer to question 43 change your current operations, both in terms of time and resources allocated to the distribution process?

Please specify which changes are one-off and which changes are recurrent:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Since there is no "objective" creteria to define "semi-professional" (which is why we are generally critical regarding the concept), the decision how and to which extend existing investor protection rules should be mitigated would be a rather political decision and it can hardly objectively decided where and how "to draw the line".

Question 45. What should be the applicable criteria to classify a client as a semi-professional client?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
Semi-professional clients should possess a minimum investable portfolio of a certain amount (please specify and justify below).	○	○	○	○	○	◉
Semi-professional clients should be identified by a stricter financial knowledge test.	○	○	○	○	○	◉
Semi-professional clients should have experience working in the financial sector or in fields that involve financial expertise.	○	○	○	○	○	◉
Semi-professional clients should be subject to a one-off in-depth suitability test that would not need to be repeated at the time of the investment.	○	○	○	○	○	◉
Other	○	○	○	○	○	◉

Question 45.1 Please explain your answer to question 45 and in particular the minimum amount that a retail client should hold and any other applicable criteria you would find relevant to delineate between retail and semi-professional investors:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Since we are skeptical about the concept of a new client category for semi-professionals as such, we want to refrain from making suggestions regarding the qualifying criteria.
However, while we appreciate the good intend and recognize that non of the proposed qualifying sectors is completely meaningless, the table presented in question 45 also exemplifies our concern that the introduction of a new client category would make the increasing regulatory framework more complex and also demonstrates the qualification process will remain a political decision based on factors which are in last consequence arbitrary.

4. Product Oversight, Governance and Inducements

The product oversight and governance requirements shall ensure that products are manufactured and distributed to meet the clients' needs. Before any product is sold, the target market for that product needs to be identified. Product manufacturers and distributors should thus be well aware of all product features and the clients for which they are suited. To do so, distributors should use the information obtained from manufacturers as well as the information which they have on their own clients to identify the actual (positive and negative) target market and their distribution strategy.

There is a debate around the efficiency of these requirements. Some stakeholders criticise that the necessary information was not available for all products (e.g. funds). Others even argue that this approach adds little benefit to the suitability assessment undertaken at individual level. Similar doubts are mentioned with regards to the review of the target market, in particular for products that don't change their payment profile. Concerns are raised that the current application of the product governance rules might result in a further reduction of the products offered.

Question 46. Do you consider that the product governance requirements prevent retail clients from accessing products that would in principle be appropriate or suitable for them?

- ○ 1 - Disagree
- ○ 2 - Rather not agree
- ○ 3 - Neutral
- ○ 4 - Rather agree
- ◉ 5 - Fully agree
- ○ Don't know / no opinion / not relevant

Question 46.1 Please explain your answer to question 46:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In our opinion the product governance regime which was introduced to a large extend with MiFID II/MiFIR is excessive, overly prescriptive and expensive with the "target market" concept possibly as the most prominent example. We think that the concept should be urgently recalibrated with the clear target that "target market" concept and product governance only should be applied for product with a certain level of

complexity and riskiness (as we have argued before, complexity per se should not raise regulatory concern). However, as mentioned before, the most absurd and misguided application product governance rule can be currently observed not in the MiFID II/MiFIR but within the PRIIPs context where following a completely incomprehensible interpretation of the law, retail investor are de facto currently excluded from large parts of the corporate bond market, in particular because these bonds – as a feature which clearly positively contributes to investor protection – contain a so called “make whole clause” which is granting the investor an additional cash compensation in the case of early redemption by the issuer.
Another conceptual weakness of the current product governance regime lies in the fact that it does not appropriately reflect if a retail investor seeks – and pays for – professional advice, in particular by mandating a portfolio manager with discretional powers.

Question 47. Should the product governance rules under MiFID II/MiFIR be simplified?

	Yes	No	N. A.
It should only apply to products to which retail clients can have access (i.e. not for non-equities securities that are only eligible for qualified investors or that have a minimum denomination of EUR 100.000).	◉	○	○
It should apply only to complex products.	◉	○	○
Other changes should be envisaged – please specify below.	◉	○	○
Simplification means that MiFID II/MiFIR product governance rules should be extended to other products.	○	◉	○
Overall the measures are appropriately calibrated, the main problems lie in the actual implementation.	○	◉	○
The regime is adequately calibrated and overall, correctly applied.	○	◉	○

Question 47.1 Please explain your answer to question 47:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As argued before, the product governance process and the target market concept should only be applied where increased complexity – to the extent that increased complexity also results in increased riskiness – makes it difficult to decide whether a product is still suitable for a retail investor. It is completely uneconomical and unnecessary to classify
When reassessing the MiFID II/MiFIR product governance rules, one should also not avoid the fundamental question whether the concept as such is really needed or if it can be seen as an unnecessary duplication of – principally desirable – investor protection efforts?

Further, even though ESMA clarified in its guidelines that the sale of products outside the actual target market is possible in so far as this can "be justified by the individual facts of the case", distributors seem reluctant to do so even if the client insists. This consultation is therefore assessing if and how the product governance regime could be improved.

Question 48. In your view, should an investment firm continue to be allowed to sell a product to a negative target market if the client insists?

- (●) Yes
- ( ) Yes, but in that case the firm should provide a written explanation that the client was duly informed but wished to acquire the product nevertheless.
- ( ) No
- ( ) Don't know / no opinion / not relevant

Question 48.1 Please explain your answer to question 48:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Definitely yes, as argued before, are of the opinion that product governance and investor protection rule should insure that retail investors are given the information required - and be warned if necessary - in order to make informed investment decisions. This should not lead to a situation where the retail investor finds him- or herself patronized by his investment service provider or by law.

MiFID II/MiFIR establishes strict rules for investment firms to accept inducements, in particular as regards the conditions to fulfil the quality enhancement test and as regards disclosures of fees, commissions and non-monetary benefits.

Question 49. Do you believe that the current rules on inducements are adequately calibrated to ensure that investment firms act in the best interest of their clients?

- (●) 1 - Disagree
- ( ) 2 - Rather not agree
- ( ) 3 - Neutral
- ( ) 4 - Rather agree
- ( ) 5 - Fully agree
- ( ) Don't know / no opinion / not relevant

Question 49.1 Please explain your answer to question 49:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In our opinion, the inducement-regime which was significantly extended and aggravated by the introduction of MiFID II is neither convincing from a conceptual point of view nor does ist provide sufficient legal certainty in practice. Whereby the topic was drawn into and further dominated by two ultimately "political" regulatory issues, the "unbundling" of research and the introduction of the category of "non-independent investment

advice".
In addition, the implementation of the far reaching general prohibition of inducements often remains difficult in practice, especially with regard to the scope of the prohibition and handling of exemptions. This concerns for example the concrete requirements and the proof of the presence of "quality improvements", the demarcation between inducements and balanced contractual consideration as well the definition of "third party" which can remain difficult in practice. Not to mention that the bureaucratic burden has significantly increased.
Furthermore, the severe intervention in existing market structures by the categorization of investment research as inducements and the introduction of the unbundling rule as a "Level II" measure has gave raise to serious concern with respect to the democratic legitimization of the legislative process. In our view, regulatory decisions which have such a far reaching structural impact should not be possible without a clear mandate on "Level I". In other words, all regulatory core definitions and concepts should be decided by democratically legitimated political bodies and not by ESMA or other regulators.

Some consumer associations have stated that inducement rules inducements under MiFID II/MiFIR are not sufficiently dissuasive to prevent conflicts of interest in the distribution process. They consider that financial advisers are incentivised to sell products for which they receive commissions instead of recommending the most suitable products for their clients. Therefore, some are calling for a ban on inducements.

Question 50. Would you see merits in establishing an outright ban on inducements to improve access to independent investment advice?

- (●) 1 - Disagree
- ( ) 2 - Rather not agree
- ( ) 3 - Neutral
- ( ) 4 - Rather agree
- ( ) 5 - Fully agree
- ( ) Don't know / no opinion / not relevant

Question 50.1 Please explain your answer to question 50:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

To our understanding, there are different views, not only within the industry but also among member states to which extend (third party) commission based financial advice should raise regulatory concern. MiFID II only allows commission based financial advice und certain comparably narrow conditions.
Further since member states are able to implement stricter rules with respect to inducements than stipulated by MiFID II, member states already have the possibility to ban inducements completely, if they desire to do so. We therefore do not support an aggravation of the current approach by an outright ban on inducements on a European level.

As regards the criteria for the assessment of knowledge and competence required under Article 25(1) of MiFID II, ESMA 's guidelines established minimum standards promoting greater convergence in the knowledge and competence of staff providing investment advice or information about financial instruments and services. Nonetheless, due to the diversified national educational and professional systems, there are still various options on on how to test the relevant knowledge and competences across Member States.

Question 51. Would you see merit in setting-up a certification requirement for staff providing investment advice and other relevant information?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 51.1 Please explain your answer to question 51:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Taking into account the high impact investment advice can have on the overall economic situation of European citizens and the high influence the quality of investment advice can have on a financial institution’s reputation, we have some sympathy for the idea that there should be some requirements to proof an advisor’ s qualification by requiring a certification.

Question 52. Would you see merit in setting out an EU-wide framework for such a certification based on an exam?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 52.1 Please explain your answer to question 52:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we think that there should be some basis harmonization by defining core aspects how the knowledge and competence of investment advisors could be proofed and also agree that some form of exam should be used, we would prefer the certification process to be organized locally (by or at least with a material involvement of the NCA), uses local language and provides some flexibility to take into account the different specifies of financial markets across the Union.

5. Distance communication

Provision of investment services via telephone requires ex-ante information on costs and charges (please consider also ESMA’s guidance on this matter). When a client wants to place an order on the phone, the service provider is obliged to send the cost details before the transaction is executed, a requirement which may delay the immediate execution of the

order. Further, MiFID II/MiFIR requires all telephone communications between the investment firm and its clients that may result in transactions to be recorded. Due to this requirement, several banks argue to have ceased to provide telephone banking services altogether.

Question 53. To reduce execution delays, should it be stipulated that in case of distant communication (phone in particular) the cost information can also be provided after the transaction is executed?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- (●) 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 53.1 Please explain your answer to question 53:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We fully support the proposal that in case of distant communication, in particular phone calls, it should be allowed to provide the cost information after the transaction has been executed which is, since it is in the clear interest of the client (professional and retail alike) and even more in volatile markets that an order can be placed and executed without undue bureaucratic delay.

