ESMA's CONSULTATION PAPER ON MiFID II and MiFIR

AMAFI's contribution

1. Overview

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 120 members operating for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions

The Association has been following closely the preparation of the new Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) and welcomes the opportunity to answer ESMA's consultation on its consultation and discussion papers.

ESMA's consultation and discussion paper on MiFID II is a considerable challenge for AMAFI and its members in terms of number of questions, time frame to respond, and complexity. This is why AMAFI has prioritised and focused on the main issues and has not been able to answer all questions.

This does not mean that those unanswered questions are not important to AMAFI. Moreover, some detailed comments may not be as comprehensive as expected. We will continue to work and provide additional input in the second round of consultations concerning the RTS where ESMA needs to provide legal drafting. AMAFI will also follow the adoption of the delegated acts by the Commission and its transmission to Council and Parliament.

AMAFI understands that ESMA has deadlines to comply with. However, AMAFI requests once more that ESMA provide longer consultation periods, of at least 3 months. Stakeholders should be given sufficient time in order to build up a comprehensive, detailed and meaningful response.

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?

Yes, AMAFI agrees with the proposed cumulative conditions to be fulfilled in order for an investment service to be deemed to be provided in an incidental manner. However, the reference to "*temporal terms*"

as regards the condition that "*a close and factual connection must exist*" is not very clear and therefore it would be useful if ESMA could clarify this particular notion.

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?

No, AMAFI does not agree.

The type of communication channel used to communicate information to clients cannot be the only criterion to determine if that information is a personal recommendation or not. The only defining criterion of investment advice is the existence of a personal recommendation. Hence the proposal to remove the words "*through distribution channels or*" from article 52 of the MiFID implementing Directive may bring some clarity.

However, this wording had several advantages:

- It made clear that investment research is not investment advice, since investment research is a recommendation intended "*for distribution channels or for the public*"[1]. The publication of investment research may be followed in some instances by the delivery of personal recommendations to a client, based on the research paper and the specific circumstances of the client. But generally, this is not the case as the opinions (such as memo sales or sales commentaries) sent to clients who showed an interest in receiving them are neither "*based on the consideration of the circumstances of*" the persons who receive nor "*presented as suitable*" to them (*MiFID implementing directive, Art. 52*). In other words, if research can be used as a basis to provide investment advice, its production and publication do not constitute investment advice, which the wording of Article 52 helped make clear.

- Because distribution channels are defined in MAD implementing directive as a means to make information available to a large number of persons[2], the wording in Article 52 ensured that general recommendations, such as advertising, to a group of clients, rather than to the public in general, would not be automatically equated to investment advice.

Removing this wording would therefore create a risk that advertising to a group of clients and investment research could be seen as investment advice per se, with the possibility of NCAs taking different views on that.

It is therefore important for harmonisation purpose to make sure that the necessary caveats that underlined the concept of "*distribution channels*" be inserted back into article 52 such that its last paragraph read: "*A recommendation is not a personal recommendation if it is issued to the public or to a group of persons based on their characteristics as a group or if it is investment research as per article 24-1*".

[1] Article 24-1 of the MiFID implementing directive states that "For the purposes of Article 25, 'investment research' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public (…)".

[2] "*a channel through which information is, or is likely to become, publicly available. 'Likely to become publicly available information' shall mean information to which a large number of persons have access*" (*Directive 2003/125/EC, article 1(7)*)

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?

AMAFI is supportive of ESMA's decision to complement the existing compliance requirements included in Article 6 of the MiFID Implementing Directive with some provisions of its guidelines on the compliance function requirements (*ESMA/2012/388*). As the compliance function is an important function within investment firms, the positioning of which is essential to its success and whose boundaries with other internal functions are not always easy to set, it is useful that its main operating principles be clearly stated in Level 2 measures. Such principles cannot be set only in ESMA's guidelines, which are only soft-law provisions subject to a "comply or explain" mechanism, so that Member States may decide not to comply with some of their provisions, and some discrepancies may remain between their legislations.

It is not clear however how this change will affect the existing guidelines. In AMAFI's view those should be amended to be consistent with the other levels of legislation, in which case a proper consultation process should take place, especially since the current guidelines raise a few issues.

More generally, AMAFI would find it inadequate that the general obligation set in Article 16.2 of MiFID II to "*ensure compliance of the firm (...) with its obligations under this Directive*" only leads at level 2 to requirements related to the compliance function, as this function is not the only control function involved in ensuring compliance of the firm with MiFID. Even if a focus on the compliance function is relevant in AMAFI's view, it should be made clear that the compliance function is part of a larger internal control system within the firm (see our answer to Question 4 below – section "*The compliance function is not in charge of all controls needed in an investment firm*").

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

AMAFI considers that the following aspects of the draft technical advice should be amended:

- ***The advisory responsibilities of the compliance function should be highlighted more prominently***

Although ESMA's draft technical advice is quite detailed about the missions and responsibilities of the compliance function, it mainly focuses on the monitoring responsibilities of this function. Several paragraphs are dedicated to these, whereas its advisory mission is mentioned only once, in paragraph 3(ii).

It creates an imbalance between the monitoring and advisory obligations of the compliance function, positioning it as a control function, while advising is as much its core mission.

Such advisory responsibilities cover for instance the provision of day-to-day assistance to staff on compliance matters, involvement in the establishment of new policies and procedures, the provision of advice for new activities and products, training on compliance matters, etc. These advisory activities are fundamental to the firm complying with laws and regulations because they constitute preventive measures and greatly contribute to promoting and enhancing a "compliance culture", as pointed out by ESMA in its guidelines on the compliance function.

A balance between control and advice should therefore be sought at the risk otherwise of transforming the compliance officer into a controller with such an administrative focus that it would stifle its advisory role, which is as important for the success of the function. The risk is also to lose the unique positioning of

the function in the organisation, close both to the businesses and the regulatory imperatives and to blur the boundaries with other control functions.

As a consequence, consistent with some of the developments in the ESMA's Guidelines on certain aspects of the MiFID compliance function (*ESMA/2012/388, § 40, p.29*), more details should be added in paragraph 3(ii) of the draft technical advice about the advisory responsibilities of the compliance function, which could read:

> "*to advise and assist the relevant persons responsible for carrying out investment services and activities to comply with the firm's obligations under MiFID II,* ***by way of provision of training, participation in the establishment of new policies and procedures, recommendations on the resolution of conflicts of interest, complex transactions, new products and activities, involvement in the development of IT systems, etc***."

- ***The compliance function is not in charge of all controls needed in an investment firm***

Paragraph 3.iii. states that the compliance function should report to management "*on the overall control environment of the firm for investment services and activities*".

AMAFI does not agree that the function should report on the overall control environment because it deals with compliance matters and not with all other types of controls such as those related to market risks, credit risks, operational risks, internal audit, etc. It may not be the case in all jurisdictions (although application of the CRD means that a risk management function should exist), but in some, the compliance function is definitely not the only control function acting independently as a second line of defence within an investment firm and having a direct reporting line to management.

In France, the compliance function is one piece of the internal control arrangements, which includes a function of "permanent control", one of risk management (covering all types of risks), and an internal audit one. The fact that, in some jurisdictions, the compliance function may be in charge of all these aspects should not pre-empt the existence of other set up in the European Union, which are mainly due to the transposition of other European directives such as CRD. The level 2 measures of MiFID II should not consider the role of the compliance function independently from other obligations that structure the overall control arrangements of firms. Compliance of the firm with laws and regulations does not necessarily rests on a single function but is more often the result of the work of several functions, coordinated to cover all aspects.

It should also be noted that the obligations of MiFID II are not all exclusively owned by the compliance function. For example, matters related to operational risk such as algorithmic trading and business continuity policies are likely to be covered by risk management.

Conversely, and although the scope of the technical standards are obviously limited to MIFID II, the compliance function's role is not limited to this piece of regulation and covers other regulations such as, at a minimum, the Market Abuse directive.

