



European Securities and  
Markets Authority

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



22 May 2014



European Securities and  
Markets Authority

Date: 22 May 2014



## Responding to this paper

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

### **Instructions**

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

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

Responses are most helpful:

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

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

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

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

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

### **Publication of responses**

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

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

### **Data protection**

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



## **1. Overview**

## **2. Investor protection**

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

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

<ESMA\_QUESTION\_1>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_1>

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

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

<ESMA\_QUESTION\_2>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_2>

### **2.3. Compliance function**

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

<ESMA\_QUESTION\_3>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_3>

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

<ESMA\_QUESTION\_4>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_4>

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



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

<ESMA\_QUESTION\_5>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_5>

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

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

<ESMA\_QUESTION\_6>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_6>

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

<ESMA\_QUESTION\_7>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_7>

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

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

<ESMA\_QUESTION\_8>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_8>

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

<ESMA\_QUESTION\_9>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_9>

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

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



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

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

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

<ESMA\_QUESTION\_12>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_12>

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

<ESMA\_QUESTION\_13>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_13>

## **2.7. Product governance**

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

<ESMA\_QUESTION\_14>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_14>

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

<ESMA\_QUESTION\_15>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_15>

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

<ESMA\_QUESTION\_16>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_16>

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

<ESMA\_QUESTION\_17>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_17>

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

<ESMA\_QUESTION\_18>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_18>

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

<ESMA\_QUESTION\_19>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_19>

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

<ESMA\_QUESTION\_20>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_20>

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

<ESMA\_QUESTION\_21>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_21>

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

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

<ESMA\_QUESTION\_22>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_22>

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

<ESMA\_QUESTION\_23>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_23>

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



<ESMA\_QUESTION\_24>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_24>

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

<ESMA\_QUESTION\_25>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_25>

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

<ESMA\_QUESTION\_26>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_26>

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

<ESMA\_QUESTION\_27>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_27>

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

<ESMA\_QUESTION\_28>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_28>

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

<ESMA\_QUESTION\_29>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_29>

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

<ESMA\_QUESTION\_30>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_30>

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

<ESMA\_QUESTION\_31>  
TYPE YOUR TEXT HERE





<ESMA\_QUESTION\_31>

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

<ESMA\_QUESTION\_32>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_32>

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

<ESMA\_QUESTION\_33>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_33>

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

<ESMA\_QUESTION\_34>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_34>

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

<ESMA\_QUESTION\_35>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_35>

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

<ESMA\_QUESTION\_36>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_36>

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

<ESMA\_QUESTION\_37>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_37>

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

<ESMA\_QUESTION\_38>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_38>

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

<ESMA\_QUESTION\_39>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_39>

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

<ESMA\_QUESTION\_40>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_40>

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

<ESMA\_QUESTION\_41>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_41>

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

<ESMA\_QUESTION\_42>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_42>

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

<ESMA\_QUESTION\_43>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_43>

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

<ESMA\_QUESTION\_44>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_44>

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

<ESMA\_QUESTION\_45>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_45>



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

<ESMA\_QUESTION\_46>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_46>

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

<ESMA\_QUESTION\_47>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_47>

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

<ESMA\_QUESTION\_48>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_48>

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

<ESMA\_QUESTION\_49>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_49>

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

<ESMA\_QUESTION\_50>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_50>

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

<ESMA\_QUESTION\_51>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_51>

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

<ESMA\_QUESTION\_52>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_52>

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

<ESMA\_QUESTION\_53>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_53>

## **2.9. Conflicts of interest**

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

<ESMA\_QUESTION\_54>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_54>

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

<ESMA\_QUESTION\_55>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_55>

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

<ESMA\_QUESTION\_56>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_56>

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

<ESMA\_QUESTION\_57>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_57>

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



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

<ESMA\_QUESTION\_58>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_58>

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

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

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

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

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

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

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

<ESMA\_QUESTION\_62>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_62>

## **2.11. Remuneration**

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

<ESMA\_QUESTION\_63>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_63>

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

<ESMA\_QUESTION\_64>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_64>