Question 54. Are taping and record-keeping requirements necessary tools to reduce the risk of products mis-selling over the phone?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- (●) 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 54.1 Please explain your answer to question 54:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Despite bwf member firms are usually small and mid-sized companies, their business profile is usually completely “wholesale”. Therefore, taping- and record-keeping requirements were in place even before the introduction of MiFID II and there can be little regarding its effectiveness.
There was and still is a vivid debate among banks and investment firms with retail customers whether such requirements are proportionate for the retail market as well. However, now – since the technical infrastructure is already in place and investment costs already occurred, we think that the discussion comes a little late.

6. Reporting on best execution

Investment firms shall execute orders on terms most favourable to the client. The framework includes reporting obligations on data relating to the quality of execution of transactions whose content, format and periodicity are detailed in Delegated Regulation 2017/575 (also known as 'RTS 27'). The best execution framework also includes reporting obligations for investment firms on the top five execution venues in terms of trading volumes where they executed client orders and information on the quality of information. Delegated regulation 2017/576 (also known as 'RTS 28') specifies the content and format of that information.

Question 55. Do you believe that the best execution reports are of sufficiently good quality to provide investors with useful information on the quality of execution of their transactions?

- (●) 1 - Disagree
- ( ) 2 - Rather not agree
- ( ) 3 - Neutral
- ( ) 4 - Rather agree
- ( ) 5 - Fully agree
- ( ) Don't know / no opinion / not relevant

Question 55.1 Please explain your answer to question 55:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

According to unanimous feedback from bwf memberfirms based on their communication with their clients the reporting obligation for investment firms on the top five execution venues in terms of trading volumes, in its current form is a costly and burdensome purely statistical exercises which produces very little or no tangible benefit for investors.
We recommend deleting the provision without replacement. However, in case that the dispersible provision be maintained, a standardized format for such reports should be implemented to make the information provided easier accessible and comparable.

Question 56. What could be done to improve the quality of the best execution reports issued by investment firms?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.
Comprehensiveness	◉	○	○	○	○	○
Format of the data	○	○	○	○	◉	○
Quality of data	○	○	○	◉	○	○
Other	○	○	○	○	○	○

Question 56.1 Please explain your answer to question 56:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please see our answer to question 55.1.

Question 57. Do you believe there is the right balance in terms of costs between generating these best execution reports and the benefits for investors?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 57.1 Please explain your answer to question 57:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please see our answer to question 55.1.

III. Research unbundling rules and SME research coverage[7]

New rules on unbundling of research and execution services have been introduced in MiFID II/MiFIR, principally to increase the transparency of research prices, prevent conflict of interests and ensure that research costs are incurred in the best interests of the client. In particular, unbundling of research rules were put in place to ensure that the cost of research funded by client is not linked to the volume or value of other services or benefits or used to cover any other purposes, such as execution services.

[7] The review clause in Article 90 paragraph (1)(h) of MiFID II is covered by this section.

Question 58. What is your overall assessment of the effect of unbundling on the quantity, quality and pricing of research?

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As a result of the "Level II" decision, which at the time came as a surprise to many and was not uncontroversial in terms of legislative competence, to consider the dissemination of research reports as "inducements" and to prohibit the payment of research via execution costs of securities orders ("unbundling"), the market for investment research in the European Union has undergone fundamental changes. This was associated with negative consequences, especially for smaller research providers, and also had negative spillover effects with regard to access to the capital market, especially for smaller and medium-sized issuers.
While the blue chip segment continues to be a functioning market with sufficient large volumes for research products with a sufficient coverage issuers guaranteed, the market for research products for micro/small (SMEs up to 500 million market capitalization) and mid-cap (SMEs up to 5 billion Euros market capitalization) is experiencing significant negative effects.
From the perspective of suppliers of investment research, the situation can be described as follows: Due to the significantly higher administrative burden and increased cost competition by large providers (in particular by large international brokers and investment banks), medium-sized, classic “SME houses” are subject to an increased competitive pressure, which often leads to the abandonment of the company's own research departments or even might cause market exit.
Large, internationally positioned providers, on the other hand, take advantage of economy of scale effects and synergies with "predatory pricing "for access to research databases with reported prices as low as 10 thousand Euros p.a. for unlimited access while comparable packages could have cost around 100 thousand Euros a couple of years ago. Furthermore, for large international brokers and investment banks, investment research for SME-issuers only play a minor or even irrelevant role.
This has led to the undesirable situation that if research coverage is provided for SME-companies at all, it is usually sponsored/paid for by the issuer itself. Not surprisingly, investor’s trust in such products is often limited and ironically, the potential conflicts of interest arising from issuer sponsored research can be assume to be much higher than any potential conflicts of interest arising from bundling research with execution fees. Furthermore, drastically fallen prices for investment research in general, limits the resources which can be employed for such research in a quantitative and often also qualitative sense.
On the demand side of individual and collective portfolio and asset managers, the structural changes caused by regulation and the reduced availability of research, especially for micro/small-cap issuers, almost inevitably lead to a decline in interest and changed investment behavior, in which a less transparent - and consequently even less liquid - SME market attracts less attention and investment volumes. Moreover, for various market structural and regulatory reasons, issuers and their accompanying investment firms have only limited scope to compensate for the lower investor interest in the institutional sector through a stronger retail orientation.
Since banks are often discontinuing advisory services altogether due to administrative burden resulting from regulation (e.g. product governance, target market definitions, etc.) or limit themselves to offering "covered big caps". Not surprisingly, fewer and fewer private investors are gaining access to capital market transactions by SMEs. In addition, private investors have hardly any access to investment research altogether.
The declining demand leads to valuation disadvantages and discounts and - in connection with the increasing costs - to a wider gap in the cost/benefit ratio with regard to capital market access for small and medium-sized issuers and to increased risks with regard to the market success of transactions of the securities firms accompanying SME issuers. Rising costs of regulation also lead structurally to larger units on the investor side and thus to larger portfolios which almost inevitably invest in more liquid, larger issues.
The declining demand leads to valuation disadvantages and discounts and - in connection with the increasing costs - to a wider gap in the cost/benefit ratio with regard to capital market access for small and medium-sized issuers

Therefore, it must be stated clearly that the unbundling rule, together with additional administrative burden resulting from other MiFID II provisions and an excessive amount of detail in „Level II“ can be regarded as a huge disservice to SME issuers and are a clear disincentive for the success of SME growth markets which MiFID II claims to promote as one of its core objectives.

Over the last years, research coverage relating to Small and Medium-size Enterprises ('SMEs') seems to suffer an overall decline. One alleged reason for this decline is the introduction of the unbundling rules. Less coverage of SMEs may lead to less SME investments, less secondary trading liquidity and less IPOs on Union's financial markets. This sub-section places a strong focus on how to foster research coverage on SMEs. There is a need to consider what can be done to increase its production, facilitate its dissemination and improve its quality.

1. Increase the production of research on SMEs

1.1. EU Rules on research

The absence of a harmonised definition of the notion of "research" has led to confusion amongst market participants. In addition, Article 13 of delegated Directive 2017/593 introduced rules on inducement in relation to research. Market participants argue that this has led to an overall decline of research coverage, in particular on SMEs. Several options could be tested: one option would be to revise the scope of Article 13 by authorising bundling exclusively for providers of SME research. Alternatively, independent research providers (not providing any execution services to clients) could be allowed to provide research to investment firms without these firms being subject to the rules of Article 13 for this research.

Furthermore, several market participants argue that providers price research below costs. If the actual costs incurred to produce research do not match the price at which the research is sold, it may have a negative impact on the research ecosystem. Some argue that pricing of research should be subject to the rules on reasonable commercial basis.

Finally, several market participants also pointed out that rules on free trial periods of research services are not sufficiently clear (ESMA also drafted a Q&A on trial periods).

Question 59. How would you value the proposals listed below in order to increase the production of SME research?

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N. A.
Introduce a specific definition of research in MiFID II level 1	○	◉	○	○	○	○
Authorise bundling for SME research exclusively	○	○	○	○	◉	○
Exclude independent research providers' research from Article 13 of delegated Directive 2017 /593	◉	○	○	○	○	○

Prevent underpricing in research	○	○	○	○	◉	○
Amend rules on free trial periods of research	◉	○	○	○	○	○
Other	○	○	○	○	◉	○

Please specify what other proposals you would have in order to increase the production of SME research:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

An additional, however limited incentive for the production of SME research could be a VAT privilege, either by reducing the VAT rate to be paid on SME research or exclude SME Research from VAT completely.
Another tax based incentive to foster the SME market alltogether and thereby, indirectly promoting additional research on SME issuers would be a reduced capital gains tax on securities issued by SME companies. However, we are well aware that this is an Instrument to be decided about on member state level.
Aside from tax based incentives, we strongly suggest that the decission to classify investment research as an inducement and as a result prohibit to abolish th previosly accepted and well established market practice of paying for research access via execution fees should be revisited and reaccessed in the light of the clearly negative we have seen in particular for SME research as a result of this policy approach which ironically was in particular a request by the UK who now has left the EU.
In our view, the concerns regarding potential conflicts of interest on side of the asset managers, if the were given access to research which has been paid for by execution fees of their clients, was heavily overstated in the original discussion on the design of MiFID II. Here we would like to repeat our views and concerns (which unfortunately came true) which we have had expressed as a reply on ESMA MiFID II/MiFIR Consultation Paper in 2014:
"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 SMEissuers will cease to exist if “unbundling” would become mandatory."
From a retrospective position, it must be concluded that the "unbundling rule" can be regarded as a policy instrument which clearly has done more harm than good. In the light of those arguments, which we consider to be still valid and in the light of the foreseen severe negative consequuences which have been materialized, we suggest that legislators should seriously consider to lift the "unbundling rule" introduced by MiFID II altogether but at least for SME research. In case that the "unbundling rule" should be abolished for SME research only, we would propose an SME threshold of 500 million Euros market capitalisation for this purpose. At current prices, this threshold would cover a little less than two thousand SME issuers and small research providers within the Union.