As mentioned in some parts of AMAFI's answers to the consultation paper (*see Q5 on complaint-handling, and Q14 on product governance*) and the discussion paper (*see Q205 and Q208 on organisational requirements for investment firms related to algorithmic trading*), the compliance function should not be the recipient of all controls that need to be carried out in an investment firm, at the risk otherwise of spreading itself thin and losing its efficiency. ESMA should let firms decide where the responsibilities should lie in their organisation for carrying out specific controls.

In addition, as mentioned before, the compliance function is not only a control function, hence its reporting to management is not limited to the control environment and also includes prevention measures taken by the function (such as training), as well as developments of the regulatory environment.

Paragraph 3. iii. should therefore be reworded to read :

"The compliance function should therefore report to the management body on the implementation and effectiveness of "*the overall* ***compliance*** *environment*" and not on "*the overall control environment*".

- ***The compliance function should assess compliance of the complaints-handling process, it should not have to supervise the operations of the process***

Paragraph 3(iv) provides that the compliance function has the responsibility "*to oversee the operations of the complaints-handling process*", which seems to imply that the function should have an operational role in managing the complaints' process and determining their outcome for clients.

AMAFI does not agree that this should be necessarily the role of compliance, whose missions are to monitor compliance of the firm's processes with regulation and to advise businesses and management. In principle, the compliance function cannot be on the controlling side, acting as a second line of defence, and in charge of some of the operations of the firm, at the risk otherwise of undermining its independence. For proportionality reasons, the compliance function may be in charge of complaints management, where justified by the small size of the investment firm and the nature and complexity of its business, otherwise such responsibility should generally be handled by a function dedicated to this task. The independence of the function should not be a rationale for allocating to it all tasks that require balancing the interests of the firm and the ones of clients, otherwise too many activities would fall within its scope.

Of course, the compliance function should nonetheless be involved in the complaints' management process to provide advice, to control that the process is properly carried out and to use the information that complaints carry on the potential deficiencies of the firm.

More generally, it does not seem justified that ESMA's technical advice, when listing the responsibilities of the compliance function, makes a specific focus on the monitoring of the complaints-handling process. The compliance function carries out monitoring on many subjects that are as important, or even more important, but are not listed (conflicts of interest, suitability and appropriateness, best execution, ...). In addition, this specific matter is not of the same nature as points i., ii and iii., which list the general missions of the function and this monitoring aspect is actually already covered by point i.

For all these reasons, paragraph 3(iv) should be deleted.

If this paragraph was however to be maintained in the final technical advice to the European Commission, it should at least be amended to constitute a distinct paragraph and to make clear that the task of the compliance function is to monitor compliance of the complaints process and not to manage it:

"***As part of its responsibilities in point (i), the compliance function*** *should* ***assess the adequacy and effectiveness*** ~~*oversee the operations*~~ *of the complaints-handling process and consider complaints as a source of relevant information in the context of its general monitoring responsibilities*".

- ***The development on the compliance risk assessment should be consistent with the ESMA's Guidelines***

Paragraph 4 states that the compliance function should conduct an "*assessment*" without mentioning that it is a risk assessment. This should be added.

In addition, such an assessment is a way for the compliance function to determine the focus of its monitoring and advisory activities referred to in points i. and ii. but is not in itself a condition for compliance with these points, i.e. it is possible to provide proper advice to the business without having

completed a risk assessment, although such risk assessment is important for organising and focusing properly its advisory tasks.

For the sake of clarity, we recommend amending the first sentence of this paragraph as follows, to make it consistent with § 14 the ESMA's Guidelines on certain aspects of the MiFID compliance function[3]:

> "4. ~~In order to comply with points (i) and (ii) of the previous paragraph, t~~***T****he compliance function should conduct* ~~an~~ ***risk*** *assessment* ***in order to determine the focus of its monitoring and advisory activities, mentioned in points (i) and (ii) of the previous paragraph****. (...)*".

- ***Comments on conditions enabling the compliance function to discharge its responsibilities properly and independently***

  - *Paragraph 5(i)*

AMAFI agrees that it is necessary for the compliance function to have access to all relevant information. But it could be added that such access should be in due time. This will ensure, on the one hand, to that this requirement is not construed as requiring an immediate access to all relevant information, which is not always feasible for mere technical reasons, and, on the other hand, that the access is effective in practice and not prevented by undue delays.

A balanced requirement would therefore be that the compliance function have access to all relevant information "*in due time*".

  - *Paragraph 5(ii)*

This paragraph provides that the compliance officer must be appointed and replaced by the management body. However, in some jurisdictions, the notion of "*compliance officer*" encompasses several members of the compliance staff and does not designate the head of compliance, meaning the person responsible for the compliance function.

Consequently, for the sake of clarity, it should be indicated that it is the "*head of compliance*" who needs to be appointed and replaced by the management body.

Additionally, it needs to be clarified how ESMA expects the requirement to be applied in large groups which have several investment firms in different jurisdictions with one group head of compliance but several local heads of compliance. We understand that this requirement applies to the group head of compliance. It would otherwise potentially undermine the organisation of compliance in the group's entities where the local compliance head is not appointed by the local management but by the regional or group-wide compliance management.

On another point, according to ESMA's proposal, the head of compliance should be responsible for any reporting required by MiFID II. However, such reporting is broader than compliance matters only and includes matters which are under the responsibility of other functions or businesses, such as for example reports on position limits in commodity derivatives, which are outside the scope of the compliance function.

It could be argued that the compliance function has a responsibility to control that there are arrangements ensuring such reports are produced but again, firms should be able to decide how they organise their controls, so that other control units than the compliance function could take on this responsibility.

[3] "*Investment firms should ensure that the compliance function takes a risk-based approach in order to allocate the function's resources efficiently. A compliance risk assessment should be used to determine the focus of the monitoring and advisory activities of the compliance function.*"

AMAFI therefore suggests amending paragraph 5(ii) of the technical advice so that the responsibility of the head of compliance be limited to reports that are prepared by the compliance function:

> "*ii. the **head of** compliance ~~officer~~ must be appointed and replaced by the management body or, as applicable, by the supervisory body; and must be responsible for the compliance function and for any reporting **that the compliance function must prepare according to** ~~required by~~ MiFID II;*".

- *Paragraph 5(iii)*

ESMA proposes that the compliance function be "*enabled to report on an ad-hoc basis directly to the management body*" on significant risk of failure by the firm to comply with its obligations under MiFID II.

While such a possibility is essential, the verb "*report*" used in this paragraph (translated in French as "preparing a written communication" in some ESMA's guidelines using that word) implies a degree of formalism that is not needed as long as the intended goal, which is that the management body be aware of such significant risks of failure, is achieved.

Thus, we suggest that the word "*report*" be replaced by "*inform*".

- *Paragraph 5(iv)*

This paragraph provides that the compliance function "*must not be involved in the performance of services or activities they monitor*".

Yet, the meaning of the expression "*be involved in*" is too wide, as the compliance function can be considered as being involved in the performance of services and activities they monitor only because they give advice to business units about such services or activities.

It would be more accurate to indicate that the relevant persons of the compliance function must not "*carry out services and activities they monitor*".

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?

Yes, investment firms based in France as well as their branches located in other Member States of the European Union already have in place arrangements that comply with the requirements set out in the draft technical advice. They must comply with regulatory provisions adopted by the French Financial Market Authority (the *Autorité des marchés financiers*) which implement the obligation, provided by Article 10 of the MiFID Implementing Directive, for investment firms to establish, implement and maintain procedures for the handling of complaints received from actual or potential retail clients.

These provisions set detailed requirements for investment firms concerning the information to be given to clients about their complaints-handling process, the organisation of this process, as well as the procedures for responding to complaints and following them up. They are complemented by an "Instruction" of the AMF that draws further on the specific expectations of the Authority (A*MF's Instruction 2012-07 on complaint handling:* AMF's Instruction 2012-07 on complaint handling).

