

30 July 2014

Ms. Verena Ross  
Executive Director  
European Securities and Markets Association (ESMA)  
CS 60747, 103 rue de Grenelle  
75345 Paris Cedex 07 France

**Via Response Form Re: Consultation Paper on MiFID II/MiFIR**

Dear Ms. Ross:

Financial Planning Standards Board Ltd.'s (FPSB<sup>1</sup>) European member organizations (collectively, FPSB Europe) are pleased to provide comments on ESMA's Consultation Paper on MiFID II/MiFIR. FPSB Europe consists of seven nonprofit professional financial planning bodies, including:

- 1) Österreichischer Verband Financial Planners (Austria)
- 2) Association Francaise des Conseils en Gestion de Patrimoine Certifies (France)
- 3) Financial Planning Standards Board Deutschland (Germany)
- 4) Financial Planning Standards Board Ireland
- 5) Financial Planning Standards Board Nederland (The Netherlands)
- 6) Swiss Financial Planners Organization (Switzerland)
- 7) Institute of Financial Planning (United Kingdom)

Established in 2004, FPSB's mission is to benefit the public by establishing, upholding and promoting worldwide professional standards in financial planning. Working through our member organizations, represented in Europe by the organizations above, FPSB and its member organizations develop, promote and enforce internationally consistent, locally relevant standards so that:

- The public can identify qualified, competent and ethical financial planners;
- Practitioners can distinguish themselves as qualified, competent and ethical financial planning professionals; and
- Consumers, regulators and other key stakeholders can have confidence in the financial planning profession and in financial planning professionals, and recognize the benefits financial planning offers to individuals and society.

**FPSB owns the international CERTIFIED FINANCIAL PLANNER certification**

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<sup>1</sup> FPSB manages, develops and operates certification, education and related programs for financial planning organizations to benefit the global community by establishing, upholding and promoting worldwide professional standards in financial planning. FPSB demonstrates its commitment to excellence with the marks of professional distinction – CFP, CERTIFIED FINANCIAL PLANNER and CFP Logo Mark. FPSB has a nonprofit member organization in the following 25 territories: Australia, Austria, Brazil, Canada, Chinese Taipei, Colombia, France, Germany, Hong Kong, India, Indonesia, Ireland, Israel, Japan, Malaysia, New Zealand, the Netherlands, the People's Republic of China, the Republic of Korea, Singapore, South Africa, Switzerland, Thailand, the United Kingdom and the United States. For more, visit [fpsb.org](http://fpsb.org).

program outside the United States, and has licensed the member bodies of FPSB Europe to oversee the administration, promotion and enforcement of CERTIFIED FINANCIAL PLANNER certification in Europe.

CERTIFIED FINANCIAL PLANNER professionals meet rigorous competency, ethics and practice standards, qualifying them to develop financial planning strategies that assist clients in achieving their financial and life goals.

CERTIFIED FINANCIAL PLANNER professionals are part of a growing global community of financial services practitioners who place clients' interests first as part of their commitment to financial planning professionalism, and who embrace FPSB's Code of Ethics and Professional Responsibility and Financial Planning Practice Standards.

As of 31 December 2013, there were 153,376 CFP professionals in 25 countries and territories worldwide, with close to 5,000 CERTIFIED FINANCIAL PLANNER professionals practicing in Austria, France, Germany, Ireland, the Netherlands, Switzerland and the United Kingdom.

### **About FPSB's Standards**

FPSB's standards are based on a global framework that includes empirical research of the abilities, professional skills and knowledge needed to practice financial planning. FPSB and its member organizations have developed initial education, assessment, experience and ethics requirements, as well as continuing professional development standards for financial planning professionals globally. FPSB Europe's member bodies have localized these global standards and certification requirements for applicability in each of their territories, and maintain the relevancy of these standards through regular analyses of the practice of financial planning in Europe.

### **What is Financial Planning?**

FPSB and its member organizations define financial planning as the process of developing strategies to assist clients in managing their financial affairs to meet life goals. The process of financial planning involves reviewing all relevant aspects of a client's situation across a large breadth of financial planning activities, including interrelationships among often conflicting objectives. At the end of the financial planning process, a financial planner may or may not recommend products to a client.

Although financial planning is gaining prominence as a professional practice globally, people who call themselves financial planners often do so with little or no training or oversight. FPSB seeks to position financial planning oversight and models of professionalism within, or adjacent to, existing or proposed regulatory frameworks, whereby regulators and professional financial planning bodies work together to protect and benefit consumers.

## **FPSB Europe's Point of View**

FPSB Europe's responses to ESMA's questions are through the rubric of financial planning – a client-centric, process-driven professional practice that can help (re)build trust and restore the public's confidence in the marketplace and financial intermediaries. If you have any questions on our submission, or would like additional information, please feel free to contact me at +353 (87) 6997543 or [paul.grimes@fpsb.ie](mailto:paul.grimes@fpsb.ie) or FPSB's CEO Noel Maye at +1-720-407-1902 or [nmaye@fpsb.org](mailto:nmaye@fpsb.org). We appreciate the opportunity to participate in ESMA's comment process.