Question 59.1 Please explain your answer to question 59 and in particular if you believe preventing underpricing in research and amending rules on free trial periods of research are relevant:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we acknowledge that the production of research - for various reasons - might not be cost-covering in every single case, competitive distortion by systematic predatory pricing as a crowding out strategy and cross-subsidization of investment research has become a serious market-structural problem, in particular but not exclusively for smaller, boutique style providers of investment research.
The observed underpricing can lead to a reduction of research capacity available to the market and could have a negative impact on quality of research offered, creating a downward spiral for the remaining providers. Providers must take more mandates at lower prices to cover their costs, while they also compete with buy-side research which often is in a better competitive position to hire. Accordingly, time spent on a report might be reduced significantly and accuracy could decline. The described structural problems have already become a significant burden for the SME ecosystem as a whole. Furthermore, there are structures in the market that appear as a practically bypassing the current unbundling rules by implicitly agreeing jointly to cheap research and higher payment of commissions for executions at the same time. To this extend, underpricing, in a regulatory framework which prohibits bundling, a way to undermine the goals of the regulation and to distort competition.

1.2. Alternative ways of financing SMEs research

Alternative ways of financing research could help foster more SME research coverage. Operators of regulated markets and SME growth markets could be encouraged to set up programs to finance research on SMEs whose financial instruments are admitted on their markets. Another option would be to fund, at least partially, SME research with public money.

Question 60. Do you consider that a program set up by a market operator to finance SME research would improve research coverage?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral

- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 60.1 Please explain your answer to question 60:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Our member firms are devided on the question whether market operators should set up programs or in general should become involved in the production of investment research. While some members see some merit in the concept, others are rather skeptical.
Those who are in favour of the idea argue that the visibility of SME research would be increased and trading venues could act as general source which would help investors to find relevant information on SME issuers. As a practical example, the “stage” program of the Swiss market operator SIX was mentioned. https://www.six-group.com/exchanges/issuers/equities/being_public/stage_program_en.html
Those member firms which are rather critical, argued as follows:
To the extent that market operators would provide and or fund SME research this would create a situation where bundling de facto becomes allowed for a certain group of market participant (in this case market operators who fund the production of research by cross subsidies, e.g. from trading fees), while it remains prohibited for competitors.
They also believe, that market operators may too easily find themselves under the suspicion of conflict of interest if they have different levels of economic interest and involvement with particular issuers of securities traded on their venues. Therefore, market operators should remain neutral providers of market infrastructure and not deliver investment recommendations. The practical experiment of Deutsche Boerse with the research companies in its growth-segment Scale was given as an example for limited acceptance of research products provided by market operators.
It was also argued that from an issuer perspective, it would be an illusion to assume that research provided by market operators would be a free service. In fact, it would become an additional cost driver which tends to increase the fees issuers have to pay to the markets where they are listed. Taking into account the low acceptance of investment research provided by market operators, the overall cost/benefit assessment from an issuer’s perspective could be negative. Additional, implicit or explicit fees charged by the market operators could also be regarded as an additional barrier of entry which increase the overall costs of going and staying public.

Question 61. If SME research were to be subsidised through a partially public funding program, can you please specify which market players (providers, SMEs, etc.) should benefit from such funding, under which form, and which criteria and conditions should apply to this program:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Public funding programs are a tradition, widespread and accepted policy instrument in many economic segments and there is no reason to assume that they could not be a beneficial instrument in the field of investment research for SME issuers as well. However, it goes without saying that the design of any such program needs to be transparent and grant fair and equal access for suppliers (e.g. banks and independent providers alike) and a fair and an affordable, or even free, publication of such research for all investors which appropriately reflects the degree of public funding. In this respect, we would see elements of public funding as an instrument of a policy mix intended to compensate for competitive disadvantages and thereby support

a more diverse and resilient ecosystem for SME research.
However, when designing schemes which include public funding sufficient attention should be given to the aspect ex post control and avoidance of misuse in general. Furthermore, the question how it could be achieved that as a result of such a program, idealistically, every SME issuer should receive research coverage on a regular basis. In our view, such a program should not solely focus on SME equity research but should include credit research with respect to SME bonds as well.
Furthermore, since such a public funding aid would privilege SME issuer, the question by which criteria an issuer would qualify to be included into the funding scheme and how issuers shall be selected, e.g. by an application scheme, need to be given due consideration. In our view, a market capitalization of up to 200 million Euro could be seen as an appropriate threshold to qualify for such a program. Last but not least, transition rules for issuers growing out of the SME segment would have to be defined.

The growing use of artificial intelligence and machine learning in financial services can help to foster the production of research on SMEs. In particular, algorithms can automate collection of publically available data and deliver it in a format that meets the analysts' needs. This can make equity research, including on SMEs, less costly and more relevant.

Question 62. Do you agree that the use of artificial intelligence could help to foster the production of SME research?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 62.1 Please explain your answer to question 62:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Feedback from market practitioners with practical experience in this field indicates that there are significant problems in the attempt to generate SME research based on artificial intelligence (AI). Since AI based analytics employ algorithms in order to retrieve meaningful information from data available from different sources (in particular from the internet) there are practical problems, in particular for young SME companies, for the crawling-software employed to find and retrieve a sufficiently large amount of data. Furthermore, while information published by larger companies are usually available in English and accounting data following internationally agreed accounting standards, information on SME companies are often available in local language only with financial often data based on national accounting rules. The resulting inhomogeneity and a resulting limited comparability, significantly complicate the use of AI in this field for now. We therefore believe that human intelligence will remain the dominant factor for the production of SME research for the foreseeable future. At the same time, with technological progress in the field of AI rapidly accelerating, the cost advantage of automated AI based research will be a strong driver in the attempt to employ AI in the production of SME research as well.

1.3. Promote access to research on SMEs and increase quality of research

The lack of access to SME research deprives issuers from visibility and financing opportunities. However, access to SME research can be improved by creating a EU-wide SME research database.

The creation of an EU database compiling research on SMEs would ensure the widest possible access to research material. Via this public EU-wide database, anyone could access and download research on SMEs for free. Such a tool would allow investors to access research in a more efficient manner and at a lower cost, while improving SMEs visibility.

Question 63. Do you agree that the creation of a public EU-wide SME research database would facilitate access to research material on SMEs?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 63.1 If you do agree that the creation of a public EU-wide SME research database would facilitate access to research material on SMEs, please specify under which conditions this database should operate:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we have some sympathy in principle for the idea of providing European investors with a EU-wide SME database, we see significant problems in practice and therefore doubt that such an ambitious project would deliver a positive result from a cost/benefit perspective.
The various EU member states still show fundamental differences in corporate structure, tax levels, client behavior, market structures and the overall macro-economic situation. To build up Pan-European SME research database would require consistent formats and standards for the analysis which probably would create a tendency to uniform “streamlined” research appearance without taking appropriately into account individual qualities of the providers, individualities of jurisdictions and issuers. Furthermore, it must be pointed out that following our experience, a substantial number of market participants, investors and corporates in the SME segment still prefer research in local language for various reasons. An observation which holds true in particular for retail investors, which are a major driver for the success of the being public of SME companies and for the liquidity in the market for securities issued by SMEs. Another open question is how and by whom and under what kind of governance and funding structure such a database should be operated.
For the reasons presented above, we remain overall skeptical regarding the desirability and practical usefulness of such a database and we do not consider it to be a policy option which should be given priority in the course of the discussion of a MiFID II / MiFIR review. However, in case that the Commission should decide to take this idea further, it is important that such a database would be designed based strictly on a voluntary basis with respect to suppliers and users alike.

Question 64. Do you agree that ESMA would be well placed to develop such a database?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree

- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 64.1 Please explain your answer to question 64:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Aside from the fact that at this stage of the discussion we have some remaining concerns with respect to the usefulness of such a database, we are also not necessarily in favor -even though we would not categorically object it - of ESMA to develope (and possibly operate) for legal and practical reasons.
From a legal point of view, we would not regard such a database to be an instrument of financial market regulation in the first place and therfore, it should better be developed and operated by an entity whose mainpurpose is not market regulation.
From a practical point of view we are rather sceptical whether ESMA's capacity in resourches and expertise based on market participants experience with the limited performance and reliability of databases oprated by ESMA would make it first choice for such a technically challenging project.
Therefore, if the Commission, despite the reservations expressed, should decide to take this project further, we would prefer it to be an "non-regulatory" project under direct auspices of the Commission and technically developed and operated under a cost recovery policy by a private company selected based on a tender procedure and with a mandate for five to seven years.

Where issuer-sponsored research meets the conditions of Article 12 of Delegated Directive (EU) 2017/593, it can qualify as an acceptable minor non-monetary benefit. One condition is that the relationship between the third party firm and the issuer is clearly disclosed and that the information is made available at the same time to any investment firm wishing to receive it or to the general public. However, issuers and providers of investment research consider that the conditions listed under Article 12 would in most cases not apply to issuer-sponsored research. As a result, issuer-sponsored research would not qualify as acceptable minor non-monetary benefit.

Question 65. In your opinion, does issuer-sponsored research qualify as acceptable minor non-monetary benefit as defined by Article 12 of Delegated Directive (EU) 2017/593?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 65.1 Please explain your answer to question 65:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we still think that it is a fundamental regulatory misconception - based on Level II decision without any sufficient justification on “Level I” - to regulate the dissemination of investment research under the inducement regime, we would be clearly supportive for purely pragmatic reasons to qualify SME research as an “acceptable minor non-monetary benefit”. This would result in craving out SME research from the

inducement regime, given that the requirements of Article 12 of Delegated Directive EU 2017/593 are met, with the result that SME research could be provided to analysts and investors with less regulatory constrictions. However, one unintended consequence could be that the categorization as an “acceptable minor non-monetary benefit” could have a negative consequence with respect to the intellectual and economich value attributed to such research.
Furthermore, such a provision would be indeed more or less ineffective, if issuer-sponsored research would not be included, since qualifying SME research as “acceptable minor non-monetary benefit” alone would not set any incentive for such research to be produced on a third party initiative in the first place. Accordingly, based on current market-structures (which are partly the result of the shortcomings of the regime-change introduced by MiFID II), one must realistically assume that many SME issuers will stay depended on issuer sponsored research in one form or the other for the time being.

Question 66. In your opinion, does issuer-sponsored research qualify as investment research as defined in Article 36 of Delegated Regulation (EU) 2017/565?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- (•) 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 66.1 Please explain your answer to question 66:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In addition, Article 37 of Delegated Regulation (EU) 2017/565 provides rules on conflict of interests for investment research and marketing communication. Investment research is defined in Article 36 of delegated regulation 2017/565. However, issuers and providers of investment research consider that the definition of Article 36 would in most cases not apply to issuer-sponsored research which as a result, would not qualify as investment research. As a consequence, the rules on conflict of interests applicable to marketing documentation would apply to issuer-sponsored research.