AMAFI notes three important differences between the French arrangements and the ones proposed by ESMA in its technical advice:

- In terms of scope :
  - The notion of "*complaint*" is not defined in the draft technical advice, whereas it has been the subject of a debate in France when the provisions were designed;
  - The clients for whom the provisions are mandatory are retail clients (or potential clients) in France, in accordance with MiFID, whereas the technical advice does not make any difference between categories of clients.
- In terms of organisation, the draft technical advice requires setting up a complaints management function, whereas in France proportionality applies to this requirement. It also seems to imply that the compliance function should be in charge of investigating and analysing the complaints received by the firm, which does not form part of the French requirements.

On the first point, a common definition of the notion of "*complaint*" is necessary to prevent diverging interpretations between Member States. In this regard, it would be appropriate to take inspiration from the definition included in the guidelines for complaints-handling for the securities and banking sectors (*JC/2014/43*), issued in June 2014 by ESMA and EBA. A complaint could thus be defined as *"a statement of dissatisfaction addressed to a firm by a natural or legal person relating to the provision of an investment service provided under MiFID II or MiFIR".*

On the second point, AMAFI considers that the complaints arrangements obligations should be explicitly limited to complaints lodged by retail clients. Such a demanding and formal process makes sense in terms of client protection and client expectation for retail clients but is not suitable to professional clients and eligible counterparties whose complaints are dealt with through a different approach more suited to these clients. Requiring that such arrangements be developed for all clients would be ill-suited. We note that there is no legal basis for this extension in level 1, that this has not been discussed during the preparation of the texts and that no rationale for this extension is presented in the consultation paper.

Furthermore, such a broad scope would not be consistent with to the G20's high-level principles on financial consumer protection, issued in October 2011, which require investment firms to implement complaints-handling processes to handle complaints lodged by consumers, that is to say retail clients under MiFID II and MiFIR.

Therefore, it should be made clear that the arrangements concern retail clients, such that the first sentence of paragraph 1 would read:

> "*1. Investment firms should establish and maintain a complaints management policy for **retail clients** or potential **retail** clients.* (...)"**.**

If professional clients were nonetheless to be maintained within the scope of the Level 2 measures on complaints-handling, it should at least be taken into account that it is not always easy for firms, in particular for this kind of clients, to draw the boundary between commercial discussions and complaints. Consequently, it would be appropriate to introduce some flexibility in order to allow that processes for the handling professional clients' complaints differ from the process related to complaints lodged by retail clients.

This should be clearly indicated in the Level 2 measures, because requirements set out in these texts are generally implemented by Member States through very detailed and demanding requirements which are not suited for professional clients. In this regard, it would be necessary to at least limit to retail clients the scope of the obligation, referred to in the first sentence of paragraph 2, to publish the details of their complaints-handling process. Indeed, as according to the following sentence of paragraph 2, firms are required to provide this information to clients "*on request, or when acknowledging a complaint*", such information will ultimately be communicated to professional clients too, so that it does not have to be published ex-ante.

Hence, paragraph 2 would have to be reworded as follows:

> *"2. Investment firms should publish the details of the process to be followed when handling a complaint* ***for retail clients****. This information should* ***also*** *be provided to clients or potential clients, on request, or when acknowledging a complaint.* (...)"**.**

On the third point, whilst responsibilities for managing complaints should be clear within the firm, we do not believe a dedicated management function is appropriate for smaller firms. The proportionality principle should therefore apply in this respect. In addition, as mentioned above (*see Q4*), the compliance function should not be involved in carrying out operational tasks. Even if a firm could choose to assign the responsibility of the complaints management to the compliance function, each investment firm should be able to decide which function is in charge and there should be no incentive from the technical advice for the compliance function to carry out this task. If the objective is to reassure some Member States that managing the complaints process is compatible with the compliance function's missions, then it should be reworded.

For instance, in France, the regulatory measures adopted by the *Autorité des marches financiers* recommend investment firms to establish a process in two stages. The complaint received by the client facing staff is handled by them, and where it cannot be resolved by them, it is passed to a dedicated function, which does not have to be the compliance function.

Similarly, AMAFI does not agree with paragraph 7 under which the compliance function should be the one analysing all complaints. It should lean on the complaint management function for the analysis of the complaints themselves, while obviously providing advice on request, it should be informed by the complaints management function of the major failures and deficiencies identified through the complaints handling process and have access to reporting on complaints to use them as a source of relevant information.

Finally, as regards the wording of paragraph 7, AMAFI would like to draw ESMA's attention to the difficulties that may arise with regard to its translation, as the difference between analysing "*complaints*" and "*complaints-handling data*" is not clear. If this last expression were to be kept, ESMA should explain plainly what complaints-handling data refers to.

Consequently, AMAFI recommends:

1. Amending the first sentence of paragraph 3 to read :

> ***"Investment firms should have arrangements that enable complaints to be investigated. They should establish a complaints management function to the extent it is proportionate to their business, the nature and range of investment services and activities they carry out".***

2. Deleting the last sentence of paragraph 3. If this sentence was to be maintained in the final technical advice, it should at least be amended to read "*Firms may decide that the compliance function carry out this function*", to make it clear that this is an organisational decision made by the firm that is considered legitimate by the authorities.

3. Amending paragraph 7 as follows:

> "*7. ~~Investment firms compliance functions~~* ***The complaints management function*** *should analyse complaints ~~and complaints-handling data~~ to ensure that they identify and address any issues****, and should report to the compliance function on complaints and major failures and deficiencies identified***."

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.

No, AMAFI does not consider that other records should be added to the minimum list proposed.

Moreover, from AMAFI's perspective, it would be better that, contrary to ESMA's proposal, this list be exhaustive. It would ensure greater convergence of supervisory approaches within the European Union and prevent discrepancies between Member States.

The non-exhaustive nature of the list may encourage gold-plating by certain national competent authorities and create unfair regulatory distortions, while the purpose of Level 2 implementing measures is on the contrary to mitigate such risks. It would also add to the complexity and costs of recording arrangements in international firms.

Besides, discrepancies about the scope of the record-keeping obligation could have harmful consequences for investment firms operating in several Member States, as, through their branches, they may break data protection obligations of their Home State in order to respect record-keeping obligations implemented by the financial authority of the Host State (as it currently the case with some third country recording requirements such as some stemming from the Dodd Frank Act).

As a consequence, it would be more appropriate that ESMA elaborates an exhaustive list of records which have to be kept by investment firms, on the basis of the existing detailed Level 3 recommendations issued by CESR in 2007, complemented by additional types of records, if any, that a national competent authority deems essential to be kept.

In the same vein, and contrary to ESMA's proposal, in paragraph 6, to "*publish and update guidelines specifying the detailed content and the timing of the records* (...) *and providing for additional records*", AMAFI considers that provisions related to the content and the timing of the records cannot be set in guidelines, which are subject to a "comply or explain" mechanism (*see Question 3*), and have no legal value for a judge or a national data protection authority. They are essential provisions in particular because they relate to the treatment of personal data and must therefore be provided by the Level 2 implementing measures, for legal certainty and the consistent application of the European Union's law.

Finally, as regards the requirement in paragraph 2 for firms to keep "*in writing*" certain policies they have to maintain, as such policies are more and more stored electronically rather than in paper form, it would be more suitable to replace the expression "*in writing*" by "*on a durable medium*".

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

ESMA's proposal, in paragraph 2, that records be kept "*in an electronic format that facilitates the search of information where the nature and volume of records warrants such a format*" would create additional costs for investment firms. Even though it is difficult to quantify them with accuracy, it is nonetheless certain that this requirement would be excessively onerous for firms and that the costs would be disproportionate compared to its benefits. As investment firms still use some paper documents, a requirement to store records in an electronic format would force them to modify their storage systems and

generate extra costs that smaller firms might not be able to bear, such that this requirement would not be proportionate.