Respectfully submitted,



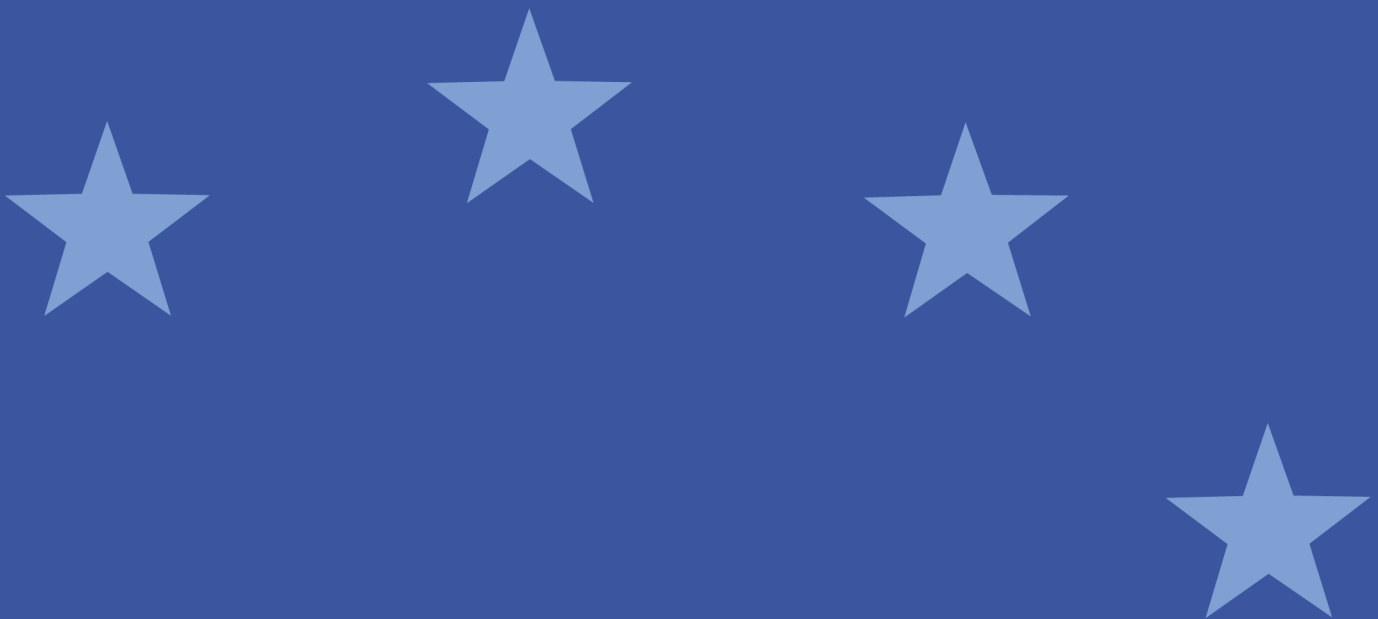
Paul Grimes, CFP  
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Markus Streule, Director, Swiss Financial Planners Organization  
Steve Gazzard, CEO, Institute of Financial Planning  
Noel Maye, CEO, Financial Planning Standards Board Ltd.



European Securities and  
Markets Authority

# Reply form for the ESMA MiFID II/MiFIR Consultation Paper



22 May 2014



European Securities and  
Markets Authority

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Date: 22 May 2014



## Responding to this paper

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

### **Instructions**

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

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

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

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

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

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

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

### **Publication of responses**

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

### **Data protection**

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



## 1. Overview

## 2. Investor protection

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

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

<ESMA\_QUESTION\_1>

Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) acknowledge that individuals involved in providing professional services in areas such as law, accounting, etc. may provide investment services that are connected with, but incidental to, the professional activity being offered. However, for such individuals to obtain exemption from MiFID's investor protection obligations for persons providing an investment service, the incidental advice or service should be general in nature, rather than specific. Additionally, if the client were to act on the advice or service provided, and the outcome had the ability to negatively impact, or introduce substantial risk to, the client's current financial position, then the provider should not be allowed to present or classify the advice or service as incidental. Allowing the provision of incidental investment advice or services should not exculpate the provider from the need to be competent to provide such advice or service. If the client is reasonably expected to rely on the incidental investment advice or service being provided, the client has the right to expect the provider of that advice or service meets the same standards as those qualified to provide investment advice.

<ESMA\_QUESTION\_1>

### 2.2. Investment advice and the use of distribution channels

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

<ESMA\_QUESTION\_2>

Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) agree with removing "through distribution channels" from Article 52 of the MiFID Implementing Directive. However, the current sentence reads "... exclusively through distribution channels or to the public." Simply removing "through distribution channels" would leave an awkward sentence ... "exclusively or to the public." If the intent is now to say "exclusively to the public" or "to the public" (based on CESR's Article 52 clarification, which references "the public in general"), then ESMA should remove additional text, "exclusively through distribution channels or," and add additional text, "in general" after "to the public," so that the sentence will read ... "a recommendation is not a personal recommendation if it is issued to the public in general." It should be made clear that non-personal recommendations made to "the public" are intended for "the public in general," and not a select segment of the public that may be led to understand that the information



provided is directed to them individually or to them as a select segment of the general investing public. Consequently, the non-personal advice provided through distribution channels should be: in fact, general in nature; clearly identified as financial research; and accompanied by appropriate oral and/or written disclaimers in the media used to promote the advice.

<ESMA\_QUESTION\_2>

### **2.3. Compliance function**

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

<ESMA\_QUESTION\_3>

Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) agree, in general, with ESMA's desire to expand the existing compliance requirements included in Article 6 of the MiFID Implementing Directive. However, ESMA will need to keep in mind that additional compliance tends to be accompanied by additional administrative burdens and also by additional costs, which are typically passed on to investors. With regard to the compliance requirements suggested, ESMA might consider that, in addition to taking a risk-based approach, MiFID could require investment firms to identify the severity of the risks and to track "direction" of risks, so that the firm's management body can understand where investor harm may be likely to come from within the firm. Additionally, while it can be appropriate for the compliance function to oversee the operation of the investor complaints process, investment firms should avoid making complaint handling a "box ticking" exercise – an adviser may have complied with the company's written processes and procedures, but not with the spirit of a "client first" duty of care. It will be important for firms' compliance functions to understand, and support, the additional protection offered by standards of ethics and professionalism developed by professional bodies/associations in the sector.

<ESMA\_QUESTION\_3>

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

<ESMA\_QUESTION\_4>

Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) suggest that ESMA consider adding to the existing compliance provisions of the MiFID Implementing Directive that investment firms should connect their internal compliance functions to the oversight and enforcement of professional standards and obligations for financial advisers, as developed by the territory's professional bodies/associations.

<ESMA\_QUESTION\_4>

### **2.4. Complaints-handling**

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

<ESMA\_QUESTION\_5>





Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) cannot comment on institutional arrangements that are in place, as we are not a financial institution. However, FPSB Europe would like to highlight the arrangements now in place for those in the financial planning profession. The almost 5,000 CERTIFIED FINANCIAL PLANNER professionals conducting business in seven European and neighbouring territories (i.e., Austria, France, Germany, Ireland, the Netherlands, Switzerland and the U.K.) are required to have such complaints-handling arrangements in place, based on the ethical and professional conduct obligations established for financial planning professionals by FPSB Europe. In this context, ESMA might want to re-cast the language of Article 25(1), which requires investment firms to have qualified advisers in place, to note that CERTIFIED FINANCIAL PLANNER professionals working for investment firms are expected to fully comply with requirement contained in Article 25 (1). In addition to internal compliance-based complaints handling, ESMA should encourage investment firms to direct complaints against those holding professional credentials who work for the firm to the appropriate professional bodies/associations for additional complaints handling, consistent with the ethical and professional conduct expectations of that professional.