Question 67. Do you consider that rules applicable to issuer-sponsored research should be amended?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- (•) 4 - Rather agree
- 5 - Fully agree

Don’t know / no opinion / not relevant

Question 67.1 If you do consider that rules applicable to issuer-sponsored research should be amended, please specify how:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Issuer-sponsored research should not be stamped as “marketing communication” any longer but rather as a specific form of investment research. Quality standards are almost the same and inherent differences do not justify a treatment as marketing communication. It is rather plane that issuer-sponsored research cannot fulfil the requirements especially of Art. 37 para. 2 lit. d) and f) MiFID-DelR. In this context it should be sufficient in terms of investor transparency that the research provided is issuer-sponsored. Such a label is very much in line with investor expectation anyway. It should be considered that talking about SMEs issuer-sponsored research will be mostly the only form of research coverage available to investors due to the unbundling misconception.

Question 68. Considering the various policy options tested in questions 59 to 67, which would be most effective and have most impact to foster SME research?

	1 (least effective)	2 (rather not effective)	3 (neutral)	4 (rather effective)	5 (most effective)	N. A.
Introduce a specific definition of research in MiFID level 1	○	○	◉	○	○	○
Authorise bundling for SME research exclusively	○	○	○	○	◉	○
Amend Article 13 of delegated Directive 2017/593 to exclude independent research providers' research from Article 13 of delegated Directive 2017/593	◉	○	○	○	○	○
Prevent underpricing of research	○	○	○	○	◉	○
Amend rules on free trial periods of research	◉	○	○	○	○	○
Create a program to finance SME research set up by market operators	◉	○	○	○	○	○
Fund SME research partially with public money	○	○	○	◉	○	○
Promote research on SME produced by artificial intelligence	◉	○	○	○	○	○
Create an EU-wide database on SME research	○	◉	○	○	○	○
Amend rules on issuer-sponsored research	◉	○	○	○	○	○
Other	○	○	○	○	○	◉

Question 68.1 Please explain your answer to question 68:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The answers mirror our opinion on the desireability and effectiveness of the different policy options as presented in our answers to questions 59 to 67.

IV. Commodity markets[8]

As part of the effort to foster more **commodity derivatives trading denominated in euros**, rules on pre-trade transparency and on position limits could be recalibrated (to establish for instance higher levels of open interest before the limit is triggered) to facilitate nascent euro-denominated commodity derivatives contracts. For example, Level 1 could contain a specific requirement that a nascent market must benefit from more relaxed (higher) limits before a positon has to be closed. Another option would be to allow for trades negotiated over the counter (i.e. not on a trading venue) to be brought to an electronic exchange in order to gradually familiarise commodity traders with the beneficial features of “on venue” electronic trading.

ESMA has already conducted a consultation on position limits and position management. The report will be presented to the Commission at the end of Q1 2020. From a previous ESMA call for evidence, the commodity markets regime seems to have not had an impact on market abuse regulation, orderly pricing or settlement conditions. ESMA stresses that the associated position reporting data, combined with other data sources such as transaction reporting allows competent authorities to better identify, and sanction, market manipulation. Furthermore, the Commission has identified in its Staff Working Document on strengthening the International Role of the Euro that “There is potential to further increase the share of euro-denominated transactions in energy commodities, in particular in the sector of natural gas”.

The most significant topic seems the current position limit regime for illiquid and nascent commodity markets. The position limit regime is thought to work well for liquid markets. However, illiquid and nascent markets are not sufficiently accommodated. ESMA also questioned whether there should be a position limit exemption for financial counterparties under mandatory liquidity provision obligations. ESMA would also like to foster convergence in the implementation of position management controls.

Another aspect mentioned in the Commission consultation on the international role of the euro is a more finely calibrated system of pre-trade transparency applicable to commodity derivatives. Such a system would lead to a swifter transition of these markets from the currently prevalent OTC trading to electronic platforms.

[8] The review clause in Article 90 paragraph (1)(f) of MiFID II is covered by this section.

Question 69. Please specify to what extent you agree with the statements below regarding the experience with the implementation of the position limit framework and pre-trade transparency?

	1	2	3	4	5	

	(disagree)	(rather not agree)	(neutral)	(rather agree)	(fully agree)	N. A.
The EU intervention been successful in achieving or progressing towards improving the functioning and transparency of commodity markets and address excessive commodity price volatility.	○	○	○	◉	○	○
The MiFID II/MiFIR costs and benefits with regard to commodity markets are balanced (in particular regarding the regulatory burden).	○	○	◉	○	○	○
The different components of the framework operate well together to achieve the improvement of the functioning and transparency of commodity markets and address excessive commodity price volatility.	○	○	○	◉	○	○
The improvement of the functioning and transparency of commodity markets and address excessive commodity price volatility correspond with the needs and problems in EU financial markets.	○	○	○	◉	○	○
The position limit framework and pre-trade transparency regime for commodity markets has provided EU added value.	○	○	◉	○	○	○

Question 69.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

Quantitative elements for question 69.1:

	Estimate (in €)
Benefits	Estimates provided by EFET: Reduced risk of market squeezes 100.000 Based on cases before position limits have been introduced
Costs	a. IT build – infrastructure/software and FTE equivalent cost Set-up costs (one-off):150.000-700.000 Running costs (annual): 10.000-45.000 Comments/explanation: Setup of database / interfaces / robot workflows b.Monitoring of positions Running costs (annual): 140.000 Comments/explanation: 0.2-1 FTE (not dedicated but distributed over resources in risk management, Backoffice, IT, external consultants, Legal). No benefit to business since position monitoring is covered by risk system anyway. MiFiD position limit definition based on products is not consistent with our risk management and ETRM setup and has therefore no added value for us other than be compliant with regulations. c. Governance/compliance documentation Set-up costs (one-off): 120.000 Running costs (annual): 30.000 Comments/explanation: Includes setup / maintenance of documentation for hedging purpose and commercial activity d. Exemption applications Set-up costs (one-off): 30.000 Running costs (annual): 5.000-15.000 Comments/explanation: Including all applications for subsidiaries in EU, based in cost in the last 12 Months, 50% efforts for earmarking hedge deals 59 e. Missed profit opportunities (theoretical)

	Running costs (annual): 250.000 Comments/explanation: Includes missed profits from direct market access without MiFID restrictions (e.g. routing of financial instruments) f. Imperfect hedges (theoretical) Running costs (annual): 70.000 Estimates provided by EFET: Overall range (aggregated various replies) Set-up costs (one-off): 300.000 -1.000.000 Running costs (annual): 100.000 - 550.000

Qualitative elements for question 69.1:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 69 and 69.1 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
The introduction of position limits has not disrupted or impacted the commodity markets in a major way and the position limit regime has been working reasonably well for well-developed, liquid contracts.
However, EFET disagrees with Commission's view that contracts are still extensively traded off-venue. Firms mainly trade at Regulated Markets and OTC on brokers which are OTFs with most deals being concluded electronically on screen. In power and gas, brokers offer, apart from the REMIT C6 products, also exchange products (OTC-cleared/block trades) or financial OTC products. The financial OTC products are subject to that venue's position limit according to MiFID. At the same time, further deals are also concluded off-venue OTC, either bilateral or over brokers which do not deem themselves for being an OTF. The OTC trading on bespoke products has proven again to be one of the cornerstones of the market during the current CoVID-19 crisis, by complementing on-venue activities. In case non-OTF brokers offer any financial products that might undergo mandatory treatment under the OTF regime, this should be subject to supervision and sanctioning by the relevant NCA on these brokers.
Furthermore, there are a few caveats. For the new and illiquid contracts, the limits applied under article 15 of RTS 21 are too low and rigid, even considering the increased flexibility offered to competent authorities under article 19 of RTS 21. In certain cases, they prevent the development of the market for these new contracts. Hence market participants need to enter into imperfect proxy-hedges or trade other products bilaterally in order to not breach the position limits.
The introduction of position limits has increased uncertainty in commodity derivative markets and occasionally discouraged market participants from entering into positions. The lack of clear rules regarding calculation methodologies and the possibility of unexpected changes to the rules increases the risks for market participants and may reduce liquidity or move liquidity to non-EU trading venues.
We urge a review of its scope to reduce it to a limited set of critical contracts. Such a reduction of scope would align the regime with the US approach of the CFTC and hence, ensure a level playing field between US and EU trading venues. It would also address several of the shortcomings of the current regime, namely the definition of 'same contracts,' the application of hedging exemptions and the negative impact on the development of new and illiquid contracts.
EFET considers that for a contract to qualify as "critical", a combination of quantitative (liquidity, number of MPs) and qualitative (type of MPs, characteristics of underlying market) criteria is the preferable approach. Liquidity (measured in terms of either absolute open interest, open interest vs deliverable supply ratio, churn ratio or any other metric) should be used as the main variable.
We welcome the changes proposed by ESMA (i.e. amend Level 1 to delete the reference to the "same contract" procedure and introduce a more pragmatic approach) in the Consultation Paper on Position Limits (Nov2019). The separate setting of limits for each contract based on the same underlying and with the same characteristics should be continued by the respective NCAs, but based on the open interest of the most liquid market is a simpler alternative to implement and monitor than the establishment and monitoring of a joint limit.
We support the introduction of a position limit exemption for positions entered in the framework of a mandatory liquidity provision arrangements and such an exemption should be available to both financial and non-financial counterparties.
EFET supports the introduction of a position limit hedging exemption for financial counterparties belonging to a predominantly commercial group.
The extension of the hedging exemption to new counterparties should also be an opportunity to review and harmonise the application process for hedging exemptions, in particular to exclude quantitative upper limits

for such a hedging exemption. In practice this lead to repeated applications and hence triggered unnecessary additional administrative burdens.
Finally, we want to draw attention of the impact of Brexit on the Ancillary Activity Exemption. In a post Brexit environment it is of utmost importance for non-financial firms using commodity, commodity derivatives, EUAs and EUA derivatives markets to benefit from an exemption from the licensing requirement under MiFID II, thereby avoiding burdensome and costly financial market regulations, in particular prudential regulation.

1. Position limits for illiquid and nascent commodity markets

The lack of flexibility of the **position limit** framework for commodity hedging contracts (notably for new contracts covering natural gas and oil) is a constraint on the emergence euro-denominated commodity markets that allow hedging the increasing risk resulting from climate change. The current de minimis threshold of 2,500 lots for those contracts with a total combined open interest not exceeding 10,000 lots, is seen as too restrictive especially when the open interest in such contracts approaches the threshold of 10,000 lots.