As the intended goal is to ensure that competent financial authorities have readily access to information they deem relevant, this can also be achieved through the requirement for investment firms to store their records in a way that they be accessible for competent authorities. This would be consistent with the current record-keeping obligation provided by Article 51(2) of the MiFID Implementing Directive, which requires that investment firms retain records "*in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that* (…) *the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;* (…)".

Besides, the condition related to the nature and volume of records to determine if they must be kept in an electronic format is too imprecise and would provide no legal certainty for investment firms. Diverging interpretations between Member States may result from this provision, as each national competent authority can have its own understanding of when the nature and volume of records requires that they be stored in an electronic format.

Therefore, we recommend amending paragraph 3 as follows:

> "*3. Investment firms* ***shall*** ~~*should*~~ *keep* ~~*at least*~~ *the records identified in the table below. These records should be* ***retained in a durable medium which allows them to be accessible and readily available for national competent authorities*** ~~*maintained in an electronic format that facilitates the search of information where the nature and volume of records warrants such a format*~~".

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?

The measures proposed by ESMA are not sufficient.

Indeed, a common practice for investment firms consists in banning the use of some devices they have provided to their employees, for purposes such as the conclusion of transactions or the provision of client order services related to the reception, transmission and execution of client orders. When they have implemented such a prohibition, investment firms do not record telephone and electronic communications made on these devices.

AMAFI therefore considers important that this possibility for investment firms not to record communications made with devices whose use they ban for the conclusion of transactions and the provision of client order services, be clearly mentioned in the Level 2 measures.

Besides, we consider that the following aspects of the draft technical advice should be amended:

- ***The involvement of the management body***

Paragraph 2 states that "*the management body has effective oversight and control over the policies and procedures relating to the firm's recording of telephone conversations and electronic communications*".

However, the inclusion of such a provision in the Level 2 measures is not legally justified. Neither Article 9 of MiFID II, which lists the missions and responsibilities of the management body, nor any other Level 1

provision mentions that Level 2 implementing measures should be adopted as regards the scope of the management body's responsibilities.

Furthermore, the responsibility of the management body with respect to procedures is broad with no focus on the ones related to record keeping. As stated in Article 9.1 of MiFID II, "*the management body define, approve and oversee:*
(a) the organisation of the firm for the provision of investment services and activities and ancillary services, including (...) the procedures and the arrangements for the provision of services and activities".

The focus on record keeping seems therefore out of proportion, all the more that no such focus on the other areas of responsibility of the management body is made in other sections of the draft technical advice.

As a consequence, we recommend deleting paragraph 2.

- ***The notion of "technology neutral"***

ESMA's proposal in paragraph 4 that investment firms ensure that their "*arrangements to comply with the recording requirements are technology neutral*" is unclear. Does this mean that the recording arrangements of the firm must be efficient whatever the nature of the equipment used to communicate is or that these arrangements have to be regularly upgraded in order for the firm to keep pace with technological innovation?

We suspect that the latter one is the right answer, due to the lack of feasibility and proportionality of the second option. However, considering the consequences of a misunderstanding in terms of obligations for investment firms, it would be useful that ESMA amends paragraph 4 in order either to at least explain the meaning of "*technology neutral*" or to change this wording to make it self-explanatory.

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

Yes, AMAFI agrees that in principle it is necessary for an investment firm to periodically ensure its recording arrangements are effective, but we do not agree with some of the requirements set out in the draft technical advice.

First, we are uncertain about the interpretation of paragraph 7 that states that the firm shall monitor "*the records of all transactions and orders subject to these requirements*". Such monitoring cannot be exhaustive because it would be disproportionate considering the amount of records concerned, taped conversations being not the least. This would be very costly for firms, with limited or no added benefit. Also, it should be emphasised that such monitoring can create great concerns within firms with respect to data privacy laws and may not be feasible in all firms (in France, it has to be approved by representatives of employees). At best, this monitoring could consist in a periodic spot check on a sample of executed transactions. As paragraph 4 already provides for firms to periodically re-evaluate the effectiveness of their arrangements and take remedial action, this additional requirement in paragraph 7 should therefore be deleted, to allow firms to organise their monitoring as they see fit.

Similarly, we are uncertain as to the requirement to comply with "*wider regulatory requirements*" as stated in paragraph 7 of the draft technical advice whereby investment firms should have in place "*requirements* (the word "*arrangements*" seems more appropriate) t*o ensure compliance with the recording and record-keeping requirements in accordance with Article 16(7) and Recital 57 of MiFID II and their wider regulatory requirements*". While it can be understood from the wording of this sentence that the regulatory requirements referred to are only the MiFID II implementing measures, this is not clearly specified. If it were to encompass third country requirements related to record-keeping, AMAFI is of the opinion that this is not appropriate. These are out of the scope of MiFID II, so that level 2 measures cannot impose

compliance with them. Additionally, some national data protection authorities consider that it is disproportionate for an investment firm to systematically record communications if the purpose of the recording is only to be compliant with third country regulations (as for e.g. the ones imposed in the context of the US Dodd Frank Act). Hence, the notion of "*wider regulatory requirements*" should be replaced by "*MiFID II implementing measures*" or, if it is certain that all the national data protection authorities will authorise investment firms to record communications on a permanent basis in order to comply with third country requirements, by a wording precise enough to remove any ambiguity.

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?

No, it does not seem necessary to include additional items of information.

Besides, while the wording of paragraph 9 implies that investment firms are compelled to record relevant face-to-face conversations they have with their clients by using written minutes or notes, the use of minutes and notes is only an option granted to investment firms. Indeed, MiFID II states that "*the content of relevant face-to-face conversations with a client may be recorded in written minutes or notes*" (MiFID II, art. 16(7)), so that investment firms can record those face-to-face conversations by using other means.

In addition, as regards the notion itself of "*relevant face-to-face conversations*", it should be indicated that these conversations are only those where orders are placed by clients. Actually, while the MiFID II recording obligation encompasses communications relating to transactions or the provision of client order services, whether or not they result in the conclusion of a transaction or the provision of client order services (*MiFID II, art. 16(7), § 1 and 2*), the provision on the recording of face-to-face conversations is limited to conversations where orders are placed by clients (*MiFID II, art. 16(7), § 7*).

Consequently, as Level 2 implementing measures should be consistent with Level 1 provisions, the first sentence of paragraph 9 should be amended as follows:

> "*9. **Where an** ~~I~~**i**nvestment firms ~~shall~~ record**s** in written minutes or notes ~~all relevant~~ information related to relevant face-to-face conversations **where orders are placed by** ~~with~~ clients**,**~~. T~~**t**he information recorded is at the discretion of the firm but must include at least the following:*"

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

No, it is not useful that clients sign the written minutes or notes related to relevant face-to-face conversations they had with an investment firm.

As the face-to-face conversations which have to be recorded are those related to transactions concluded by the firm or to the provision of client order services, clients will ultimately receive a confirmation of the execution of their orders, or at least a report on the service provided by the firm.

Besides, it is not clear what the purpose of this signature would be, and if it would really enhance client's protection. Indeed, the client's signature could generate confusion as to the legal quality of the written minutes or notes. They could be seen as a client's agreement for a course of action, and thus be binding for them, while their purpose is solely to transcribe the content of a meeting. In this regard, the requirement for clients to sign the written minutes could on the contrary undermine their protection and produce mistrust from clients. The legal validity of a transaction or service should be subject to the relevant contractual arrangements between the firm and the client and the relevant civil law provisions and thus should be independent from these minutes.

Finally, such a requirement would be a heavy administrative burden for investment firms, as it would generally be difficult to present the minutes or notes to clients at the end of the meetings. The written

minutes or notes would thus have to be sent to them later by post mail or e-mails, therefore making it more difficult for firms to obtain the client's signature, especially in an international business context. This would be likely to result in a high rate of missing signatures and a cumbersome process to recover them, without a clear benefit.