<ESMA\_QUESTION\_5>

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

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

<ESMA\_QUESTION\_6>

Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) endorse the principles contained in the Financial Planner Duty of Care to Clients, adopted by FPSB and its member organizations in 25 territories and countries around the world. ESMA might consider adding additional items to the list contained in its draft technical advice from FPSB's document, including language consistent with the following principle (3), Provide full and appropriate disclosure. A financial planner discloses all relevant facts to the client, initially and on an ongoing basis where changes take place, where the disclosure is necessary to avoid misleading the client or any other parties and to retain ongoing agreement between the parties in a financial planning engagement. Such disclosure includes: (a) an accurate and understandable description of the compensation arrangements being offered, including information related to the costs to the client and general form and source of compensation to the financial planner and/or the financial planner's employer; and terms under which the financial planner and/or the financial planner's employer may receive any other sources of non-salary compensation, and if so, what the sources of these payments are and on what they are based; (b) a summary of likely conflicts of interest between the client and the financial planner, the financial planner's employer or any affiliates or third parties, including information about any familial, contractual or agency relationship of the financial planner or the financial planner's employer that has a potential to materially affect the relationship with the client; (c) any information about the financial planner or the financial planner's employer that could reasonably be expected to materially affect the client's decision to engage the financial planner; and (d) any information that the client might reasonably want to know in establishing the scope and nature of the relationship, including information about the financial planner's areas of expertise.

<ESMA\_QUESTION\_6>



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

<ESMA\_QUESTION\_7>

**No comment.**

<ESMA\_QUESTION\_7>

## **2.6. Recording of telephone conversations and electronic communications**

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

<ESMA\_QUESTION\_8>

**Although recording rules do not apply generally to the service of investment advice, if investment advisory conversations result in a transaction, then MiFID requires that they be recorded. By default, to comply with this requirement, intermediaries would need to tape every conversation to ensure full compliance with regulatory obligations, and this could inadvertently have a chilling effect on investor discussions with the adviser. Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) suggest that, to reduce the risk of non-compliance, intermediaries should clearly separate discussions that are advisory in nature from discussions likely to lead to a transaction, communicate this separation to clients, and then, with the client's consent, tape the transaction-based discussions. By clearly separating the two types of discussions with clients, and communicating the nature of the engagement and related recording obligations, intermediaries will be better able to comply with the expectations of MiFID II Article 16(7) and Article 51(4) of the MiFID Implementing Directive while still providing advisory services to clients.**

<ESMA\_QUESTION\_8>

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

<ESMA\_QUESTION\_9>

**Yes.**

<ESMA\_QUESTION\_9>

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

<ESMA\_QUESTION\_10>

**Consistent with the answer provided for Q6, Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) endorse the principles contained in the Financial Planner Duty of Care to Clients, adopted by FPSB and its member organizations in 25 territories and countries around the world. ESMA might consider adding requirements that intermediaries holding themselves out as providing advisory services add to their minutes or notes of face-to-face conversations with clients confirmation that they have disclosed all relevant facts to the client, initially and on an ongoing basis where changes take place, where the disclosure is necessary to avoid misleading the client or any other parties and to retain ongoing agreement between the parties in the advisory engagement. Such disclosures could include those consistent with Principle (3) of FPSB's Financial Planner Duty of Care to Clients, namely: (a) an accurate and understandable description of the compensation arrangements being offered, including information related to the**

costs to the client and general form and source of compensation to the financial planner and/or the financial planner's employer; and terms under which the financial planner and/or the financial planner's employer may receive any other sources of non-salary compensation, and if so, what the sources of these payments are and on what they are based; (b) a summary of likely conflicts of interest between the client and the financial planner, the financial planner's employer or any affiliates or third parties, including information about any familial, contractual or agency relationship of the financial planner or the financial planner's employer that has a potential to materially affect the relationship with the client; (c) any information about the financial planner or the financial planner's employer that could reasonably be expected to materially affect the client's decision to engage the financial planner; and (d) any information that the client might reasonably want to know in establishing the scope and nature of the relationship, including information about the financial planner's areas of expertise.

<ESMA\_QUESTION\_10>

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

<ESMA\_QUESTION\_11>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) agree strongly with this requirement. Having the intermediary obtain the client's signature to minutes or notes of the face-to-face conversation demonstrates that the intermediary has obtained informed client consent and mutual agreement with the discussion points and decisions reached. Acknowledged consent and agreement from the client on the decisions reached will reduce subsequent complaints and provide an appropriate level of documentation for use by firms' compliance departments and others investigating the appropriateness of the service and recommendations provided.**

<ESMA\_QUESTION\_11>

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

<ESMA\_QUESTION\_12>

**Yes. With regard to telephone recordings, see FPSB Europe's response to Q8.**

<ESMA\_QUESTION\_12>

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

<ESMA\_QUESTION\_13>

**No comment.**

<ESMA\_QUESTION\_13>

## **2.7. Product governance**

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

<ESMA\_QUESTION\_14>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) would like to expand the proposed distributor requirements to also include products available on the secondary market given that, from the client's perspective, it does not make a difference if the financial instrument is acquired on the primary or secondary market.**

<ESMA\_QUESTION\_14>

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

<ESMA\_QUESTION\_15>

**Yes. Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) believe this will support a level playing field among all providers of advisory services in the marketplace and enhance investor protection.**

<ESMA\_QUESTION\_15>

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

<ESMA\_QUESTION\_16>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) support requiring distributors to periodically inform the manufacturer about their experience with the product. However, FPSB Europe would add that the burden of evaluating product performance should not solely rest with distributors. ESMA should also require that manufacturers share the burden to periodically review distributors' experiences with their products. Information should be provided by both the distributors and the manufacturers on a regular periodic basis (unless product failure in the market is evident, at which point it should be as soon as possible), indicating that the product is performing as anticipated with the target investor audience, as described by the manufacturer.**

<ESMA\_QUESTION\_16>

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

<ESMA\_QUESTION\_17>

**No Comment.**

<ESMA\_QUESTION\_17>

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

<ESMA\_QUESTION\_18>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) suggest that the most important action is to immediately stop distributing the product to the misjudged target market. If the target market for a specific product has been misjudged, this should be the fault of the manufacturer, not the distributor (unless the distributor deliberately distributed the product to a target market for which the product was not designed). Manufacturers should be held liable for products that were designed to be embraced by the wrong target market for the benefit of the manufacturer, or that increase the potential risk of an identified investor target group in ways that were unanticipated. Much as the manufacturers of faulty vehicles or appliances take responsibility for product recalls and paying compensation to damaged consumers, the same should apply in**