## 2.12. Fair, clear and not misleading information

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

<ESMA\_QUESTION\_65>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_65>

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

<ESMA\_QUESTION\_66>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_66>

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

<ESMA\_QUESTION\_67>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_67>

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

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

<ESMA\_QUESTION\_68>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_68>

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

<ESMA\_QUESTION\_69>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_69>

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

<ESMA\_QUESTION\_70>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_70>

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

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

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

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

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

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

<ESMA\_QUESTION\_73>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_73>

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

<ESMA\_QUESTION\_74>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_74>

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

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

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

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

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

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



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

<ESMA\_QUESTION\_78>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_78>

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

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

<ESMA\_QUESTION\_79>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_79>

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

<ESMA\_QUESTION\_80>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_80>

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

<ESMA\_QUESTION\_81>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_81>

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

<ESMA\_QUESTION\_82>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_82>

## **2.16. Investment advice on independent basis**

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

<ESMA\_QUESTION\_83>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_83>





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

<ESMA\_QUESTION\_84>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_84>

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

<ESMA\_QUESTION\_85>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_85>

## **2.17. Suitability**

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

<ESMA\_QUESTION\_86>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_86>

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

<ESMA\_QUESTION\_87>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_87>

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

<ESMA\_QUESTION\_88>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_88>

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

<ESMA\_QUESTION\_89>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_89>



## 2.18. Appropriateness

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

<ESMA\_QUESTION\_90>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_90>

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

<ESMA\_QUESTION\_91>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_91>

## 2.19. Client agreement

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

<ESMA\_QUESTION\_92>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_92>

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

<ESMA\_QUESTION\_93>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_93>

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

<ESMA\_QUESTION\_94>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_94>

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

<ESMA\_QUESTION\_95>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_95>



**2.20.**

## **2.20. Reporting to clients**

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

<ESMA\_QUESTION\_96>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_96>

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

<ESMA\_QUESTION\_97>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_97>

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

<ESMA\_QUESTION\_98>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_98>

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

<ESMA\_QUESTION\_99>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_99>

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

<ESMA\_QUESTION\_100>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_100>



## 2.21. Best execution

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

<ESMA\_QUESTION\_101>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_101>

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

<ESMA\_QUESTION\_102>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_102>

## 2.22. Client order-handling

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

<ESMA\_QUESTION\_103>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_103>

## 2.23. Transactions executed with eligible counterparties

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

<ESMA\_QUESTION\_104>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_104>

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

<ESMA\_QUESTION\_105>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_105>

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



<ESMA\_QUESTION\_106>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_106>



## **2.24. Product intervention**

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

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

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

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



### 3. Transparency

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

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

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

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

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

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

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

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

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

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

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

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

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





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

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

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

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

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

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

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

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

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

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

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

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

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

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

<ESMA\_QUESTION\_121>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_121>

### 3.3. The definition of systematic internaliser

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

## 4. Data publication

### 4.1. Access to systematic internalisers' quotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<ESMA\_QUESTION\_156>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_156>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<ESMA\_QUESTION\_164>  
TYPE YOUR TEXT HERE





<ESMA\_QUESTION\_164>

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

<ESMA\_QUESTION\_165>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_165>

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

<ESMA\_QUESTION\_166>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_166>

## 5. Micro-structural issues

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

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

<ESMA\_QUESTION\_167>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf

<ESMA\_QUESTION\_167>

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

<ESMA\_QUESTION\_168>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf

<ESMA\_QUESTION\_168>

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

<ESMA\_QUESTION\_169>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf

<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>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf

<ESMA\_QUESTION\_170>

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

<ESMA\_QUESTION\_171>

Please see the joint response of FIA, FIA Europe and FIA European Principal Traders Association (“FIA EPTA”), as submitted by FIA EPTA on our behalf

<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>

We generally agree with the approach proposed by ESMA, however we would like to point out some clarifications because the differentiation of 'can' and 'must' be physically settled may be difficult to assess upon entry into a contract for those wholesale energy products and energy derivatives that *are* eventually settled physically where transfer of ownership takes place upon execution.