Question 70. Can you provide examples of the materiality of the above mentioned problem?

- (●) Yes, I can provide 1 or more example(s)
- ( ) No, I cannot provide any example

Please provide example(s) of (nascent) contracts where the position limit regime has constrained the growth of the contract:

Underlying cause of the constraint (A/B/C)*:

*Note: 1 The underlying cause of the constraint is due to (A) the position limit becoming too restrictive as open interest increases, (B) an incorrect categorisation under the position limits framework or (C) the underlying physical markets are not efficiently reflected.

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 70 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
Under article 15 of RTS 21, ESMA has established a specific regime for new and illiquid contracts for the purpose of calculations of position limits. It states that new contracts traded on a trading venue with a total combined interest in spot and other months not exceeding 10,000 lots over a consecutive three-month period shall be set a limit of 2,500 lots.
Some NCAs have interpreted this requirement under Article 15 of RTS 21 to mean that on day 1 of a new commodity derivative, a limit of 2,500 lots would apply. In some instances, such a limit is too restrictive to allow a new contract to develop into a liquid instrument.
Existing derogations for illiquid markets which have an open interest between 5,000 and 10,000 lots under the ESMA Q&As are welcome and should be applied by NCAs (article 19 of RTS 21). However, they are often not sufficient to mitigate the negative impact of disproportionately low position limits. Fast growing markets, in particular, have suffered from (1) an increasingly restrictive limit as open interest increases, (2) an inflexible treatment in terms of their categorisation under the position limits framework and (3) an inaccurate reflection of the underlying physical markets.
In certain cases, they prevent the development of the market for these new contracts. Hence market participants need to enter into imperfect proxy-hedges or trade other products bilaterally in order to not

breach the position limits.
In particular, once a market participant approaches the position limit, it is likely to withdraw from the market and switch to another trading venue outside of the MiFID II regime, leaving the NCA no time to adjust the limit upwards. To not unintendedly breach the limit, market participants might also be obliged to take recourse to imperfect proxy hedging or bilateral trading of a similar product. Furthermore, in relation to newly launched contracts, it is not unusual that only one participant sits on the buy or sell side of the market, making a limit of 50% (which is the maximum allowed by the existing derogations) not sufficient to allow the market to further develop. For instance, if there are only two market participants in a new contract, then they each hold a position of 100% of the net open interest.
EFET believes there could be merits in limiting the application of MiFID II position limits II to a more limited set of important, critical commodity derivative contracts. If this change is implemented, no limit will apply to new and illiquid contracts and the issues described above will be solved.
In case position limits remain applicable to all commodity derivative contracts, RTS 21 should be revised to suspend position limits applicable to new and illiquid markets along with a review period for these contracts (3 months, 6 months, 9 months, depending on the contract). This would allow the concerned NCA to review the development of the contract and determine a position limit appropriately calibrated regarding the needs of the market.
This is supported by the policy objective of the MiFID II as expressed in RTS 21 which provides that "Position limits should not create barriers to the development of new commodity derivatives and should not prevent less liquid sections of the commodity derivative markets from working adequately."
New and nascent products normally constitute a minor share of commodity markets. Moreover, such contracts are unlikely to influence price movements in the underlying physical commodity markets that could negatively impact consumers. Thus, the suspension of position limits for such contracts would not pose any risk to the transparency and functioning thereof. On the contrary, attracting more volume to regulated venues would contribute to a more transparent trading environment subject to the full scope of the Market Abuse Regulation. At the same time, new and illiquid markets with suspended limits would remain subject to internal position monitoring and management by the trading venue, market surveillance procedures aimed at preventing abuse as well as position reporting under MiFID II Article 58.

Size of the OTC space the contract(s) is/are trying to enter (in €):

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Market share the nascent contract(s) is/are expected to gain (in %):

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Contract(s) is/are euro denominated?

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 71. Please indicate the scope you consider most appropriate for the position limit regime:

	1 (most appropriate)	2 (neutral)	3 (least appropriate)	N.A.
Current scope	○	○	◉	○
A designated list of 'critical' contracts similar to the US regime	◉	○	○	○
Other	○	○	○	◉

Question 71.1 Please explain your answer to question 71:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 71 and 71.1 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
EFET believes that the position limit regime has been working reasonably well for well-developed, liquid contracts, whereas we urge a review of its scope to reduce it to a limited set of critical contracts. Such a reduction of scope would align the regime with the US approach of the CFTC and hence, ensure a level playing field between US and EU trading venues, and as such and protect the liquidity and competitiveness of EU commodity markets. It would also address several of the shortcomings of the current regime, namely the definition of 'same contracts,' the application of hedging exemptions and the negative impact on the development of new and illiquid contracts.
Refocusing the scope of the position limit regime to a limited set of critical contracts is a more effective tool to address the negative impact of position limits on new and illiquid contracts and would deliver a much needed simplification of the regime without significantly impacting its effectiveness in terms of market abuse prevention and market transparency.
EFET believes that a refocus of the framework is justified as price formation mainly occurs in benchmark products and only insofar it seems necessary and appropriate to reduce the potential threat of market manipulation. Finally, this would create a regulatory level-playing field between the EU and US commodity markets and protect the liquidity and competitiveness of EU commodity markets.

Question 72. If you believe there is a need to change the scope along a designated list of 'critical' contracts similar to the US regime, please specify which of the following criteria could be used.

For each of these criteria, please specify the appropriate threshold and how many contracts would be designated 'critical'.

- ☐ Open interest
- ☐ Type and variety of participants
- ☑ Other criterion:
- ☐ There is no need to change the scope

Other criterion:

Please specify what other criterion could be used and explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 72 and 72.1 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
Our suggestion is a combination of quantitative (liquidity, number of market participants) and qualitative (type of market participants, characteristics of underlying market) criteria as the preferable approach. Liquidity (measured in terms of either absolute open interest, open interest vs deliverable supply ratio, churn ratio or any other metric) should be used as the main variable.
Additionally, we support the use of gross open interest as the most appropriate methodology considering that the usage of net open interest to determine the other month position limit would be inappropriate as it does not properly reflect trading on behalf of clients. Although it is a common practice in the industry to calculate open interest on a net basis, we believe that for the specific purpose of calculating position limits under RTS 21 a gross methodology would be more appropriate. For example, if a member holds 5 lots long

for client A and 5 lots short for client B, this position should not be netted, as the positions belong to different beneficial owners.
To note, EFET members do not see the need for changes in the existing methodologies. Regulators are already given sufficient flexibility to set limits as a percentage of deliverable supply or open interest, using a higher or lower percentage on the basis of a number of intervening factors.
In order to improve the stability of the position limit regime, we suggest that the relevant assessment is performed by NCAs and ESMA annually on the basis of a three-year rolling average of the relevant indicators.
EFET believes that thresholds should be defined after extensive stakeholder consultation to ensure that all relevant elements and views are taken into account. In particular, trading venues find themselves in a privileged vantage point, as they understand best the markets they operate and possess a vast amount of information about participants, orders and trades, so their views should be taken into special consideration.

Threshold for this other criterion:

Number of affected contracts in the EU for this other criterion:

Question 72.1 Please explain your answer to question 72:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 72 and 72.1 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
EFET members believe that the application of position limits to a large number of contracts is redundant and argued for a more focused scope of application before the entry into force of MiFID II.
The reason is that the position limit regime must be sufficiently flexible and not create an overly cumbersome process for the setting of any limits. As part of this, the scope of contracts that need to be subject to limits should also be looked at as well as how to ensure emerging liquidity is not damaged Otherwise, we would recommend no changes to the system after such a short period of time.
This refocus would make the system more efficient, mitigate non-intended consequences and reduce the compliance burden for all concerned parties (market participants, trading venues, NCAs/ESMA). Most importantly, such an approach would avoid stifling the development of new and illiquid products.
In case position limits remain applicable to all commodity derivative contracts, RTS 21 should be revised to suspend position limits applicable to new and illiquid markets along with a review period for these contracts (3 months, 6 months, 9 months, depending on the contract). This would allow the concerned NCA to review the development of the contract and determine a position limit appropriately calibrated regarding the needs of the market. This is supported by the policy objective of the MiFID II as expressed in RTS 21 which provides that “Position limits should not create barriers to the development of new commodity derivatives and should not prevent less liquid sections of the commodity derivative markets from working adequately.”
Furthermore, new and nascent products normally constitute a minor share of commodity markets. Moreover, such contracts are unlikely to influence price movements in the underlying physical commodity markets that could negatively impact consumers. Thus, the suspension of position limits for such contracts would not pose any risk to the transparency and functioning thereof. On the contrary, attracting more volume to regulated venues would contribute to a more transparent trading environment. At the same time, new and

illiquid markets with suspended limits would remain subject to internal position monitoring and management by the trading venue, market surveillance procedures aimed at preventing abuse as well as position reporting under MiFID II Article 58.
ESMA has questioned stakeholders on the actual impact of position management controls. Stakeholder views expressed to the ESMA consultation appear diverse, if not diverging. This may reflect significant dissimilarities in the way position management systems are understood and executed by trading venues. This suggests that further clarification on the roles and responsibilities by trading venues is needed.

ESMA has questioned stakeholders on the actual impact of position management controls. Stakeholder views expressed to the ESMA consultation appear diverse, if not diverging. This may reflect significant dissimilarities in the way position management systems are understood and executed by trading venues. This suggests that further clarification on the roles and responsibilities by trading venues is needed.

Question 73. Do you agree that there is a need to foster convergence in how position management controls are implemented?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 73.1 Please explain your answer to question 73:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 73 and 73.1 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
EFET believes that the current position management regimes exercised by exchanges are generally adequate. EFET members did not notice any significant impact on liquidity of commodity derivative market, as a result of position management controls.
While a one-size-fits-all approach may be difficult to calibrate and may result in unintended consequences, we see merits in establishing a set of measures that would provide a minimum standard with which all trading venues must comply. We agree with ESMA in its Call for Evidence on Position limits and position management in commodity derivatives consultation that new Level 2 measures may be the most appropriate instrument to achieve this objective. Given the wide variety of market structures and specificities across different commodity derivative markets, such measures should not be overly prescriptive and should not constrain the ability of a trading venue to implement enhanced controls if deemed necessary.

Question 74. For which contracts would you consider a position limit exemption for a financial counterparty under mandatory liquidity provision obligations?