**financial services. If a distributor has mismanaged product distribution, the manufacturer can sue the distributor, but the manufacturer should be held ultimately responsible for toxic products.**

<ESMA\_QUESTION\_18>

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

<ESMA\_QUESTION\_19>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) believe that a manufacturer should be responsible for building a product that does what it is meant to do, for an identified target audience, under identified market circumstances, and to communicate that clearly to distributors and in all product promotional materials to be accessed by investors. This product communication should clearly indicate what the product is likely to do in a regularly performing market, in a market whose value drops dramatically or rises quickly. Manufacturers should be held liable for any increased risk exposure/loss to investors based on unintentional or intentional design flaws. Manufacturers should create compensation structures for intermediaries selling the product and explain why the compensation is higher or lower than comparable products in the marketplace. Distributors should be responsible for ensuring intermediaries understand the product, who it is designed for, what it is meant to do in a down, regular and up market. Distributors should require intermediaries to communicate this adequately to appropriately targeted investors, and obtain informed client consent prior to product transactions. Distributors should ensure that the product is the best product for its purpose, and choose the least complicated product that will still meet the target investor group's needs. Both manufacturers and distributors should be responsible for monitoring product performance in the marketplace, and quickly responding to a situation where a product is failing to meet the expectations of the manufacturer and/or target investor group. Any entity functioning as both manufacturer and distributor has the obligations of both.**

<ESMA\_QUESTION\_19>

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

<ESMA\_QUESTION\_20>

**No.**

<ESMA\_QUESTION\_20>

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

<ESMA\_QUESTION\_21>

**No comment.**

<ESMA\_QUESTION\_21>

## **2.8. Safeguarding of client assets**

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



<ESMA\_QUESTION\_22>

**No comment.**

<ESMA\_QUESTION\_22>

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

<ESMA\_QUESTION\_23>

**No comment.**

<ESMA\_QUESTION\_23>

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

<ESMA\_QUESTION\_24>

**No comment.**

<ESMA\_QUESTION\_24>

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

<ESMA\_QUESTION\_25>

**No comment.**

<ESMA\_QUESTION\_25>

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

<ESMA\_QUESTION\_26>

**No comment.**

<ESMA\_QUESTION\_26>

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

<ESMA\_QUESTION\_27>

**No comment.**

<ESMA\_QUESTION\_27>

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

<ESMA\_QUESTION\_28>

**No comment.**

<ESMA\_QUESTION\_28>

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

<ESMA\_QUESTION\_29>

**No comment.**

<ESMA\_QUESTION\_29>

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

<ESMA\_QUESTION\_30>

**No comment.**

<ESMA\_QUESTION\_30>

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

<ESMA\_QUESTION\_31>

**No comment.**

<ESMA\_QUESTION\_31>

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

<ESMA\_QUESTION\_32>

**No comment.**

<ESMA\_QUESTION\_32>

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

<ESMA\_QUESTION\_33>

**No comment.**

<ESMA\_QUESTION\_33>

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

<ESMA\_QUESTION\_34>

**No comment.**

<ESMA\_QUESTION\_34>

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

<ESMA\_QUESTION\_35>

**No comment.**

<ESMA\_QUESTION\_35>

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

<ESMA\_QUESTION\_36>

**No comment.**

<ESMA\_QUESTION\_36>

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

<ESMA\_QUESTION\_37>

**No comment.**

<ESMA\_QUESTION\_37>

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

<ESMA\_QUESTION\_38>

**No comment.**

<ESMA\_QUESTION\_38>

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

<ESMA\_QUESTION\_39>

**No comment.**

<ESMA\_QUESTION\_39>

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

<ESMA\_QUESTION\_40>

**No comment.**

<ESMA\_QUESTION\_40>

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

<ESMA\_QUESTION\_41>

**No comment.**

<ESMA\_QUESTION\_41>

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

<ESMA\_QUESTION\_42>

**No comment.**

<ESMA\_QUESTION\_42>

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

<ESMA\_QUESTION\_43>

**No comment.**

<ESMA\_QUESTION\_43>



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

<ESMA\_QUESTION\_44>

**No comment.**

<ESMA\_QUESTION\_44>

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

<ESMA\_QUESTION\_45>

**No comment.**

<ESMA\_QUESTION\_45>

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

<ESMA\_QUESTION\_46>

**No comment.**

<ESMA\_QUESTION\_46>

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

<ESMA\_QUESTION\_47>

**No comment.**

<ESMA\_QUESTION\_47>

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

<ESMA\_QUESTION\_48>

**No comment.**

<ESMA\_QUESTION\_48>

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

<ESMA\_QUESTION\_49>

**No comment.**

<ESMA\_QUESTION\_49>

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

<ESMA\_QUESTION\_50>

**No comment.**

<ESMA\_QUESTION\_50>

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

<ESMA\_QUESTION\_51>

**No comment.**

<ESMA\_QUESTION\_51>

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

<ESMA\_QUESTION\_52>

**No comment.**

<ESMA\_QUESTION\_52>

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

<ESMA\_QUESTION\_53>

**No comment.**

<ESMA\_QUESTION\_53>

## **2.9. Conflicts of interest**

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

<ESMA\_QUESTION\_54>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) support the proposal. Investment firms should assess and periodically review their conflicts of interest policy, and then communicate the results of that review to the client, initially and on an ongoing basis where changes take place, to avoid misleading the client, or other parties, about the nature and impacts of the conflicts and to retain ongoing agreement between the parties.**

<ESMA\_QUESTION\_54>

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

<ESMA\_QUESTION\_55>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) suggest that the best execution obligations contained in Article 21 (that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients) addresses the fiduciary duty an investment firm owes its client. FPSB Europe supports the notion that an adviser must place the interest of the client first, at all times acting honestly, in utmost good faith, and in a manner the adviser reasonably believes to be in the best interest of the client. ESMA might consider adding to this article clarity around the title/language the adviser uses to describe himself or herself so that,**

regardless of whether he or she is engaging in financial advisory services or in product sales, the client can expect and is owed a duty of care consistent with that of a fiduciary.