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

No. Even though AMAFI agrees with most of ESMA's proposals related to the storage and retention of records, we recommend amending the requirement to store records "*in a medium so that they are accessible and readily available to NCA's on request*", provided in paragraph 11 of the draft technical advice.

Indeed, it may not always be feasible for mere technical reasons, to ensure that records be immediately available. A more proportionate requirement would therefore be that records be stored in a medium so that they are accessible and available "*in due time*" to national competent authorities on request.

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?

Due to the very short timeframe left for consultation, AMAFI is unable to answer this question.

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.

- ***General comments***

No, the issue is not so much the nature of the market but the nature of the financial instruments themselves.

- Product governance requirements should apply to in-house products, i.e. to financial instruments that are designed and/or issued by the investment firm on which the firm has some amount of control. The investment firm cannot be required to apply all the governance arrangements set at level 1 to products it does not have control over, such as shares or bonds issued by a third party.

- The concepts of manufacturing and distribution apply easily to a retail context for products such as funds or structured products; but they are not adapted to vanilla flow instruments such as bonds and equities for which there is no manufacturer as such (we assume that the intention is not to consider that the corporate issuer is the manufacturer), to relationships between regulated professionals where there is no distribution (for e.g., execution services on flow products or reverse enquiries from clients), to secondary markets where there is no distribution but mere trading.

AMAFI is of the opinion that the scope of the product governance requirements is unclear at level 1, and made larger and all encompassing by the draft advice, instead of being clarified with a view to ensuring workability.

Paragraph 14 of the level 1 text indicates that the delegated acts "*shall take into account:*

> *(a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions;*
> *(b) the nature and range of products being offered or considered including different types of financial instruments;*
> *(c) the retail or professional nature of the client or potential clients*"

The proposed advice though does not comply with this requirement as it makes no difference between services, types of clients and financial instruments.

AMAFI is of the opinion that product governance, because it does not relate only to the product approval process, but also to aspects more specific to certain types of services and financial instruments, should not be tackled in general terms and should be looked at distinguishing between those. At a minimum, proportionality should be introduced in the draft advice, so that not all requirements of the draft advice need applying, depending on the service provided, the type of financial instrument concerned and/or the type of client concerned. This is because some of these requirements go beyond the mere approval process of the product and are workable only in certain situations, such as the definition of a distribution strategy, the determination of a granular target market, the scenario analysis, the charging structure, the regular review of existing financial instruments, the information to distributor, the design to meet the needs of the target market, the compatibility of distribution compatible with target market, the compatibility with clients' needs.

It should also be indicated for the sake of clarity that these requirements do not apply to the sale of financial instruments to eligible counterparties as Article 24.2 is not applicable to those.

As regards financial instruments in scope, ESMA could make a few clarifications inferred from some of the wording used at level 1:

- Article 24 states that "*investment firms which manufacture financial instruments (...) shall ensure that those financial instruments are designed to meet the needs of an identified target market (...)*". If the financial instrument needs to be designed to meet the needs of a target market then issuance of vanilla bonds and shares should not be in scope: these instruments are not primarily designed to meet investors' needs, but rather to meet the financing needs of their issuer. Their design should not primarily focus on the needs of a target market. This turn of phrase is an indication that what is targeted here are products designed for the purpose of investment, before any other purpose.

- Articles 16 and 24 use the expression "*an investment firms which manufactures financial instruments for sale to clients*", assuming a logic whereby the firm produces the financial instrument, with a view that once produced, it will be sold to a number of clients. It hints at products which are on the shelves and are ready for distribution. The term "*manufacturer*", not defined at level 1, should be construed in the light of this logic. AMAFI therefore objects that OTC products should be in scope of this requirement without proportionality. These financial instruments are not designed without a demand from the client; they are not designed for further distribution but to meet specific client's needs. Although the types of OTC product concerned should obviously undergo an approval process internally, they are not of a nature that would require application of the other requirements pertaining to a manufacturer-distributor relationship.

As regards investment services, AMAFI does not agree that "*product governance arrangements should be considered broadly*" and that "*they should also apply, where relevant, to the provision of investment services*". **Nowhere in Articles 16 and 24 is there an obligation applicable to investment services, the product governance arrangements only apply at level 1 to financial instruments. There is no mandate for the advice to go beyond the level 1 text and extension to investment services should be removed.**

- *Specific comments*

  - *Paragraph 1*

The terms "*investment products*", not defined at level 1, should be replaced by "*financial instruments*" which are the terms used in Article 16 and Article 24, which target firms who "*manufacture financial instruments*", not firms who manufacture "*investment products*", some terms which, by the way, are not defined in Article 4 (Definitions) of the Directive.

The definition provided for a manufacturer is too large (see previous comments). As is, it could also encompass distributors who "create" a product for their clients by deciding on its features and ordering its production to an investment bank.

Footnote 32 is incomprehensible for two reasons:

- investment services are not "*distributed*"
- investment services are out of scope of the product governance requirements set in Articles 16 and 24.

  - *Paragraphs 2 and 3 – Conflicts of interest*

The market positions of the firm should not be relevant, i.e. for a financial institution to play properly its role, it is essential that it can build and hold positions opposite to the ones of its clients. And clients can have views different from the investment firm. The potential conflict between own account activities and client's interest does not hinge on market positioning. It is dealt with via organisational arrangements to ensure separation of own account activities with clients'. The existence of potential conflicts of interest should not result in preventing perfectly legitimate business and answering clients' needs as long as these conflicts are managed so that they do not affect clients' interests. This requirement is already covered by Article 23 of MiFID II.

By the way, if this were to be kept, it is not the "*product design*" that should not adversely affect clients but the product's features or characteristics.

Paragraph 3, conflicts of interest should be identified during the product approval process, not each time "*a product is generated*".

  - *Paragraph 5 – Management body*

Paragraph 5 allocates specific responsibilities over product governance process to the management body.

However, the inclusion of such a provision in the Level 2 measures is not legally justified. Neither Article 9 of MiFID II, which lists the missions and responsibilities of the management body, nor any other Level 1 provision mentions that Level 2 implementing measures should be adopted as regards the scope of the management body's responsibilities.

Furthermore, the management body should be informed of material issues and failures and should act to remediate them but should not be hailed into the day-to-day operations of the firm.

In addition, the responsibility set in the level 1 text is broad and not focused specifically on product governance. As stated in Article 9.1 of MiFID II, "*the management body define, approve and oversee:*
(a) the organisation of the firm for the provision of investment services and activities and ancillary services, including (...) the procedures and the arrangements for the provision of services and activities".

The focus of the draft advice on the responsibility of the management body on product governance seems therefore out of proportion, all the more that no such focus on the other matters covered by the management body is made in other sections of the draft technical advice.

On another point, AMAFI considers that it is not the role of the compliance function to report on new product approvals or the products manufactured by the firm. The compliance function will give its advice during the approval process but it does not own the product range of the firm. The compliance function acts as a second line of defence, this position should not be jeopardised by involving it in matters that are under the direct responsibility of the business. It is the businesses in charge who should prepare and communicate theses reports to the management body.

As a consequence, we recommend deleting paragraph 5 altogether.

- *Paragraphs 7 and 8 – Definition of target market*

AMAFI disagrees that firms should identify negative target markets. This is contrary to the level 1 text and is disproportionate in terms of feasibility. In addition, the requirement in paragraph 8 to define the target market at a sufficiently granular level aims precisely at avoiding distribution outside the target market. The sentence "*As part of this process,* (...) *is not compatible*" should thus be deleted

We note however that there is no clarity, neither at level 1, nor in the draft advice, as to the consequences of a distributor selling the product outside the target market. AMAFI understands that this is still permissible, which is necessary to allow enough flexibility to adapt to client's specific situations, but that, in such a case.