This exemption would mirror the exclusion of the related transactions from the ancillary activity test.

	Yes	No	N.A.
Nascent	◉	○	○
Illiquid	◉	○	○
Other	◉	○	○

Please specify for which other contracts you would consider a position limit exemption for a financial counterparty under mandatory liquidity provision obligations:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 74 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comment we adopt:
EFET supports the introduction of a position limit exemption for positions entered in the framework of a mandatory liquidity provision obligations, provided they are available to both financial and non-financial counterparties.

Question 74.1 Please explain your answer to question 74:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 74.1 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
It would significantly simplify the regulatory burden, without jeopardizing the integrity or transparency of the market. We do not see any valid reason why the scope of the exemption should be limited to investment firms.
For the sake of consistency, the exemption should mirror the treatment of liquidity provision arrangements in the Ancillary Activity Exemption test, stipulated by Delegated Regulation 2017/592.

Question 75. For which counterparty do you consider a hedging exemption appropriate in relation to positions which are objectively measurable as reducing risks?

	Yes	No	N. A.

A financial counterparty belonging to a predominantly commercial group that hedges positions held by a non-financial entity belonging to the same group	◉	○	○
A financial counterparty	◉	○	○
Other	○	◉	○

Question 75.1 Please explain your answer to question 75:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 75.1 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
EFET supports the introduction of a position limit hedging exemption for financial counterparties belonging to a predominantly commercial group..
The extension of the hedging exemption to new counterparties should also be an opportunity to review and harmonise the application process. We also believe that ESMA and the European Commission should promote greater coordination in the implementation of hedging exemptions across the EU, including a more harmonised application process for market participants. At present, some NCAs impose quantitative limits on hedging exemptions, unnecessarily increasing the administrative burden for market participants who face greater hedging needs (for instance, due to an increase in the production of the underlying commodity) and are consequently forced to file new applications. We believe that once the hedging needs have been demonstrated, market participants should be granted a hedging exemption without quantitative limits. The robustness of the regime and the supervisory capabilities of the NCAs would be unaffected as NCAs can continue to monitor the use of the exemption on the basis of the daily position reports.

2. Pre-trade transparency

MiFIR RTS 2 (Commission Delegated Regulation (EU) No 2017/583) sets out the large-in-scale (LIS) levels are based on notional values. In order to translate the notional value into a block threshold, exchanges have to convert the notional value to lots by dividing it by the price of a futures or options contract in a certain historical period.

Some stakeholders argue that the current provisions of RTS2 lead to low LIS thresholds for highly liquid instruments and high LIS thresholds for illiquid contracts. This situation makes it allegedly hard for trading venues to accommodate markets with significant price volatility. This hinders their potential to offer niche instruments or develop new and/or fast moving markets.

Question 76. Do you consider that pre-trade transparency for commodity derivatives functions well?

- ○ 1 - Disagree
- ◉ 2 - Rather not agree
- ○ 3 - Neutral
- ○ 4 - Rather agree
- ○ 5 - Fully agree
- ○ Don’t know / no opinion / not relevant

If you do not consider that pre-trade transparency for commodity derivatives functions well, please (1) provide examples of markets where the pre-trade transparency regime has constrained the offering of niche instruments or the development of new and/or fast moving markets, and (2) present possible solutions including, where possible, quantitative elements:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 76 we agree with our colleagues from the European Federation of Energy Traders (EFET) whose comments we adopt:
We welcome the attention to pre-trade transparency requirements and believe that the changes EC is consulting upon would generally bring about improvements to the current framework.
We urge for a cautious approach to pre-trade transparency, as we remain concerned by what we fear to be the negative, unintended consequences of MiFIR provisions mandating pre-trade transparency for commodities.
Involved stakeholders (Trading Venues/Market participants) experience the pre-trade transparency obligations and corresponding solutions offered by exchanges largely as an additional burden which makes the conclusion of deals less efficient.
The recommend Level 1 and / or Level 2 changes to address the shortcoming of the current pre-trade transparency regime:
Level 1 change:
We propose to extend the so-called “negotiated transaction waiver” for equity instruments (Art. 4 (1) (b) MiFIR) to bilaterally negotiated commodity derivative transactions. This waiver allows trading participants to individually agree on the price and volume of the trade before transmitting it to the trading platform for the purpose of clearing. For this purpose the conditions of the present negotiated transaction waiver for equity instruments need to be adapted to the specifics of the commodity (derivatives) markets and their participants, in particular to allow a sufficient volume of pre-arranged trades to be registered at exchanges.

Level 2 to adapt the LIS and IL calculation/methodology.:
The IL and LIS waivers have not been properly calibrated for commodity derivatives. Calculations based on insufficiently granular sub-asset classes, besides arbitrarily selected and inappropriately calibrated parameters, result in disproportionately low LIS thresholds for highly liquid products and overly high thresholds for developing (illiquid) markets. Furthermore, the methodology has led to a significant number of niche and nascent products being incorrectly (re-)classified as liquid, and thus becoming subject to significantly broader transparency requirements, which were previously reserved for developed markets.
We therefore propose to amend the methodology and calibration of the IL and LIS thresholds accordingly.

PART TWO: AREAS IDENTIFIED AS NON-PRIORITY FOR THE REVIEW

This section seeks to gather evidence from market participants on areas for which the Commission does not identify at this stage any need to review the legislation currently in place. Therefore, PART TWO does not contain policy options. However, should sufficient evidence demonstrate the need to introduce certain adjustments, the Commission may decide to put forward proposals also on the topics listed below. As in the first section, certain questions are directly linked to the review clauses in MiFID II/MiFIR while others are questions raised independently of the mandatory review clause.

V. Derivatives Trading Obligation[9]

Based on the G20 commitment, MiFIR article 28 introduced the move of trading in standardised OTC derivative contracts to be traded on exchanges or electronic trading platforms. The trading obligation established for those derivatives (DTO) should allow for efficient competition between eligible trading venues. ESMA has determined two classes of derivatives (IRS and CDS) subject to the DTO. These classes are a subset of the EMIR clearing obligation.

The Commission invites market participants to share any issues relevant with regard to the functioning of the DTO regime, the scope of the obligation and the access to the relevant trading venues for DTO products.

[9] The review clause in Article 52 paragraph (6) of MiFIR is covered by this section.

Question 77. To what extent do you agree with the statements below regarding the experience with the implementation of the derivatives trading obligation?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The EU intervention been successful in achieving or progressing towards more transparency and competition in trading of instruments subject to the DTO.	○	○	○	○	○	○
The MiFID II/MiFIR costs and benefits with regard to the DTO are balanced (in particular regarding the regulatory burden).	○	○	○	○	○	○
The different components of the framework operate well together to achieve more transparency and competition in trading of instruments subject to the DTO.	○	○	○	○	○	○
More transparency and competition in trading of instruments subject to the DTO corresponds with the needs and problems in EU financial markets.	○	○	○	○	○	○
The DTO has provided EU added value.	○	○	○	○	○	○

Question 77.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

Quantitative elements for question 77.1:

	Estimate (in €)
Benefits	
Costs	

Qualitative elements for question 77.1:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 78. Do you believe that some adjustments to the DTO regime should be introduced, in particular having regards to EU and non-EU market making activities of investment firms?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 79. Do you agree that the current scope of the DTO is appropriate?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 79.1 Please explain your answer to question 79:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The introduction of EMIR Refit has not been accompanied by direct amendments to MiFIR, which leads to a misalignment between the scope of counterparties subject to the clearing obligation (CO) under EMIR and the derivatives trading obligation (DTO) under MiFIR. ESMA consulted in Q4 2019 on the need for an adjustment of MiFIR, receiving broad support for such an amendment and ESMA published their report on 7 February 2020.

Question 80. Do you agree that there is a need to adjust the DTO regime to align it with the EMIR Refit changes with regard to the clearing obligation for small financial counterparties and non-financial counterparties?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 80.1 Please explain your answer to question 80:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

VI. Multilateral systems

According to MiFID II/MiFIR, a 'multilateral system' means any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system. MiFID II/MiFIR also requires all multilateral systems in financial instruments to operate as a regulated trading venue - being either a regulated market or a multilateral trading facility (MTF) or an organised trading facility (OTF) - bringing together multiple third-party buying and selling interests in a way that results in a contract.

Some trading venues express concerns due to emerging trends which allow alternative type of electronic platforms to offer very similar functionality to a multilateral system for the matching of multiple buying and selling interests. These electronic platforms are not authorised as regulated trading venues, hence they do not have to comply with the associated regulatory requirements, notably in terms of reporting obligations or business rules to manage clients' relationships. The main argument advanced against regulation of these electronic systems is that they match trading interests on a bilateral basis and not via a multilateral system. However, according to traditional trading venues, this alternative electronic protocol may cause competitive distortions, effectively creating a level playing field distortion against the regulated trading venues which are bound by MIFID II/MiFIR provisions. There is a debate whether MiFID II /MiFIR should therefore take a more functional approach and define the operation of a trading facility in broader terms than the current definition of trading venues or multilateral system as to encompass these systems and ensure fair treatment for market players.

Question 81. Do you consider that the concept of multilateral system under MiFID II/MiFIR is uniformly understood (at EU or at national level) and ensures a level playing field between the different categories of market players?

- 1 - Disagree
- 2 - Rather not agree
-

3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 81.1 If your response to question 81 is rather negative, please indicate which amendments you would suggest and why:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

VII. Double Volume Cap[10]

MiFID II/MiFIR introduced a Double Volume Cap ('DVC') to curb "dark" trading by limiting, per platform and at EU level, the use of certain waivers from pre-trade transparency. Some stakeholders have criticized the DVC as a too complex process failing to reduce off-exchange trading in the EU. For instance, according to a 2019 Oxera study, the equity market share of systematic internalisers has risen to 25% since application of the DVC while the share of on venue trading is declining. For example, the market share of CAC40 shares trading on the primary stock exchange (Euronext) fell from 75% in 2009 to 62% in 2018 and Oslo Børs's market share of trading on OBX-listed shares dropped from 95% in 2009 to 62% in 2018. The proportion of public order book trading on the primary exchange in major equity indices has declined to between 30% and 45% of overall on-venue trading. The Commission services are seeking stakeholder's views on their experience with the DVC and its impact on the transparency in share trading.

[10] The review clauses in Article 52 paragraphs (1), (2) and (3) of MiFIR are covered by this section.

Question 82. Please specify to what extent you agree with the statements below regarding the experience with the implementation of the Double Volume Cap?