<ESMA\_QUESTION\_55>

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

<ESMA\_QUESTION\_56>

**Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) considers the existing distinction sufficient. FPSB Europe strongly endorses that financial research in general is directed to the public and does not constitute advice, as advice is specifically directed to a specific individual. Consequently, any result of financial research presented to the client should be labelled as financial research and not the opinion of the adviser.**

<ESMA\_QUESTION\_56>

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

<ESMA\_QUESTION\_57>

**Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) strongly believe that the intermediary’s “client first” or fiduciary duty to a client should trump the ability to avoid complying with Article 24 of the MiFID Implementing Directive due to how the underlying product is described. FPSB Europe supports the notion captured in MiFID II that disclosure should be a mechanism of last resort to protect consumers.**

<ESMA\_QUESTION\_57>

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

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

<ESMA\_QUESTION\_58>

**Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) are in general agreement with ESMA’s Draft Technical Advice related to Articles 16(3) and 24 of MiFID II. ESMA should consider, in the case of distribution to retail clients, requiring investment firms to have staff with adequate knowledge, skills and abilities to provide investment services and advice to clients. The almost 5,000 CERTIFIED FINANCIAL PLANNER professionals conducting business in seven European and neighbouring territories (i.e., Austria, France, Germany, Ireland, the Netherlands, Switzerland and the U.K.) meet the knowledge, skills and abilities requirements, based on FPSB Ltd.’s Financial Planner Competency Profile, along with ethical and professional conduct obligations established for financial planning professionals by FPSB Europe. In this context, ESMA might want to add language in its Draft Technical Advice calling for investment firms that distribute to retail clients to have appropriately qualified advisers in place.**

<ESMA\_QUESTION\_58>

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

<ESMA\_QUESTION\_59>

**No comment.**

<ESMA\_QUESTION\_59>

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

<ESMA\_QUESTION\_60>

**No comment.**

<ESMA\_QUESTION\_60>

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

<ESMA\_QUESTION\_61>

**No comment.**

<ESMA\_QUESTION\_61>

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

<ESMA\_QUESTION\_62>

**No comment.**

<ESMA\_QUESTION\_62>

## **2.11. Remuneration**

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

<ESMA\_QUESTION\_63>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) strongly endorse an approach whereby investment firms must act fairly, honestly and professionally in accordance with the best interests of both retail and professional clients, which in turn must guide the creation and enforcement of the firm's remuneration policies. In MiFID II, Article 24(10), FPSB Europe suggests adding language to read: ...when the investment firm could offer a different financial instrument which would better meet the client's needs.**

<ESMA\_QUESTION\_63>

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

<ESMA\_QUESTION\_64>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) support the proposal, while acknowledging that assessing the quality of services provided to clients (through measures such as client satisfaction assessments, client retention measures, number of complaints, etc.) might prove challenging for some firms.**



<ESMA\_QUESTION\_64>

## **2.12. Fair, clear and not misleading information**

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

<ESMA\_QUESTION\_65>

**Yes.**

<ESMA\_QUESTION\_65>

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

<ESMA\_QUESTION\_66>

**Yes.**

<ESMA\_QUESTION\_66>

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

<ESMA\_QUESTION\_67>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) believe that professional investors need not be required to have the same high level of investor protection by law as retail clients. However, if a professional investor is unsure about his or her level of knowledge or familiarity with the services, advice or products provided by the intermediary or firm, the professional investor should be allowed to ask that he or she be treated as a retail client. Once this happens, that client should no longer be considered a professional investor, but rather a retail investor.**

<ESMA\_QUESTION\_67>

## **2.13. Information to clients about investment advice and financial instruments**

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

<ESMA\_QUESTION\_68>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) in general welcome the concept of fee-based financial advice. ESMA should take into consideration, however, that the majority of retail clients in Europe are not willing or able to pay fees for financial advice; an unintended consequence of introducing a fee-based model for financial advice might result in the exclusion of certain types or classes of investors from accessing financial advice. ESMA and regulators/legislators throughout Europe will need to evaluate how these proposals will best serve retail clients who are in-**



creasingly responsible for their own financial futures. FPSB Europe remains confused by some of the language presented in Articles 24(7) of MiFID II, which distinguishes between “independent” and “non-independent” advice and between a “restricted” and “unrestricted/broad” service offering, and which allows firms to offer the same client independent and non-independent advice. Analysing the Draft Technical Advice, it seems that unrestricted service offerings can be provided by a non-independent investment firm and restricted service offerings can be considered independent advice. It might be that retail clients will confuse non-independent advice with advice from a firm with a restricted offering. FPSB Europe suggests ESMA provide further clarification for the benefit of the retail investor of the distinctions among the terms independent, non-independent, restricted and broad in the Draft Technical Advice.

<ESMA\_QUESTION\_68>

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

<ESMA\_QUESTION\_69>

**Yes. Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) welcome the provision of information on how instruments are likely to function in different market conditions and how the interaction of underlying components will affect risk.**

<ESMA\_QUESTION\_69>

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

<ESMA\_QUESTION\_70>

**As discussed in the response to Q58, Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) recommend that ESMA add the requirement that investment firms should employ qualified financial advisers. The almost 5,000 CERTIFIED FINANCIAL PLANNER professionals conducting business in seven European and neighbouring territories (i.e., Austria, France, Germany, Ireland, the Netherlands, Switzerland and the U.K.) meet competency requirements, based on FPSB Ltd.’s Financial Planner Competency Profile, along with ethical and professional conduct obligations established for financial planning professionals by FPSB Europe.**

<ESMA\_QUESTION\_70>

## **2.14. Information to clients on costs and charges**

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

<ESMA\_QUESTION\_71>

**Yes.**

<ESMA\_QUESTION\_71>

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

<ESMA\_QUESTION\_72>



**Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) support the requirement that intermediaries and advisers provide clients with all appropriate information, but cautions that the principle of proportionality should be adhered to. The principles for the Point of Sale information proposed in the Draft Technical Advice will lead to significant extra administrative costs to the firm and actual costs to the client. These costs, together with other costs arising from compliance with the new rules, might lead to a reduction in the number of advisers (as seen in the U.K. as a result of the Retail Distribution Review), which FPSB Europe believes is not in retail clients’ best interests.**

<ESMA\_QUESTION\_72>

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

<ESMA\_QUESTION\_73>

**Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) support the requirement but, similar to our response to Q72, cautions that the principle of proportionality should be adhered to.**