In any case, our understanding is that:

- where contracts must be settled in cash or have an option to settle in cash at the option of one of the parties, these should be assessed under C.5;
- only contracts without (option for) cash settlement that 'can be' or 'must be' physically settled need to be assessed under C.6 or C.7, depending on the place of execution and the other conditions set out in these sections. However when cash settlement takes place 'by reason of default or other termination events', this should not give reason to any assessment under Annex I Section C, as this is merely an exception to the normal settlement of the contract. The wording in C5 and the spirit of C6 and C7 confirm this understanding.
- A commodity derivative contract that is cash-settled by mutual consent must explicitly contain provisions for cash-settlement by mutual agreement. In our experience, this does not happen very frequently. In any case it is most likely that if mutual agreement between the parties to cash settle is reached, this would result in the contract being categorised as falling under section C.5

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

In relation to the draft technical advice, we understand the 'waterfall' of the definitions in a way that contracts which are excluded from the definition of financial instruments under Annex I Section C.6 (must be physically settled wholesale energy products and traded on a OTF), are not be required to be tested further against the criteria defined in C.7 and the related implementing rules. The wording "*not otherwise mentioned in point 6*" included in C.7 highlights that C.6 prevails over C.7 in this regards. Similarly, we expect that the transitional exemption for energy derivatives in coal and oil according to article 95 is valid also for those contracts that *must* be physically settled and that are traded bilaterally.

The carve-out in C.6 for wholesale energy products would be deprived of their purpose if the same contracts would have to be assessed against the requirements of C.7.

<ESMA\_QUESTION\_213>

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

<ESMA\_QUESTION\_214>

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

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

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

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

<ESMA\_QUESTION\_214>

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

<ESMA\_QUESTION\_215>

Yes, in general we agree with the approach proposed by ESMA. However, we believe that the wording proposed by ESMA does not fully acknowledge the obligation for physical settlement applicable under standard contracts, nor it reflects the concepts expressed in Recital 10 of MiFID II, which defines the conditions of an enforceable and binding obligation of physical delivery. Therefore, we provide suggestions for redrafting at the bottom of this answer.

Firstly, the terms ‘unrestricted and unconditional right to physical delivery’ may create legal uncertainty. According to Recital 10 of MiFID II mentioned by ESMA (point 11, p.279 CP), the contracts must have an ‘enforceable and binding obligation to physically deliver which cannot be unwound’. This must be understood to uphold that the exemption is defined in a way that an enforceable and binding obligation of physical delivery is a rule which allows for certain exceptions, but excludes an option to pay or receive cash instead of fulfilling the obligation to physically deliver. The terms used in the Recital are more appropriate on a legal point of view and more in line with the level I text compared with the proposals of the draft technical advice.

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

Most importantly, whilst we appreciate ESMA's consideration of the implications of 'operational netting' in power and gas markets, we highlight in this context that the offset of deliveries for operational reasons in the gas and electricity markets is normally an obligation stemming from the transmission systems operators' operational rules and it should not be understood to be a 'right to offset transactions'. Similarly the right to net payments obligations should be acknowledged without compromising the status of the contract as 'must be physically settled'.

In consideration of the comments above, we suggest the following amendments to the draft technical advice:

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

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

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

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

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

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

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

*i. physical delivery of the commodities;*

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

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

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



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

<ESMA\_QUESTION\_215>

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

<ESMA\_QUESTION\_216>

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

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

The operational arrangements for delivery in gas and power markets may produce an offset of physical deliveries, however no netting takes place between contracts or transactions which could be considered equivalent to cash settlement: as the obligation under each individual contract to physically deliver and transfer title remains legally binding and enforceable. In this and the next answers the terms nomination and scheduling are used as synonymous.