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N. A.
The EU intervention been successful in achieving or progressing towards the objective of more transparency in share trading.	○	◉	○	○	○	○

The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	◉	○	○	○	○	○
The different components of the framework operate well together to achieve more transparency in share trading.	○	◉	○	○	○	○
More transparency in share trading correspond with the needs and problems in EU financial markets.	○	○	○	◉	○	○
The DVC has provided EU added value	○	◉	○	○	○	○

Question 82.1 Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

Quantitative elements for question 82.1:

	Estimate (in €)
Benefits	
Costs	

Qualitative elements for question 82.1:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 82 and 82.1 we agree with our colleagues of the Federation of European Securities Exchanges (FESE), whose comments we adopt:
The double volume cap (DVC) was designed to limit the trading taking place under the RP waiver, provided in Art. 4(1)(a) of MiFIR, and the NT waiver for liquid instruments, set out in Art. 4(1)(b)(i)) of MiFIR. Whilst it is possible to see some positive effects of the DVC, market liquidity has only benefited from the DVC to a limited extent. When assessing the DVC's capacity to limit dark trading, it is important that the benefits of such a mechanism are balanced against the high complexity of the DVC system.
For this reason, FESE is calling to limit the available waivers under the transparency regime to the LIS and OMF waivers. In this case, the DVC mechanism would be rendered obsolete at the NT and the RP waivers would not exist anymore. The repeal of those waivers to mainly keep the LIS waiver is part of a broader simplified market structure where the LIS threshold is used as the main tool to delineate lit and dark trading. Because the main purpose of the waiver regime is to protect market participants from adverse market movements following the execution of large orders, there seems to be little justification for trading small orders via the RP or NT waivers, which is largely the case currently. Using the LIS threshold to delineate dark trading would be an efficient way to incentivise lit trading and address concerns about the impact of dark trading on financial markets and the price formation process all the while contributing to a much-needed simplification of the current framework. In addition, it makes sense to maintain the OMF waiver as an order in an OMF facility ultimately becomes pre-trade transparent and therefore contributes to the price formation process.
However, it would still be important to allow for non-price forming technical trades to be reported off-book on exchange. FESE therefore calls for such a reporting tool to be defined at Level 1. Overall, quality and consistency of reporting and flagging are necessary in order to improve transparency available to market participants. Against this background, FESE calls for an extension of the Market Model Typology (MMT) to a full range of market participants and sees merit in looking at how the technical implementation of MMT could be done under the governance of ESMA.

VIII. Non-discriminatory access[11]

MiFIR introduces an open access regime to trade and clear financial instruments on a non-discriminatory and transparent basis. The key purpose of MiFIR open access provisions is to facilitate competition among trading venues and central counterparties and prevent any discriminatory treatments. It aims at creating more choice for investors, lowering costs for trade execution, clearing margins and data fees. Open access might therefore bring opportunities for new entrants in the market to compete with traditional providers. Furthermore, it could potentially help fostering financial innovation, developing alternative business models which could allow cost efficiency gains in trading and clearing operational processes compared to the current situation.

MiFIR open access provisions provide safeguards to preserve financial stability without adversely affecting systemic risk. The relevant competent authority of a trading venue or a central counterparty shall grant open access requests only under specific conditions, notably that open access would not threaten the smooth and orderly functioning of the markets. MiFIR open access rules also added multiple temporary transitions periods and opt-outs (Article 35 and 36 of MiFIR) for an exemption from the application of access rights, with the majority of opt-outs ending on 3 July 2020.

The Commission will have to submit to the European Parliament and to the Council reports on the application and impact of certain open access provisions. With this in mind, the Commission would like to gather feedback from market stakeholders which could be useful for the preparation of the reports.

[11] The review clauses Article 52 paragraphs (9), (10) and (11) of MiFIR are covered by this section.

Question 83. Do you see any particular operational or technical issues in applying open access requirements which should be addressed?

- Yes
- No
- Don't know / no opinion / not relevant

Question 84. Do you think that the open access regime will effectively introduce cost efficiencies or other benefits in the trading and clearing areas?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 85. Are you aware of any market trends or developments (at EU level or at national level) which are a good or bad example of open access among financial market infrastructures?

Please explain your reasoning and specify which countries:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

IX. Digitalisation and new technologies

Technology neutrality is one of the guiding principles of the Commission's policies and one of the key objectives of the Commission's Fintech Action Plan. A technology-neutral approach means that legislation should not mandate market

participants to use a particular type of technology. It is therefore crucial to address obstacles or identify gaps in existing EU laws which could prevent the take-up of financial innovation or leave certain of the risks brought by these innovations unaddressed.

Furthermore, it is evident that digitalisation and new technologies are transforming the financial industry across sectors, impacting the way financial services are produced and delivered, with possible emergency of new business models. The digital transformation can bring huge benefits for the investors as well as efficiencies for industry. To promote digital finance in the EU while properly addressing the new risks it may bring, the Commission is considering proposing a new Digital Finance strategy building on the work done in the context of the FinTech action plan and on horizontal public consultations. The Commission recently published two public consultations focusing on crypto assets and operational resilience in the financial sector, and may consult later this year on further topics in the context of the future Digital Finance strategy.

In that context, and to avoid overlapping, this consultation will only focus on targeted aspects, which are not covered by these horizontal consultations. The Commission will of course take into consideration any relevant input received in the horizontal consultations in its future policy work on the MiFID II/MiFIR framework.

Question 86. Where do you see the main developments in your sector: use of new technologies to provide or deliver services, emergence of new business models, more decentralised value chain services delivery involving more cooperation between traditional regulated entities and new entrants or other?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 86 we agree with our colleagues of the Federation of European Securities Exchanges (FESE), whose comments we adopt:
FinTech can help to expand access to financial services for consumers, investors and companies, bringing greater choice and more user-friendly services, often at lower prices. New financial technologies can help individuals as well as SMEs, including start-up and scale-up companies, to access alternative funding sources to support their cash flow and risk capital needs. Automation and standardisation have changed the way customers interact with market infrastructure providers, leading to an explosion in data volumes. Technological developments in relation to data analytics, Field Programmable Gate Array (FPGA), mobile technology, cloud computing, machine learning, artificial intelligence (AI) and blockchain are opening up new possibilities in relation to the services Exchanges use and provide to customers. Individually, these technologies have enormous potential and combined, they can offer an impressive array of new solutions for clients. However, it should be noted that for FPGA the related costs and complexity of implementation may for the moment prevent these technologies from playing a leading role in innovation.
An EU general regulatory framework needs to be geared towards fostering technological development and innovation. Technological developments are moving faster than the underlying legal and regulatory frameworks and in order not to impede innovation and investment, a rigid application of existing rules must be avoided. A predictable, consistent and straightforward legal environment should instead be promoted. Areas which would benefit from review include licensing requirement for FinTech companies, data protection, conflict of laws, outsourcing, cyber security, settlement finality and proper legal recognition of holding and transferring securities and other types of assets.
It is important to establish key principles upon which the EU can build a role in facilitating the development and implementation of FinTech. These principles include the need for:
• The application of the same rules for the same services and risks (including across different pieces of legislation) based on the principle of technology neutrality;
• A risk-based approach built on proportionality and materiality which allows for flexibility, particularly in

respect of innovation with small groups of customers (i.e. sandboxes), while ensuring a level playing field across the EU;
• A balancing of the local (country) risks alongside the benefits of cross-border markets (i.e. scalability, interoperability and passporting of services).
Financial Market Infrastructures (FMIs) use modern IT and technological solutions to operate, and service the financial sector worldwide. Technologies are at the core of their operations and an integral part of the regulated services they operate. FMIs ensure the efficient functioning of these markets; including but not limited to: market data, indices, clearing, securities custody, etc.
We observe that the digital economy through the use of DLT is on the road to decentralisation which is particularly true for the financial industry. In this regard, we would like to especially stress the importance of 109 maintaining principles such as technology neutrality and “same business, same risks, same rules” to uphold transparency, fairness, stability, investor protection and market integrity. In particular, as some forms of DLT, such as public blockchains have no legally accountable entity to be held liable for failings to implement risk management procedures to address risks in financial markets.
In this regard a Trusted Third Party (TTP) is required in the financial industry to create trust in the market; and ensure investor protection. In a DLT environment, TTPs are building a bridge for the exiting financial instruments in the “traditional world” via DLT solutions, increasing market integrity by e.g. “OFF-Chain to ONChain bridging” and guaranteeing the substance of a token, which is backed by financial instruments that is kept off ledger/chain. TTPs will play the role of a gatekeeper for future native digital assets, which will be issued directly on the chain. In this regard, a TTP will be responsible for addressing functions such as:
1) Control access/admission
2) Set rules for the participating nodes
3) Address potential conflicts of interest and KYC and AML requirements
4) Apply risk management measurers
5) Be reliable for market integrity, security and other regulatory requirements
The TTP will check standards for admission and the eligibility of an asset on chain. For instance, it will check if the asset is a security and transform it to a security token.