- *Paragraph 9 – Scenario analysis*

Requirements in this paragraph are a good illustration of the need to apply proportionality or to distinguish between financial instruments, categories of clients and investment services because they may not be workable at all. The requirement to undertake scenario analysis (which would need to be more precise, i.e. does it aim at scenarios during the life of the product, or at maturity?) is relevant for the more complex products were several market factors can intervene but unworkable for flow products or vanilla ones. For example, AMAFI does not see the value of such a requirement if it were applicable to a simple OTC option entered into with a professional client.

It should only be applicable to the sale of products to retail clients. It should be justified to assume that professional clients, due to their knowledge and experience, are sufficiently informed on the types of costs and fees commonly connected to their transactions and therefore are in a position to ask for the relevant information.

Besides, scenario analysis should be undertaken during the product approval process, not for each new product generated.

- *Paragraph 10 – Charging structure*

It is not clear what investment firms are required to do, i.e. what does it mean for costs and charges to be "compatible" with the needs, objectives and characteristics of the target market? It cannot mean that the level of costs and charges should be adapted to each client!

It is enough that clients will be provided with the overall costs and charges upfront of their investment – they then make the decision to invest or not. Sub-paragraph i. should be deleted.

Sub-paragraph iv. that requires the charging structure to be appropriately transparent to the target market is a duplication of the requirements related to of requiring transparency of costs and charges, dealt with in section 2.14 of the CP. This should be deleted.

- *Paragraph 11 – Distribution*

AMAFI does not agree that manufacturers should tell distributors what is the appropriate "*sales channel for the product*". The manufacturer will provide the necessary information to understand the product and sell it properly, will define the generic target market, it is in the distributors' competency and responsibility to decide on this basis which channels they should use to reach their target market.

AMAFI does not agree that manufacturers should inform distributors about their internal product approval process. Distributors should have all the necessary information about the product, including its risks; they do not need to have the recipe followed by the manufacturer to generate the product, which is confidential information. When carrying out their assessment of the product, distributors can request additional information if needed.

- *Paragraphs 13 to 15 – Products review*

The obligation to review products "*prior to any further issue or re-launch*" is disproportionate. As long as the product has been approved, new issues of this product can be carried out without going through a new review if the features remain the same. Regular review should be sufficient. It should be specified that a "re-launch" refers to a product having been through an approval process but not issued for a certain period of time since it was last sold.

The products review should be organised by family of products, it should not have to be carried out for each product sold. Furthermore, it should only apply to products currently marketed, not to products not marketed for a period of time.

More generally, the requirements related to product review are another example of the incompatibility of some of the draft advice obligations with some products' features. For example, such a review would be useless if applied to flow products sold to professional clients. For this type of products, it should be possible for firms to carry out a review only when a failure or issue arises. It seems to us that this section of the draft advice is written with structured products in mind, which would make sense. If it is the case, then it should be specified. If not, flexibility should be introduced to allow a workable application to other products.

It seems that paragraph 14 is also targeting structured products but it is not clear what is expected from firms. As regards sub-paragraph i., barriers and thresholds are a common feature of theses products; they are part of the product description, their impact on the final pay-off is described and the scenario analysis will show how they will affect the pay-off of the product (refer PRIIPS' requirements in this respect). When a crossing has occurred, and the firm has identified it, what should it do?

The same question arises in relation to points ii. and iii: once these are identified, what is expected from the firm? Is this analysis for the purpose of adapting the features of the product for further issuances or is it to inform clients and if so, on which course of action and under what legal context (investment advice)? If the firm can ensure that its products are properly designed and described to clients, it cannot ensure that they will all have a positive performance... The benefit of this requirement should be carefully weighed against its costs and workability because continuously identifying events that would affect the potential risk or return expectations of the product could be almost impossible to implement given the number of products and their diverse characteristics.

As for paragraph 15 iv., we reiterate the comments made on the "sales channel" in paragraph 11. It should not be the manufacturer's responsibility to revise the sales channels used by the distributor.

- *Paragraph 16*

Same comment as above, services should not be in scope.

- *Paragraph 17*

Footnote 34 should be part of the advice itself, otherwise it is difficult to understand the relationship between the target market of the manufacturer and the obligation for the distributor to offer products compatible with "*an identified target market*", which is not the same as the one defined by the manufacturer.

AMAFI considers it is disproportionate to have to consider the "*circumstances and needs*" of the clients the product will be offered to. This is similar to a suitability test since circumstances and needs are specific to each client, whereas for a number of services, only the appropriateness test will apply. We agree that distributors should ensure they offer the products to clients compatible with the target market, but this should not translate into overly prescriptive requirements, inconsistent with other requirements of MiFID.

- *Paragraph 21*

This links with our comment on paragraph 15. This aspect of the draft advice raises uncertainties as to the split of responsibilities between the manufacturer and the distributor.

Manufacturers and distributors already exchange information on the sale of products; they also set contractually some of the information that should be exchanged. Most of the time, this helps adjust the product for a further issue. Although we are not opposed in principle to a regulatory requirement, its effect should not be to transfer to the manufacturer the responsibility to make sure products are sold properly.

It should be highlighted as well that such requirement would be inapplicable with non-EU distributors unwilling to subject themselves to this obligation. This should be explicitly provided for in the draft advice, as is done for relationships with non-EU manufacturers in paragraph 6.

- *Paragraph 24*

Same comments as for paragraph 5.

- *Paragraph 26*

If the manufacturer is a non-MiFID firm, it is disproportionate to require from distributors that they distribute the product in accordance with the target market, since such target market will precisely not have been defined by the manufacturer (except if it has agreed to do so under a contract). It is enough to require that they ensure that the information obtained from the manufacturer is of a "*reliable and adequate standard*".

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?

Yes, to the extent that such a requirement could help EU distributors obtain the necessary information from the manufacturer, even though the manufacturer will not be bound by MiFID requirements.

Paragraph 6 should be more precisely written to make clear that the "*collaboration*" refers to the relationships between an EU distributor and a non-EU manufacturer.

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?

It is not clear what the terms "*experience with the product*" cover. On the communication of information to the manufacturer by the distributor, see our comment on paragraph 21.

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)?

Apart from discussing the issue with the distributor to agree remediation steps, the impact is likely to be commercial as is already the case today.

When manufacturers identify that products are not sold as intended, the current practice is already to reconsider the terms of the relationship with the distributor.

AMAFI does not think however that this should become a regulatory obligation. The various obligations imposed by MiFID II and the level 2 text are indeed such that the incentive to reconsider commercial relationships that do not work as intended will be greater.

Additionally, we reiterate that such flow of information should not result in the manufacturer being considered responsible for the actions of the distributor, who remains fully responsible for the way it provides investment services to its clients. The manufacturer should be expected to take corrective actions as appropriate, but must not incur liabilities for the distributor's deficiencies.

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)?

If the misjudgement is the result of a flaw in the information provided by the manufacturer or in the product itself, then it is interesting that the distributor informs the manufacturer, so that the product or target market can be adjusted if need be or, at the extreme, the product not sold anymore.

In any case, the potential client impact should be assessed to decide on the best course of action.

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.

No. As mentioned in our comments of paragraphs 1, 17, 6, 21, 26, requirements are not always clear as to who they apply to. See also in question 14 our general comments on the scope that is unclear.

In addition, the link between these requirements and PRIIPS is not clear, in terms of scope but also in terms of obligations. This creates a complex regulatory environment for manufacturers and distributors. For example, the obligation to provide scenarios already exists under PRIIPS, so that complying with PRIIPS should deem compliance with MiFID in this respect.

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.

No. AMAFI is of the view that the proposed requirements are more than exhaustive because they would apply too extensively as proposed, without distinguishing between financial instruments, investment services and categories of clients.

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

If the scope of the requirements is not refined, and even if it is, we believe that significant costs would be incurred by investment firms, if only in terms of administrative processes and controls to implement.

For example:

- The requirement of performing scenario analysis can be very costly for manufacturers depending on its scope.
- The review of existing products can be extremely costly depending on ESMA's final expectations.