#### **Nominations/Schedules timelines to TSOs**

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

Users may have direct access to energy production facilities (e.g. a power plant) or may acquire energy from other users. In all cases, the acquisition (and sale) of energy at a wholesale level takes place through contractual agreements (e.g. EFET master agreements) which stipulate the obligation for the selling party to a transaction to physically deliver and transfer the rights of title in the respective commodity and the obligation of the buying party to accept such delivery and transfer of title, including on a net basis (see for example EFET General Agreement concerning the delivery and acceptance of Natural Gas §4). Such a stipulation can also arise by virtue of the market structure itself.

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

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

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

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

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

An example on how nominations works in electricity markets can be found at this link, referring to the Belgian electricity system: [http://www.elia.be/~media/files/Elia/Products-and-services/ProductSheets/E-Evenwicht/E3\\_E\\_E-Nomination.pdf](http://www.elia.be/~media/files/Elia/Products-and-services/ProductSheets/E-Evenwicht/E3_E_E-Nomination.pdf)

For Gas for example:

[http://www.grtgaz.com/fileadmin/clients/fournisseurs/documents/en/operationnel/1\\_Find\\_out\\_more\\_about\\_nominations\\_confirmations.pdf](http://www.grtgaz.com/fileadmin/clients/fournisseurs/documents/en/operationnel/1_Find_out_more_about_nominations_confirmations.pdf)  
(<http://www.grtgaz.com/en/acces-direct/customer/shipper-trader/peg.html#tabs3>)

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

### **Balancing of demand and supply in gas and electricity markets**

In the daily activity of submitting nominations/schedules to system operators all individual contracts traded either on platforms or bilaterally are physical for settlement purposes.

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

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

It is important to note that nominations and schedules are just the users intended deliveries and acceptances. What is actually delivered/accepted is what is allocated by the TSO after the delivery period. If more or less energy is physically transferred at a delivery point than the aggregate confirmed nominations of all users then the resulting excess or shortage of energy is either attribute to the party causing the problem if this can be identified or smeared across all users according to system rules (e.g. on a pro rata basis to nominations) as part of the TSO's allocation process. So users may under or over deliver or accept on their contractual obligations and the remedies clause of the relevant bilateral deal between them will then apply.

For instance the EFET contracts contain terms that apply in the case of more than one trade between the parties at a delivery point in a delivery period to apportion the Allocated (i.e. delivered) quantity notified by the TSO for the delivery point and delivered period between the trades. This is important as it allows the parties to check that they have delivered and accepted the correct delivery quantity for each trade and, if not, to apply the damages/remedies clauses for failure to deliver or accept a trade as well as to invoice for the amounts delivered under each trade.

## Conclusion

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

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

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

We urge therefore ESMA to consider such substantial characteristics when compiling the draft technical advice to the EU Commission for the delegated acts on the definition of commodity derivative.

<ESMA\_QUESTION\_216>

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

<ESMA\_QUESTION\_217>

### **Power and natural gas**

Bilateral trading standard agreements in gas and electricity include contracts such as:

- The EFET General Agreements concerning the Delivery and Acceptance of Natural Gas / Electricity, including their annexes and appendices
- Trading Terms & Conditions Short Term Flat NBP 1997 (NBP 1997, UK Gas)
- Zeebrugge Hub Natural Gas Trading Terms & Conditions (ZBT 2004, Belgian Gas)

- Grid Trade Master Agreement 2004 (GTMA 2004, UK Power),
- Standard Terms and Conditions for Sale and Purchase of Natural Gas for UK Short Term Deliveries at the Beach (Beach 2000, UK Gas)
- ISDA Master Agreement (1992/2002) with physical trading annexes (GTMA Transactions; NBP; ZBT)
- Zeebrugge Beach Natural Gas trading Terms and Conditions (ZBT 2004)
- BP General Terms and Conditions for the sales and purchases of Crude oil/ Petroleum Products
- Standard Coal Trading Agreement (SCoTA)
- Any long form confirmation referring to the above mentioned master agreements

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

Fulfilling such obligation of delivery requires that the counterparties to a transaction have a separate contractual relationship with operators of transmission systems or transportation networks and/or service providers responsible for the management and operations of the nomination platforms. Delivery is performed arranged by submitting the schedules of the transactions to the operator of the designated delivery point.