Question 87. Do you think there are particular elements in the existing framework which are not in accordance with the principle of technology neutrality and which should be addressed?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 87 we agree with our colleagues of the Federation of European Securities Exchanges (FESE), whose comments we adopt:
New technologies are used in different areas of application, with different goals in mind and within different regulatory frameworks. Amendments may therefore be needed in order to provide legal clarity and allow benefits of the technologies in the EU. As an overarching principle, a technology-neutral approach is very important, as regulation should be independent from the used technology.
However, for some areas, policymakers should consider the following technology specific challenges and how to address these:
1. Cloud: outsourcing of material functions, proper risk management, clarity of the liabilities on both sides and currently missing standard contract clauses to facilitate negotiations of compliant contracts with providers, especially for small/mid-sized institutions. As the importance of these services increase an overarching appropriate oversight paradigm is missing.
2. Big data / AI: quality, and source and ownership of data, data protection and data sovereignty as well as

ethical questions (e.g. reconciliation of decisions, biases)
3. DLT/blockchain: liability and accountability in public permissionless chains, and smart contracts, material outsourcing considerations data protection and new IT-risks.
With regard to the existing framework, we find one example in the realm of DLT/Blockchain very important, where the principle of technology-neutrality should be upheld. Regulators should treat the technology itself as any other IT system, based on the principle “same business, same risk, same rules” regarding its use and connected risks. Further, regulators should focus especially on the “records” maintained in this environment, as they could be digital representations of different forms of assets, used in the financial industry. From our point of view, these digital or crypto-assets should be treated in a “substance-over-form” approach, meaning that if they, for example, fulfill the criteria of a financial instrument in accordance with the current regulatory 110 framework, they should be treated as such. FESE favours a regulatory categorisation of “crypto-assets” at EU level. This would allow regulators and financial market participants to have a common definition of “digital asset” and allow distinguishing between different types to bring significant benefits to market participants and consumers.
FESE supports the introduction and application of a harmonised regime. On a general line, FESE would not favour the use of “soft law” (e.g. guiding principles), as this might be interpreted differently by Member States. FESE, therefore, welcomes that the Commission is considering potential regulatory requirements to address “crypto-assets” currently not covered by EU legislation. Moreover, we believe that ‘investment /security tokens’ should be considered as financial instruments under MiFID II (Art. 4, paragraph 15). Alternatively, such clarification could potentially be given through Level 2 amendments. However, any legislative measures should avoid undermining other potentially applicable regulations (such as EMD for certain payment tokens). In line with the Better Regulation principles, we consider it important that any changes to the definitions of financial instruments be subject to an impact assessment to avoid any unintended consequences.
If digital or crypto-assets represent a currently existing financial instruments (e.g. shares, commodities etc.), then they should adhere to the existing regulatory framework following the “same business, same risk, same rules” approach.
However, the MiFID II legal framework must bring legal clarity as to which digital assets fall under the scope of MiFID II financial instruments (as stipulated in Annex I of MiFID II Section C. To ensure technologyneutrality, a number of other, existing regulation should also be applicable (e.g. EMD, MAR, SSR, Prospectus, CSDR, SFD, FCD, EMIR, UCITS, AIFMD).
Further, as new technologies carry technology-specific risks, regulators should consider how to ensure a high level of IT security. Lastly, it should be clarified that existing actors, e.g. financial market infrastructures like CCPs and CSDs, are already allowed to handle these new assets, as they do with other assets classes (e.g. CCPs can accept crypto-assets as margins or CSDs can offer services on “crypto-assets”).
To ensure the integrity of the financial markets and mitigate risks, new emerging actors, like custodial wallet providers, should comply with existing financial rules and regulations and ideally be licensed accordingly. In general, to uphold the principle of technology-neutrality and to benefit from new technology, it is important to strike the right balance between safety and the availability/usage of innovative technology.

Question 88. Where do you think digitalisation and new technologies would bring most benefits in the trading lifecycle (ranging from the issuance to secondary trading)?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 88 we agree with our colleagues of the Federation of European Securities Exchanges (FESE), whose comments we adopt:
In general, we think of new technologies as enabling new opportunities to the financial industry as a whole, including the trading lifecycle. At the same time, we expect an evolutionary process, rather than a revolution, due to the high level of financial stability standards and the importance of market integrity. Currently, depending on the technology, the financial industry is adapting and is still in an early stage. The benefits of the technologies differ, but are for example: increased transparency, cost reduction, speed of software development and quality by more extensive testing, increased geographical coverage, resilience etc. We are certain that new asset classes, procedures, services and actors are emerging.
Combining innovative technologies, for instance blockchain based technologies, with established, highly regulated market infrastructures would be the natural choice in order to ensure market stability while making use of the innovative potential brought about through FinTech. DLT has the potential to accelerate, decentralise, automate and standardise data-driven processes and 111 therefore to alter the way in which assets are transferred and records are kept. In particular, DLT allows cross-verification of information in a transparent and dependable way and can simplify complex verification and validation processes. Hurdles to wide scale adoption of DLT in securities markets are technical limitations, contextual aspects such as business model/market model design, technical integration/transition, legal/ regulatory complexity. For solutions based on DLT to reach actual implementation in securities market, visions for the future need to be broken down into defined descriptions of services and solutions that are accepted and desired by its intended consumers and meet legal, regulatory and technical requirements. DLT should not be considered a panacea that will replace all existing infrastructure in securities markets but rather DLT solutions need to be integrated into the existing ecosystem of infrastructure in securities market, which will require some efforts and time. Transition planning and execution is also important in DLT business cases when the intention is for DLT to replace legacy technology.

Question 89. Do you consider that digitalisation and new technologies will significantly impact the role of EU trading venues in the future (5/10 years time)?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- (•) 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 89.1 Please explain your answer to question 89:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 89 and 89.1 we agree with our colleagues of the Federation of European Securities Exchanges (FESE), whose comments we adopt:
New technologies and digitalisation seem to affect Europe’s businesses in various ways. Not only has the European financial system been transformed significantly due to the introduction of digitalisation and new technologies but these initiatives have also made their first impacts on financial services throughout Europe. Despite the lack of specific laws and regulations in relation to all innovative technology related matters, the market is implementing new forms of digital products and services without a framework that provides legal certainty and trust.
By examining the current trends in the financial markets, it is expected that digitalisation, new technologies

and artificial intelligence (AI) will continue to impact global capital markets while affecting at the same time all financial participants, including trading venues. Based on the current trends in the financial markets, we could assume that machine learning and AI could be fully integrated into the trading space within five years and, as such, affect both services and financial instruments of exchanges throughout Europe. Trade performance analytics, real time management as well as cyber security are and will continue to be considered important to both financial markets and most of the financial market participants especially in terms of their long-term defensive solutions.
Traders will focus and will continue to dedicate more time on strategies which allow them to create opportunities, in areas related to performance analytics and execution management systems (EMS). Traders believe that EMS will impact financial markets and as such the functions of the exchanges in Europe (and not only) within the next five years.
In addition, buy-side participants are expected to continue to use cloud adoption tactics. As such, the cost of ownership will decrease and more agile development methodologies will be adopted, increasing at the same time the innovation pace within trading venues as well.
A deeper understanding of the above-mentioned services is needed, along with clear legal definitions in 112 order to provide trust and certainty to market participants. The scope of any future initiatives from the European Commission should take into consideration the tendencies described above and the dialogue with the market on specific proposals should be further enhanced.

The online environment puts a strong focus on providing products to customers as fast as possible, with as few barriers as possible. As far as financial services are concerned, this might endanger retail clients if they do not take enough time to reflect on purchasing complex financial products. On the other hand, making the product quick and easy to purchase (e.g. speedy or 'one-click' products) makes it easier for clients to buy and sell at least simple investment products online. Taking all of the above into consideration, the Commission would like to gather feedback on whether certain rules in the MiFID II/MiFIR framework on marketing and provision of information to clients should be adjusted to better suit the provision of services online.

Question 90. Do you believe that certain product governance and distribution provisions of the MiFID II/MiFIR framework should be adapted to better suit digital and online offers of investment services and products?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Question 90.1 Please explain your answer to question 90:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At question 90 and 90.1 we agree with our colleagues of the Federation of European Securities Exchanges (FESE), whose comments we adopt:
The EU regulatory framework needs to be geared towards fostering technological development as the financial industry and its users are benefitting significantly from such developments. Data analytics, machine intelligence and robot advice is already significantly aiding the decision process and quality of information being shared. FPGA also supports distribution of massive amounts of data with high throughput for market

transparency and equality. Cloud techniques to efficiently distributed data, easily scale storage needs and secure data for resiliency purposes will also help to improve the access to finance. Another area which improves access to finance is mobile banking.
However, it is crucial to adequately manage potential risks in order to ensure that markets can remain fair, orderly and trusted venues to carry out business.
Product governance means the controls and the systems that a firm must put in place for the ongoing management, the marketing, the design and the approval of all products throughout their lifecycle to verify that they comply with the relevant regulatory and legal requirements.
The product governance requirements have impacted and will continue to impact both distributors, subdistributors as well as manufacturers in various ways. In particular, all their relevant obligations can be categorised based on the four distinctive phases of the product governance cycle: i) design and approval, ii) development and implementation, iii) launch and promotion and iv) monitoring and review.
The new regime constitutes a significant change to European financial product distribution and is challenging for firms to implement. Distributors and manufacturers, of financial services and products need to set standards in order to supervise their ongoing monitoring of distribution activities, while encouraging the development of efficient procedures for the design of financial services and products and for the proper identification of the target market.
The MiFID II/MiFIR review is an opportunity for a simplification of these standards in line with the principle of technology neutrality. The current framework could be further adapted to better suit both traditional and digital offers of investments services and products. By applying the technology-neutral approach in reviewing the existing regime, the distribution of a product (be it a traditional asset or a crypto-asset for example) should not be differentiated by the means of its distribution (be it human or via technological means). This would guarantee an even level of investor protection and allow for the technology and market infrastructure to develop.

Question 91. Do you believe that certain provisions on investment services (such as investment advice) should be adapted to better suit delivering of services through robo-advice or other digital technologies?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 91.1 Please explain your answer to question 91:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At questions 91 and 91.1 we agree with our colleagues of the Federation of European Securities Exchanges (FESE), whose comments we adopt:
As passive management of assets is gaining importance and considering the already large (and growing) universe of financial products, this could lead to a proliferation of robo-advising platforms. In this sense, any adaptation of provisions or inclusions into already existing frameworks should be aimed at fostering the entrance of new competitors in order to improve services.

X. Foreign exchange (FX)

Spot FX contract are not financial instruments under MiFID II/MiFIR. Some stakeholders and competent authorities raised concerns as regards the regulatory gap and requested the Commission to analyse if policy action would be needed.

Question 92. Do you believe that the current regulatory framework is adequately calibrated to prevent misbehaviours in the area of spot foreign exchange (FX) transactions?

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don’t know / no opinion / not relevant

Question 92.1 Please explain your answer to question 92:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 93. Which supervisory powers do you think national competent authorities should be granted in the area of spot FX trading to address improper business and trading conduct on that market?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Section 3. Additional comments

You are kindly invited to make additional comments on this consultation if you consider that some areas have not been covered above.

Please, where possible, include examples and evidence.

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 94. Have you detected any issues beyond those raised in previous sections that would merit further consideration in the context of the review of MiFID II/MiFIR framework, in particular as regards to the objective of investor protection, financial stability and market integrity?

Please explain your answer:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

The maximum file size is 1 MB.
You can upload several files.

Useful links

More on the Transparency register (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

More on this consultation (https://ec.europa.eu/info/publications/finance-consultations-2020-mifid-2-mifir-review_e

Specific privacy statement (https://ec.europa.eu/info/law/better-regulation/specific-privacy-statement_en)

Consultation document (https://ec.europa.eu/info/files/2020-mifid-2-mifir-review-consultation-document_en)

Contact

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