We note that French firms are already subject to prescriptive rules in their relationships with distributors and that these requirements will come as an addition.

AMAFI is not in a position to give an estimate of these costs within such a short consultation period, and its members are not able to carry out such an evaluation considering the uncertainties surrounding the exact obligations that will apply.

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?

No, AMAFI does not agree with the proposal for investment firms to establish and maintain a separate client assets oversight function. Under MiFID 1 (and in particular under Article 6 of MiFID 1 Implementing Directive), investment firms have an obligation to establish and maintain a permanent and effective compliance function which operates independently and ensures *inter alia* that the firms complies with its obligations under the Directive, such obligations including those relating to the safeguarding of client assets.

Under MiFID II, similar level 2 provisions are proposed by ESMA in its Consultation Paper which provides as follows (*Consultation paper, 2.3 Compliance function, pp. 18-22*):

- « *Investment firms should establish and maintain a permanent and effective compliance function that operates independently and that has the following responsibilities:*
  i. to monitor on a permanent basis and to assess, on a regular basis, the adequacy and effectiveness of the measures and procedures put in place in accordance with subparagraph 1 of Article 6(1) of the MiFID Implementing Directive, and the actions taken to address any deficiencies in the firm's compliance with its obligations » (*Draft technical advice, § 3(i)*); and

- « *In order to enable the compliance function to discharge its responsibilities properly and independently, investment firms should ensure that the following conditions are satisfied:* (…)

ii. the compliance officer must be appointed and replaced by the management body or, as applicable, by the supervisory function; and must be responsible for the compliance function and for any reporting required by MiFID II » (Draft technical advice, § 5(ii)).

Therefore, AMAFI does not see the need to create a new and separate function responsible for matters relating to the firm's compliance with its obligations regarding the safeguarding of client instruments and funds. Having said that, should the principle of allocating these responsibilities to a specific function be maintained, it should be an option for all firms, and not only for those which could request the application of the proportionality principle, to decide for themselves whether it is appropriate for them to attribute these responsibilities either to a separate dedicated function or to the compliance function or to another function of the firm.

In addition, it would be very useful if ESMA could be more specific about the content of the mission of the officer in charge of supervising the compliance of the firm with its obligations regarding the safeguarding of client instruments and funds. At this point, AMAFI feels that the extent of its responsibilities is not sufficiently defined. As regards particularly the annual report to be established under Article 20 of the MiFID 1 Implementing Directive, if it were to be maintained, the requirement in that respect should be standardised to the extent possible so as to ensure a better level of harmonisation throughout the EU.

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?

As a professional organisation, AMAFI is not in a position to provide an estimate of the cost implications for its members of establishing and maintaining such a function as this cost may be quite different from one firm to another. It is quite certain however that this cost would be significant which is problematic given that the creation of such a function does not appear to be justified in any way.

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?

AMAFI disagrees with ESMA's attempt to narrow the possibility for investment firms to have TTCA arrangements with non retail clients in the upcoming MiFID II implementing provisions.

Article 16(10) of MiFID II prevents all use of TTCA by any party for retail clients. No such prohibition is set for non retail clients. Further provisions pertaining to TTCAs with non retail clients should not be introduced in such implementing legislation as there is a European directive dedicated to collateral. The scope of the Directive 2002/47/EC provides a comprehensive framework for the recognition and enforcement of ownership rights in collateral arrangements between non retail counterparties. AMAFI considers therefore that including provisions relating to TTCAs with non retail clients in the MiFID II implementing legislation has no legal basis in the light of the MiFID II level 1 legislation but it might also be very confusing as it would inevitably create fragmentation and partial overlaps in the European regulatory framework.

AMAFI would also like to stress out that under Article 16 paragraph 11 sub-paragraph 2 of MiFID II, Member States may, in exceptional circumstances, impose additional requirements on investment firms concerning the safeguarding of client assets, provided they are objectively justified and proportionate and any such requirements, which they intend to impose, must be notified promptly to the European Commission. There is no reason therefore to preempt the possibility for Members States to address specifically this concern by defining justified and proportionate "Level 2" measures, when appropriate.

AMAFI considers also that ESMA's proposal if implemented would result in treating professional clients and eligible counterparties in the same manner as retail clients and that would be inconsistent with the current tiered system of client classification set out in MiFID. Indeed, professional clients and eligible counterparties should not be submitted to some form of suitability test, as proposed by ESMA and furthermore, the criteria which are proposed would be inadequate in the context of high volume business involving volatile markets, daily yet unpredictable margin calls, changing volumes in clearing and settlement.

Finally, AMAFI would like to stress out that imposing at this stage new general requirements when concluding TTCAs with non retail clients would limit the investment firms' options for managing and mitigating their credit risk vis-à-vis non retail clients and is likely to lead to an increase in the cost of credit provided to such clients. In particular, collateral transferred in this way is often used by the investment firms to lower the cost of funding obtained in support of the client' activities. Any such change would be likely to have a negative impact on the ability of the professional clients to negotiate the use of their assets and liabilities as they think appropriate. For instance ICMA recently issued a report that explained the crucial need for collateral fluidity[4]. The options envisaged by the ESMA would be contrary to the needs of the European economy.

Consequently, AMAFI believes that the new requirements envisaged by ESMA are not appropriate. It would be more appropriate at this stage to focus on how to improve the transparency of information with non retail clients in the context of transactions involving the provision of collateral.

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?

No, AMAFI does not agree with ESMA's proposal. For a more detailed answer, please refer to AMAFI's response to Question 24.

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?

No, AMAFI does not agree with ESMA's proposal. For a more detailed answer, please refer to AMAFI's response to Question 24.

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?

Please refer to AMAFI's response to Question 24.

[4] "Collateral is the new cash: the systemic risks of inhibiting collateral fluidity" An initiative of the European Repo Council April 2014

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?

No, AMAFI considers that no further measures are needed. The current legal framework is sufficiently clear to guarantee that there is no possible confusion between the prohibited TTCA arrangements and other securities financing transactions that could be concluded under Article 19 of the MiFID Implementing Directive

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?

No, AMAFI does not agree with ESMA's proposal.

Investment firms that engage in securities financing transaction (SFTs), such as securities lending and repos, will face stricter rules as soon as the proposal for an SFT Regulation put forward in January 2014 by the European Commission is adopted. The proposal was designed to enhance transparency and forms part of a wider package of reforms to address the risks posed by shadow banking. In this context, investment firms will be subject to increased disclosure requirements. Indeed, in order to increase investor awareness of the risks associated with SFTs, counterparties will need to disclose additional information to investors about their use of SFTs, as well as other financing structures, over and above current requirements under the AIFMD and the UCITS Directive. The mechanism for investor disclosure is via the prospectus or other pre-investment documentation and within annual reports.

Furthermore, a definition of re-hypothecation should be clarified and more stringent rules should be adopted through Article 15 of the SFT draft regulation. Indeed, counterparties that receive financial instruments as collateral would only be permitted to re-hypothecate them with the express consent of the providing counterparty, once it would have been informed of the inherent risks, and only after the collateral has been transferred to the counterparty's account.

Consequently, besides the fact that the proposed measures go beyond the MIFID II requirements as underlined above (*see Q24*), AMAFI does not see any added value in specifying additional requirements in the MiFID II "Level 2" measures since the scope of the draft SFT Regulation will apply to all counterparties in SFT markets, investment funds as defined by Directives 2009/65/EC and 2011/61/EU and any counterparty engaging in re-hypothecation**.** Not only there would not be any any added value in dealing with these matters in MiFID II but in doing so, we can see a risk of overlapping, regulatory arbitrages and loopholes - since the scope of the draft SFT Regulation will apply to all counterparties in SFT markets, investment funds as defined by Directives 2009/65/EC and 2011/61/EU and any counterparty engaging in re-hypothecation. In addition, the SFT Regulation would cover all financial instruments provided as collateral as listed in Annex I Section C of MiFID II.