### **Key terms of the Trading Contracts**

- Obligation under each trade to physically deliver and transfer rights of title in the agreed quantity of the relevant commodity by the means applicable at the relevant delivery point. In order to deliver or accept the parties are obliged to nominate/schedule accurately and on timely basis. There is no 'cash out' or 'book out' option whereby a party can elect to pay cash or liquidated damages to the other party in lieu of fulfilling its obligations to deliver or accept commodity. Remedies for failure to deliver or accept the correct contract quantity in each delivery period for each trade – generally calculated as the difference between the contract price and the price paid or received by the non-defaulting party in replacing short positions or selling long positions caused by the defaulting party.
- Force majeure –generally defined as an occurrence beyond the reasonable control of one of the parties which it could not reasonably have avoided or overcome and which it makes impossible for one of the parties to perform its obligations according to the contract terms.
- In a natural gas contract, what happens in the event that Off Specification natural gas is delivered.
- Invoicing and payment – the quantities delivered under each trade are separately invoiced on a monthly in arrears basis and VAT paid (or the reverse charge applied) to such amounts.
- Credit and security requirements.



- Termination rights – The Framework Agreement and the Individual Contracts can only be terminated ordinary or early in the event of specified material reasons. An ordinary termination does not affect the existing Individual Contracts and the existing delivery obligation. In the case of material default such as accrued failures to pay or the insolvency of the counterparty or the failure of credit support, the non-defaulting party generally seeks to have the right to terminate all outstanding trades and to claim damages for both quantities already delivered but not paid for and its future losses arising due to losing the contract early i.e. for its loss of bargain (Mark to Market losses). In practice these clauses are usually only invoked on the insolvency of the counterparty and whether they are enforceable depends on the insolvency laws of the country of incorporation of the party that is insolvent (NB: the laws of many countries prevent the termination of contracts on the grounds of insolvency). Contracts often provide an intermediate right for the non-defaulting party to suspend deliveries in the event of material default by the other party before invoking termination rights. If all trades are so terminated the non-defaulting party must calculate its losses or gains in respect of each trade and aggregate and offset these i.e. it cannot just claim for its losses whilst benefiting from its gains.

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

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

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

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

## **Oil, oil products and coal**

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

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

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

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

In case of Coal, the most used standard contract is the 'Standard Coal Trading Agreement' (SCoTA).

Not considering the above described contracts with operational netting as "must be physically settled" would reduce liquidity in these key markets and drive up costs for consumers unnecessarily.

<ESMA\_QUESTION\_217>

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

<ESMA\_QUESTION\_218>

Force Majeure is generally defined as an occurrence beyond the reasonable control of one of the parties which it could not reasonably have avoided or overcome and which it makes impossible for one of the parties to perform its obligations according to the contract terms. Please note that this definition is subject to national civil laws and case law and might evolve subject to new legislation being adopted or case law being made. In case of liquid gas and electricity markets for example, depending on the delivery point, this may be limited to failure of communication or IT systems of the relevant network (within system balancing points) or an unplanned physical outages or failures of pipelines, terminals and transmission systems. In the case of the oil markets it may include a broad range of marine, port, pipeline or storage related events affecting the transmission and handling of cargoes of crude oil or refined products by sea and by pipeline.

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

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

**Other bona fide inability to perform** should be instead understood as any circumstance whereby the performance of a physical delivery or off-take does not take place for reasons that do not qualify as Force Majeure nor as reason of default or other termination event and which are objectively measurable as reasons defined in the contract terms for parties not to perform their obligations and set the contract aside. These other bona fide inability to perform may include condition precedent clauses or other circumstances that may suspend – but not terminate – the execution of the contract, annihilate ab initio or void and set aside the contract.