<ESMA\_QUESTION\_73>

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

<ESMA\_QUESTION\_74>

**See response to Q72.**

<ESMA\_QUESTION\_74>

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

<ESMA\_QUESTION\_75>

**Yes.**

<ESMA\_QUESTION\_75>

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

<ESMA\_QUESTION\_76>

**No comment.**

<ESMA\_QUESTION\_76>

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

<ESMA\_QUESTION\_77>

**Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) welcome the overall goal of the requirement but caution about the unintended consequence of the impact the new costs and charges introduced are likely to have on the price paid for services and advice by retail clients. FPSB Europe considers two potential adverse outcomes for retail clients – (1) higher prices for advice and (2) fewer people seeking / being able to afford advice. We doubt that either are the intent of ESMA’s implementation of MiFID II.**

<ESMA\_QUESTION\_77>

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



<ESMA\_QUESTION\_78>

**No comment.**

<ESMA\_QUESTION\_78>

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

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

<ESMA\_QUESTION\_79>

**Yes, we agree with the list. No other benefits should be included.**

<ESMA\_QUESTION\_79>

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

<ESMA\_QUESTION\_80>

**Assuming the question is asking about the proposed approach for the disclosure of monetary and non-monetary benefits by firms acting in a non-independent capacity, Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) recommend that ESMA introduce an obligation that non-independent advice has to be clearly labelled as such, with an explanation (in font size consistent with the rest of the marketing materials) that the instrument or advice provided to the client could be influenced by a third party.**

<ESMA\_QUESTION\_80>

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

<ESMA\_QUESTION\_81>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) agree with the non-exhaustive list provided, with the exception of item 10(i) listed on page 124 of ESMA's Call for Comment on MiFID II, which refers to a fee, commission or non-monetary benefit "used to pay or provide goods and services ... in [the firm's] ordinary course of business." FPSB Europe could envisage a scenario whereby the firm uses commissions it obtains to pay for market data and news services (e.g., Bloomberg, Reuters, etc.), which would be designed to enhance the quality of advice given to clients.**

<ESMA\_QUESTION\_81>

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

<ESMA\_QUESTION\_82>

**Yes. However, since FPSB Europe is not an investment firm, we cannot provide an actual amount for the additional costs likely to be incurred by a firm to comply with the requirements proposed in chapter 2.15.**

<ESMA\_QUESTION\_82>



## 2.16. Investment advice on independent basis

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

<ESMA\_QUESTION\_83>

Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) refer to our response to Q68 on “independent” versus “non-independent” advice. FPSB Europe understands that a firm providing independent advice may decide to offer a restricted number of financial instruments, once it has reviewed a range of instruments. The number of financial instruments covered (which may be a narrow (i.e., one) or a broad range) is not the appropriate measure for a firm’s “independence.” Rather, the measure of “independence” should be based on whether the adviser/investment firm is financially dependent on the product provider or not. ESMA seems to be placing strict requirements on independent firms, but then allowing firms to offer both independent and non-independent advice, subject to providing the client appropriate disclosure and having different employees offer the different types of advice. With ESMA having already questioned the efficacy of disclosure as the primary means of protecting clients, this seems contradictory and puts independent advisory firms at a disadvantage. FPSB encourages ESMA to require prominent, “plain English” notices to clients that advice is non-independent, and what that means. In addition, we encourage ESMA to call for regulatory-supported campaign to educate consumers on the distinctions between independent and non-independent advice.

<ESMA\_QUESTION\_83>

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

<ESMA\_QUESTION\_84>

Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) consider a typical example of providing independent and non-independent advice to be the provision of financial planning. FPSB Ltd.’s member organizations in 25 countries and territories around the world have defined financial planning as a six-step process, namely: (1) Establish and define the relationship with the client; (2) Collect the client’s information; (3) Analyse and assess the client’s financial status; (4) Develop the financial planning recommendations and present them to the client; (5) Implement the client’s financial planning recommendations; and (6) Review the client’s situation. When providing financial planning to a client, the CERTIFIED FINANCIAL PLANNER professional is obliged to act in the client’s interest, independent from the interests or incentives of specific products or product providers. The financial advice provided by the CERTIFIED FINANCIAL PLANNER professional is broad-based, and focused on the client’s goals, needs and objectives. While the financial planning services are client-focused, when it comes to implementation of the financial plan (step 5 of the six-step process), then the firm might switch to a non-independent service for the client. To address the potential for conflicts in such arrangements, FPSB Ltd.’s Code of Ethics and Professional Responsibility calls for clear disclosure to the client and separate levels of obligations when engaged in financial plan versus implementing planning recommendations, typically through the delivery of products. Firms providing these types of services need to maintain a strict internal procedure for managing client engagement.

<ESMA\_QUESTION\_84>



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

<ESMA\_QUESTION\_85>

**Yes. However, since FPSB Europe is not an investment firm, we cannot provide an actual amount for the additional costs likely to be incurred by a firm to comply with the requirements proposed in chapter 2.16.**

<ESMA\_QUESTION\_85>

## **2.17. Suitability**

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

<ESMA\_QUESTION\_86>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) agree with expanding the suitability requirements, as discussed in chapter 2.17's Draft Technical Advice. However, the concept for Suitability Reports outlined in #2 and #3 of the Draft Technical Advice seem to undercut the principle that the investment decision is ultimately taken by the investor, not the firm. With advice and products provided in the best interest of the client, and with proper disclosures and information, the client should be the one making an informed decision about the investment, and its suitability.**

<ESMA\_QUESTION\_86>

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

<ESMA\_QUESTION\_87>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) suggest adding language along the lines of "... the adviser should clearly indicate the limited scope of the engagement and information collection process (related to the product/advice sought)," so that it is made clear that the advice is suitable for that client based on the limited scope, but not necessarily suitable based on a comprehensive understanding of the client's goals, needs and objectives (i.e., it is suitable investment advice, not necessarily suitable financial planning advice). Additionally, MiFID II and ESMA's Comment Paper frequently address "risk tolerance" and "risk bearing ability." ESMA might consider introducing the concepts of "risk awareness" and "attitude towards financial risk," as covered in the areas of psychology and behavioural economics.**

<ESMA\_QUESTION\_87>

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

<ESMA\_QUESTION\_88>

Also see response to Q87. Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) suggest that if a Suitability Report has to be delivered to a client, it should be clearly stated that the judgement of suitability is based on a limited scope of engagement. The Suitability Report should communicate to the client that the financial adviser does not know all of the client’s financial and life goals, needs and objectives, and deems the product or advice suitable for the client based on the stated need(s) of the client and the limited scope of the fact find conducted by the adviser with the client.