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

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

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

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

**The examples mentioned in this answer should be intended only as illustrative and not exhaustive or conclusive because the main purpose of such concepts is to be sufficiently broad to accommodate unforeseen events impacting the commodity markets in question. Any attempt to define such cases in a granular way for all commodities would lead to additional legal uncertainty because the operational arrangements and practices in commodity markets differ extensively (see for instance the differences between the gas and oil markets referred to above).**

**In other words, it is impossible to provide a definitive list of reasons preventing the physical settlement of contracts as they can vary from case to case and similar outcomes for occasions of contractual non-completion may have fundamentally different drivers.**

<ESMA\_QUESTION\_218>

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

<ESMA\_QUESTION\_219>

We believe that article 38 of Regulation No 1287/2006 has worked well as it has provided sufficient guidance to identify the objective characteristics of contracts falling under C.7 of Annex I, Section C of Directive 39/2004/EC. Therefore we do not agree with most of the changes proposed in the draft technical advice as they may create confusion and legal uncertainty.

We believe that the standardisation criterion should be better specified and we suggest a reference to ‘listed contracts’ to limit an interpretation that can be otherwise subjective.

Also, we have some technical but substantial suggestions on the text of the technical advice that we urge ESMA to consider:

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

In consideration of the comments above we suggest the following amendments:

5. *For the purposes of Section C(7) of Annex I to Directive 2014/65/EU, a contract which is not:*
- *a spot contract within the meaning of paragraph [6],*
  - *a contract for commercial purposes within the meaning of paragraph xx, or*
  - *otherwise mentioned in section C(6) of Annex I to Directive 2014/65/EU (meaning carved out from the definition of financial instrument under the terms of C.6)*

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

- (a) *it is standardised so that in particular the price, the lot, the delivery date, the product quality specifications of the underlying, the delivery location and other terms are determined by reference to regularly published prices of listed contracts, standard lots or standard delivery dates, standard product specifications, benchmark grades, or delivery locations and other standardised terms;*
- (b) *it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;*
- (c) *it meets one of the following sets of criteria:*
  - i. *“it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF except for wholesale energy contracts or energy derivative contracts that must be physically settled and that are traded on an OTF or a third country trading venue that performs a similar function to an OTF;*
  - ii. *it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF except for wholesale energy contracts or energy derivative contracts that must be physically settled and that are traded on an OTF or a third country trading venue that performs a similar function to an OTF; or*
  - iii. *it is equivalent to a contract traded on a regulated market, an MTF, an OTF except for wholesale energy contracts or energy derivative contracts that must be physically settled and that are traded on an OTF or a third country trading venue that performs a similar function to an OTF, with regards to the price, the lot, the delivery date and other terms including equivalent margining and netting treatment to contracts that are traded on a trading venue.*

<ESMA\_QUESTION\_219>

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

<ESMA\_QUESTION\_220>

We consider the definition of ‘spot’ of key importance. The reference in Article 38.2.b to a ‘period generally accepted in the market for that commodity’, when this period is beyond 2 trading days, may lead to different results across the Member States and is therefore problematic. For instance in case of physical crude oil and refined oil trading, the complexity of the logistics for the production, transportation, delivery and storage of cargoes of oil and oil products is such that delivery almost never takes place within two trading days, nor would we feel confident in saying that industry standards for scheduled delivery periods exist. Indeed such a period could be in the range between 25 days and three months ahead of delivery.

Finally we would consider it valuable that a consultation/survey exercise with the industry is conducted at European level in order to identify a workable ‘spot’ definition for each commodity for any time beyond two trading days that reflects the market practice. Also, we suggest exploring in this context the possibility to distinguish spot contracts from derivatives also in terms of how such contracts are priced. Conventionally in some energy commodities e.g. in physical crude and refined oil trading, the price at which the product is ultimately sold is not pre-agreed in absolute terms, but rather by reference to prices prevailing at the time delivery to the vessel is actually made. For such contracts therefore, counterparties remain exposed to market risk until the defined period for pricing has elapsed, thus necessitating the use of e.g. futures if such market risk is to be hedge.

<ESMA\_QUESTION\_220>

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

<ESMA\_QUESTION\_221>

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

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

In this sense we recommend ESMA takes the approach taken under the U.K. legislation<sup>1</sup> into consideration. The legislation makes explicit provisions for indications to be used to evaluate whether a contract is made for commercial purposes, namely: (a) where one or more of the parties is a producer of the commodity or other property, or uses the commodity in its business; (b) the seller delivers or intends to deliver the commodity or the purchaser takes or intends to take delivery of it.

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<sup>1</sup> See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (2001 No. 544).

This type of approach has demonstrated to work well in practice at national level and we strongly recommend ESMA to take a similar approach, in order to avoid the circumstance in which - by giving a closed and specific list of contracts being for commercial purpose - other contracts remain out of the definition without appropriate justification.

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

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

A potential text that covers the cases mentioned above and applies also to C.10 contracts is the following:

*"A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2014/65/EU, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, if it is entered into:*

- 1. with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time;*
- 2. for the purpose of meeting regulatory requirements to purchase, sell, hold or deliver a commodity*
- 3. where one or more of the parties is a producer of the commodity or other property, or uses it in his business; or*
- 4. the seller delivers or intends to deliver the property or the purchaser takes or intends to take delivery of it."*

<ESMA\_QUESTION\_221>

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

<ESMA\_QUESTION\_222>

No, we disagree.

We believe that the characteristic of contracts that are centrally cleared by CCPs or similarly margined bilaterally is a key characteristic. In fact, it is MiFID defining which contracts are classified as *derivative financial instruments*, whilst the clearing obligation under EMIR is only a consequence of such contracts being defined as financial instruments and will apply only to a subset of such contracts, after these have been determined to qualify as derivative financial instruments under MiFID. Hence the circularity between the two pieces of legislation does not exist if the rules are implemented taking into account the hierarchy between MiFID, which prevails, and EMIR.

<ESMA\_QUESTION\_222>

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

<ESMA\_QUESTION\_223>

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

Therefore we advocate that such criterion should not be the only factor for consideration to avoid all contracts that satisfy a certain level of standardisation being considered as having the characteristics of other financial instruments. Also, other than standardisation in price, lot and delivery dates, commodity derivatives are characterised by standardised product specifications for the underlying commodity, or based on benchmark grades of product, to be delivered into pre-specified locations. We recommend ESMA to further specify such criterion in the draft technical advice.

<ESMA\_QUESTION\_223>

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

<ESMA\_QUESTION\_224>

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

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

If ESMA wants to avoid that the classification in this respect depends on the choices of the counterparties, we suggest either to stick to the previous “expressly stated to be equivalent” or, alternatively, to provide a workable definition of equivalence, in order to avoid creating any regulatory uncertainty for market participants.

Also, we believe that to ensure consistency with the level 1 text a specific and equivalent treatment should be provided for contracts that are traded or are expressly stated to be traded on a third country trading venue that performs a similar function to an OTF which must be physically settled, namely C.6 energy derivatives and wholesale energy products.

Moreover, we reiterate that central clearing or margining of contracts is a relevant and substantial condition to classify contracts which have the characteristics of other derivative financial instruments; if not included as per our suggestion on 5(b), the existence of clearing/margining arrangements must at least be taken into account when considering the equivalence criterion of 5(c)(iii).

<ESMA\_QUESTION\_224>

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

<ESMA\_QUESTION\_225>

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

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

However we believe that to ensure consistency with the level 1 text a specific and equivalent treatment should be provided for contracts that are traded or are expressly stated to be traded on a third country trading venue that performs a similar function to an OTF and that must be physically settled, namely for contracts listed currently in article 38(4) that are energy derivatives or wholesale energy products. Also, some technical amendments are necessary.