<ESMA\_QUESTION\_88>

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

<ESMA\_QUESTION\_89>

**If Suitability Reports have to be sent, yes.**

<ESMA\_QUESTION\_89>

## **2.18. Appropriateness**

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

<ESMA\_QUESTION\_90>

Financial Planning Standards Board Ltd.’s European member organizations (collectively, FPSB Europe) invite ESMA to reconsider (1) its reliance on complexity (or lack thereof) as a measure of appropriateness for a product and (2) which instruments it defines as complex. Consider a “building savings agreement,” for example. Despite the instrument being very complex, no regulator has ever considered banning such products. On the other hand, a long call, which could be considered a very straightforward investment instrument, is being considered complex by ESMA. FPSB Europe suggests that the focus should be less on complexity when it comes to appropriateness, and more on appropriate evaluation of the “fit” of the instrument for the client’s needs, alongside appropriate levels of transparency, disclosure and informed client consent.

<ESMA\_QUESTION\_90>

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

<ESMA\_QUESTION\_91>

**See response to Q90.**

<ESMA\_QUESTION\_91>

## **2.19. Client agreement**



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

<ESMA\_QUESTION\_92>

**Yes.**

<ESMA\_QUESTION\_92>

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

<ESMA\_QUESTION\_93>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) believe that professional and retail clients engaged in a one-time relationship will benefit from having a written agreement, to ensure advice is understood/agreed to. If firms are required to offer written agreements only to new clients, FPSB Europe suggests that firms be required to write to existing clients letting them know this, and offering to enter into an agreement in writing if existing clients ask for it. The client agreement should also cover the scope of advice and state the qualifications of the financial adviser.**

<ESMA\_QUESTION\_93>

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

<ESMA\_QUESTION\_94>

**Yes.**

<ESMA\_QUESTION\_94>

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

<ESMA\_QUESTION\_95>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) consider this, in principle, to be a good idea. However, FPSB Europe would suggest that firms should seek to avoid overwhelming the client with information. The investment firm should definitely describe all services that are agreed to with the client, but FPSB Europe wonders if there is much benefit for the client if services that the client does not need at the moment are described. It might be more practical, and welcomed by the client, to provide updated descriptions of services to the client based on changes in the client's needs, calling for expanded services (and related amended agreements).**

<ESMA\_QUESTION\_95>



## 2.20.

### 2.21. Reporting to clients

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

<ESMA\_QUESTION\_96>

**Yes, but as this is related with additional costs, it will be the professional client who has to bear the costs.**

<ESMA\_QUESTION\_96>

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

<ESMA\_QUESTION\_97>

**No comment.**

<ESMA\_QUESTION\_97>

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

<ESMA\_QUESTION\_98>

**Yes.**

<ESMA\_QUESTION\_98>

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

<ESMA\_QUESTION\_99>

**No comment.**

<ESMA\_QUESTION\_99>

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

<ESMA\_QUESTION\_100>

**Financial Planning Standards Board Ltd.'s European member organizations (collectively, FPSB Europe) suggest that, regarding Draft Technical Advice 2.20, #3, ESMA should bear in mind that in case of transactions with FX involved, where FX has a settlement of T+2, the reporting requirement of "no later than the first business day following execution" should be replaced by "first business day following settlement".**