We suggest therefore the following amendments:

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

- i. the contract is settled in cash or may be settled in cash at the option of one or more of the parties to the contract, other than by reason of default or other termination event;*
- ii. the contract is traded on:*
  - a. a regulated market;*
  - b. an MTF; or*
  - c. an OTF except for wholesale energy contracts that must be physically settled and that are traded on an OTF*
- iii. the contract fulfils the conditions imposed for derivative contracts under Section C 7 of Annex I of Directive 2014/65/EU.”*

<ESMA\_QUESTION\_225>

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

<ESMA\_QUESTION\_226>

Yes, we agree.

<ESMA\_QUESTION\_226>

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

<ESMA\_QUESTION\_227>

We do not have a firm opinion on this; however we do not see the need for introducing such additional type of derivative contract in this context.

<ESMA\_QUESTION\_227>

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

<ESMA\_QUESTION\_228>

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

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



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

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

In this context, the concept of *force majeure* should be intended as an occurrence beyond the reasonable control of one of the parties which it could not reasonably have avoided or overcome and which it makes impossible for one of the parties to perform according to the contract terms.

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

The EFET General Agreements define such material reason as certain cases of non-performance, cross default and acceleration, winding-up, insolvency or attachment, failure to deliver or accept and representation of warranty (e.g. failure to deliver agreed guarantee or credit standard downgrading below a certain level).

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

We provide further examples of events of default or early termination event here below. However, we reiterate our view that these examples should be intended only as illustrative and not exhaustive or conclusive because the main purpose of such concepts is to remain sufficiently broad to accommodate unforeseen events. Any attempt to define these cases in a granular way for all commodities would lead to additional legal uncertainty.

#### **Events of default/early termination events:**

- **Breach of Agreement/ non-performance.** When a party breaches its obligations under the master agreement (other than failure to deliver).
- **Credit Support Default.** When a party or its credit support provider (e.g. a guarantor or provider of letter of credit) defaults under a credit support document or the credit support document expires, is terminated or rejected.
- **Misrepresentation.** If a representation made by a party under the master agreement proves to be materially incorrect or misleading.
- **Default under other agreements.** If the counterparties to a master agreement are equally bound by another separate agreement and one of the parties defaults under the other separate and specified agreement.

- **Cross-default.** If a party or its guarantor defaults under an agreement it has in place with a third party, generally with respect to repayment of financial indebtedness.
- **Bankruptcy/Insolvency.** A party experiences a bankruptcy/insolvency event. Typically, a list of events relevant to the jurisdiction of incorporation of the party will be referenced.
- **Change in Law / Illegality.** As a result of an adoption or change in law, it becomes unlawful for a party to or its credit support provider to perform under the master agreement, or any credit support document (as applicable).
- **Tax Events.** As a result of a change in tax law, a party's tax position under the master agreement is materially prejudiced (e.g. withholding tax will be applied).
- **Credit Event upon Merger.** If a party merges with or is consolidated into another entity, and the resulting entity is materially less creditworthy than the original entity.
- **Failure to deliver.** When a party under a master agreement consistently and over a longer period fails to deliver a contractually agreed volume of commodity.
- **Material error case:** this clause entails the possibility to maintain the validity of the contract whilst material errors may have pre-empted the delivery of the commodity as initially agreed.
- **Failure to provide credit support documentation:** the failure or delay to provide a guarantee to a counterparty may be defined in contracts as a reason for suspension of the contract or termination.

<ESMA\_QUESTION\_228>

## 7.2. Position reporting thresholds

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

<ESMA\_QUESTION\_229>

We broadly support ESMA's proposals

<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>

We broadly support ESMA's proposals

<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>

We broadly support ESMA's proposals

<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>



We broadly support ESMA’s proposals although we urge regulators to ensure flexibility if the criteria would practically prove ineffective in some situations.  
<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>  
We broadly support ESMA’s proposals although we urge regulators to ensure flexibility if the criteria would practically prove ineffective in some situations.  
<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>  
We broadly support ESMA's proposals although we urge regulators to ensure flexibility if the criteria would practically prove ineffective in some situations.  
<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>