<ESMA\_QUESTION\_100>

## 2.22. Best execution

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

<ESMA\_QUESTION\_101>

**No comment.**

<ESMA\_QUESTION\_101>

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

<ESMA\_QUESTION\_102>

**No comment.**

<ESMA\_QUESTION\_102>

## 2.23. Client order-handling

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

<ESMA\_QUESTION\_103>

**No comment.**

<ESMA\_QUESTION\_103>

## 2.24. Transactions executed with eligible counterparties

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

<ESMA\_QUESTION\_104>

**No comment.**

<ESMA\_QUESTION\_104>

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

<ESMA\_QUESTION\_105>

**No comment.**

<ESMA\_QUESTION\_105>



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

<ESMA\_QUESTION\_106>

**No comment.**

<ESMA\_QUESTION\_106>

## **2.25. Product intervention**

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

<ESMA\_QUESTION\_107>

**No comment.**

<ESMA\_QUESTION\_107>

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

<ESMA\_QUESTION\_108>

**No comment.**

<ESMA\_QUESTION\_108>





### 3. Transparency

#### 3.1. Liquid market for equity and equity-like instruments

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

<ESMA\_QUESTION\_109>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_109>

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

<ESMA\_QUESTION\_110>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_110>

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

<ESMA\_QUESTION\_111>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_111>

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

<ESMA\_QUESTION\_112>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_112>

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

<ESMA\_QUESTION\_113>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_113>

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

<ESMA\_QUESTION\_114>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_114>



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

<ESMA\_QUESTION\_115>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_115>

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

<ESMA\_QUESTION\_116>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_116>

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

<ESMA\_QUESTION\_117>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_117>

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

<ESMA\_QUESTION\_118>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_118>

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

<ESMA\_QUESTION\_119>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_119>

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

<ESMA\_QUESTION\_120>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_120>

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

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

<ESMA\_QUESTION\_121>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_121>

### 3.3. The definition of systematic internaliser

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

<ESMA\_QUESTION\_122>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_122>

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

<ESMA\_QUESTION\_123>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_123>

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

<ESMA\_QUESTION\_124>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_124>

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

<ESMA\_QUESTION\_125>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_125>

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

<ESMA\_QUESTION\_126>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_126>

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



<ESMA\_QUESTION\_127>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_127>

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

<ESMA\_QUESTION\_128>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_128>

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

<ESMA\_QUESTION\_129>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_129>

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

<ESMA\_QUESTION\_130>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_130>

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

<ESMA\_QUESTION\_131>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_131>

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

<ESMA\_QUESTION\_132>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_132>

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

<ESMA\_QUESTION\_133>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_133>

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

<ESMA\_QUESTION\_134>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_134>

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

<ESMA\_QUESTION\_135>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_135>

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

<ESMA\_QUESTION\_136>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_136>

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

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

<ESMA\_QUESTION\_137>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_137>

### **3.5. Exceptional market circumstances and conditions for updating quotes**

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

<ESMA\_QUESTION\_138>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_138>

### **3.6. Orders considerably exceeding the norm**



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

<ESMA\_QUESTION\_139>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_139>

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

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

<ESMA\_QUESTION\_140>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_140>

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

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

<ESMA\_QUESTION\_141>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_141>

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

<ESMA\_QUESTION\_142>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_142>

## 4. Data publication

### 4.1. Access to systematic internalisers' quotes

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

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

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

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

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

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

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

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

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

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

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

<ESMA\_QUESTION\_148>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_148>

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

<ESMA\_QUESTION\_149>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_149>



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

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

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

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

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

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

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

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

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

## **4.3. Reasonable commercial basis (RCB)**

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

<ESMA\_QUESTION\_154>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_154>

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

<ESMA\_QUESTION\_155>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_155>

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

<ESMA\_QUESTION\_156>





TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_156>

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

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

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

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

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

<ESMA\_QUESTION\_159>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_159>

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

<ESMA\_QUESTION\_160>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_160>

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

<ESMA\_QUESTION\_161>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_161>

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

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

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

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

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

<ESMA\_QUESTION\_164>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_164>

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

<ESMA\_QUESTION\_165>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_165>

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

<ESMA\_QUESTION\_166>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_166>

## 5. Micro-structural issues

### 5.1. Algorithmic and high frequency trading (HFT)

**Q167: Which would be your preferred option? Why?**

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

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

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

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

<ESMA\_QUESTION\_169>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_169>

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

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

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

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

### 5.2. Direct electronic access (DEA)

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

<ESMA\_QUESTION\_172>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_172>

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

<ESMA\_QUESTION\_173>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_173>

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

<ESMA\_QUESTION\_174>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_174>

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

<ESMA\_QUESTION\_175>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_175>

## 6. Requirements applying on and to trading venues

### 6.1. SME Growth Markets

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

<ESMA\_QUESTION\_176>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_176>

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

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

**Q178: Do you agree with the approach described above (in the box Error! Reference source not found.), that only falling below the qualifying 50% threshold for a number of three consecutive years could lead to deregistration as a SME-GM or should the period be limited to two years?**

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

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

<ESMA\_QUESTION\_179>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_179>

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

<ESMA\_QUESTION\_180>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_180>

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

<ESMA\_QUESTION\_181>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_181>



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

<ESMA\_QUESTION\_182>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_182>

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

<ESMA\_QUESTION\_183>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_183>

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

<ESMA\_QUESTION\_184>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_184>

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

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

**Q186: Do you agree with** Error! Reference source not found., Error! Reference source not found. **or** Error! Reference source not found. Error! Reference source not found.?

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

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

<ESMA\_QUESTION\_187>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_187>

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

<ESMA\_QUESTION\_188>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_188>

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

<ESMA\_QUESTION\_189>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_189>

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

<ESMA\_QUESTION\_190>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_190>

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

<ESMA\_QUESTION\_191>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_191>

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

<ESMA\_QUESTION\_192>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_192>

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

<ESMA\_QUESTION\_193>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_193>

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

<ESMA\_QUESTION\_194>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_194>

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

<ESMA\_QUESTION\_195>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_195>

**Q196: Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph Error! Reference source not found.) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?**

<ESMA\_QUESTION\_196>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_196>

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

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

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

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

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

<ESMA\_QUESTION\_199>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_199>

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

<ESMA\_QUESTION\_200>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_200>

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

<ESMA\_QUESTION\_201>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_201>

## **6.2. Suspension and removal of financial instruments from trading**

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

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

**Q203: Do you agree that NCAs would also need to consider the criteria described in paragraph Error! Reference source not found. Error! Reference source not found. and Error! Reference source not found., when making an assessment of relevant costs or risks?**

<ESMA\_QUESTION\_203>





TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_203>

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

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

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

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

<ESMA\_QUESTION\_205>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_205>

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

<ESMA\_QUESTION\_206>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_206>

### **6.4. Monitoring of compliance – information requirements for trading venues**

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

<ESMA\_QUESTION\_207>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_207>

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

**Q208: Do you support the approach suggested by ESMA?**

<ESMA\_QUESTION\_208>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_208>

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

<ESMA\_QUESTION\_209>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_209>

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

<ESMA\_QUESTION\_210>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_210>

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

<ESMA\_QUESTION\_211>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_211>

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

<ESMA\_QUESTION\_212>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_212>

## 7. Commodity derivatives

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

**Q213: Do you agree with ESMA’s approach on specifying contracts that “must” be physically settled and contracts that “can” be physically settled?**

<ESMA\_QUESTION\_213>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_213>

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

<ESMA\_QUESTION\_214>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_214>

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

<ESMA\_QUESTION\_215>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_215>

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

<ESMA\_QUESTION\_216>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_216>

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

<ESMA\_QUESTION\_217>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_217>

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

<ESMA\_QUESTION\_218>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_218>



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

<ESMA\_QUESTION\_219>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_219>

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

<ESMA\_QUESTION\_220>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_220>

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

<ESMA\_QUESTION\_221>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_221>

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

<ESMA\_QUESTION\_222>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_222>

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

<ESMA\_QUESTION\_223>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_223>

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

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

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

<ESMA\_QUESTION\_225>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_225>

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

<ESMA\_QUESTION\_226>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_226>

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

<ESMA\_QUESTION\_227>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_227>

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

<ESMA\_QUESTION\_228>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_228>

## **7.2. Position reporting thresholds**

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

<ESMA\_QUESTION\_229>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_229>

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

<ESMA\_QUESTION\_230>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_230>

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

<ESMA\_QUESTION\_231>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_231>

## **7.3. Position management powers of ESMA**



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

<ESMA\_QUESTION\_232>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_232>

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

<ESMA\_QUESTION\_233>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_233>

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

<ESMA\_QUESTION\_234>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_234>

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

<ESMA\_QUESTION\_235>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_235>

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

<ESMA\_QUESTION\_236>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_236>

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

<ESMA\_QUESTION\_237>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_237>

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

<ESMA\_QUESTION\_238>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_238>

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

<ESMA\_QUESTION\_239>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_239>



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

<ESMA\_QUESTION\_240>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_240>

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

<ESMA\_QUESTION\_241>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_241>

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

<ESMA\_QUESTION\_242>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_242>

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

<ESMA\_QUESTION\_243>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_243>

## 8. Portfolio compression

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

<ESMA\_QUESTION\_244>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_244>

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

<ESMA\_QUESTION\_245>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_245>