Having said that, if ESMA were to go ahead with its proposal, AMAFI agrees with the draft technical advice set out in § 8 as it is clear that the requirement should not be the same for retail and non retail clients. For the latter, it is important to have flexibility in the way the consent of the client is evidenced. It would be very useful in that respect if ESMA could explain better what is intended by "*recorded in writing or in a legally equivalent alternative means; and affirmatively executed by the client.*" It could confirm for instance the interpretation of the word "*recorded*" given by IOSCO (see Recommendations Regarding the Protection of Client Assets, IOSCO, January, Principle 6, page 6 indicating that "*the term "recorded" does not prescribe a legal requirement of form. A "record" is any evidence permissible under national law*").

For non retail clients, it is important also to provide that their consent may be given through a framework agreement, and that it is not required to provide such consent transaction per transaction.

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?

No, it is not suitable to do so. Please refer to AMAFI's response to Question 29. Generally speaking there is no reason to apply to non retail clients the same rules as those applied to retail clients. As indicated above, this would be inconsistent with the current tiered system of client classification set out in MiFID I and maintained in MiFID II. Clearly, the rules applicable to professional clients (and eligible counterparties) should be more flexible.

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?

N/A

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?

Please refer to AMAFI's response to Questions 29 and 30.

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.

Yes, there is no doubt that the requirements proposed by ESMA would result in significant additional costs. However, as a professional organisation, AMAFI is not in a position to provide, on behalf of its members, an estimate of such costs which may vary significantly from one firm to another.

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?

AMAFI agrees with the proposal to consider diversification of client funds as part of the due diligence requirement when depositing clients funds (even though it does not think it is here a question of proportionality). This means that the investment firm should consider in each case whether in the particular circumstances, diversification is appropriate and to what extent it is. There should not be any quantum imposed in this respect. It is the responsibility of the investment firm when carrying out its duties to make the right assessment as to what is best for the client in the circumstances of the case.

It is a matter of due diligence of the investment firm to provide the best possible credit institution for holding client's cash, and selecting a credit institution to hold client cash funds should not be a balancing exercise between quality and quantity. The overall EU regulatory framework (considering CRR/CRD framework, DGS framework, and current MiFID "Level 2" provisions) guarantees that all EU credit institutions have in place appropriate organisational arrangements to provide for the highest standards of investor protection.

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

As a professional organisation, AMAFI is not in a position to respond to this question on behalf of its members, which does not mean that there would not be significant cost implications to them.

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?

No, an intra-group limit should not be imposed. AMAFI considers that imposing at EU level an intra-group deposit limit of 20% in respect of client funds is not well founded. Such diversification rules appear to correspond to the solution proposed by the FCA in its 2010 consultation paper (*CP 10/09*). The appropriateness of such rule for achieving better client asset protection is problematic under a number of angles and in particular, there is a strong case for holding cash with a bank group if it has a better credit rating than other banks and/or there are benefits in terms of coordination, or other efficiencies. FCA itself acknowledges these factors at paragraph 3.9 of its consultation paper 10/09 and we urge the European Commission and ESMA to reconsider their significance more carefully.

There are several safety concerns and operational issues with the diversification of client cash into multiple different credit institutions including additional costs and unnecessary complexity layer in client's cash operations (moving funds from one account to another if needed, or incurring costs for overdrafts if needed).

From a general perspective, the choice of the credit institution in which to place client funds should be informed by due diligence especially with regard to criteria relating to the stability and soundness of the credit institution in question, such as prudential soundness, credit rating, quality of supervision and overall resilience.

As mentioned above, it is a matter of due diligence of the investment firm to provide the best possible credit institution for holding client's cash, and selecting a credit institution to hold client cash funds should not be a balancing exercise between quality and quantity. Not only the overall EU regulatory framework guarantees that all EU credit institutions have in place appropriate organisational arrangements to provide for the highest standards of investor protection but also, the current MiFID implementing directive already provides in Art. 16 (1) (e) that client fund must be held in separate cash accounts from the accounts of the investment firm. The client cash funds would be clearly identifiable in the event of insolvency of the investment firm which deposited the funds for its clients with a credit institution.

Given the difficulties with imposing a specified limit, AMAFI considers that it would it be more valuable to ensure that all investment firms strictly comply with the current MIFID implementing directive which requires that:

- (i) the client must be informed that a firm is holding, or intends to hold, client money with a bank in the same group, and;
- (ii) the client money must be moved to a non-group bank if the client so requests, and,
- (iii) the firm apply due diligence procedure in selecting and monitoring the group banks used which are "at least as rigorous" as the procedures applicable to the selection and monitoring of non-group banks.

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?

AMAFI is not in a position to respond to this Question.

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

N/A

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

As a professional organisation, AMAFI is not in a position to respond precisely to this question on behalf of its members. However, most likely, the cost implications of this proposed diversification would be significant for the firms

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?

Please refer to AMAFI's response to Question 36.

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?

As a professional organisation, AMAFI is not in a position to respond precisely to this question on behalf of its members. However, most likely, the cost implications of this proposal would be significant for the firms.

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?

Yes, AMAFI agrees 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, unless this is required or permitted by local law.

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?

Yes, AMAFI agrees with the terms of § 14 of the draft technical advice which provides that the firm must disclose to the client when it is obliged to enter into a wide ranging lien so that the client is informed of the risks associated with these arrangements.

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?

As a professional organisation, AMAFI is not in a position to respond precisely to this question on behalf of its members. However, most likely, the cost implications of this proposal would be significant for the firms.

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?

Yes, AMAFI agrees with this proposal.

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?

Yes, in principle, AMAFI agrees with the proposal provided that the "other equivalent measures" are reasonable and not disproportionate or impractical.

In some third countries where segregation is not a statutory requirement, it could be proposed that investment firms be required to make their best efforts to put in place this segregation when negotiating their contractual arrangements with their sub-custodian.

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?

Please refer to AMAFI's response to Question 46.

Q48. What would be the on-going costs of making disclosures to clients when relying on 'other equivalent measures'?

AMAFI is not in a position to respond to this question on behalf of its members.

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:

In the context of the CSDR adoption, ESMA has just launched a public consultation to provide its technical advice to the EC. The technical advice covers largely the questions regarding the misuse of financial instruments, as it questions the market players notably on measures to prevent settlement fails of financial instruments, guidance regarding the implementation of buy-in regime which will be the norm (i.e. application of penalties for a participant which fails to deliver financial instrument), situations where a buy-in will not be possible (securities lending etc.).

AMAFI would therefore recommend that ESMA address this issue by closely taking into consideration the results of the CSDR discussion paper regarding the best way to limit the misuse of financial instruments.

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?

Yes, measures that address the proposals in this chapter are already in place to a large extent in France.

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?

Yes, AMAFI agrees with that. It would like to stress out however that the information to be made available very quickly to the competent authorities and insolvency practitioners are an important concern which is currently under discussion within the FSB and CPSS/IOSCO working groups. Therefore, AMAFI would recommend waiting for the publication of the final reports of the working groups in question in order to consider their proposals and thus ensure homogeneity throughout the chain of custody at international level in respect of the information to be communicated.

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

Please refer to AMAFI's response to question 51.

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?

N/A

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.

AMAFI agrees with an annual review, but it should be made clear that such review may not necessarily result in amending the policy.

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.

No.

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.

Yes, the distinction is sufficiently clear and it has worked well since MiFID was implemented, allowing distinguishing between investment research and other types of general recommendations that are not research, such as sales commentaries or trading ideas.

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.

The AMF has recently published guidance (Position-recommendation n° 2013-25) promoting arrangements whereby financial analysts should be physically separated from traders and sales persons, except when the size of the firm does not allow such separation and the firm has other arrangements in place.

A European position on this subject would help harmonisation.

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?

AMAFI's response covers both equity and bonds offerings.

No, there are no additional details or requirements that appear necessary to be included. However, several aspects of the draft technical advice need amending to be workable.

First, there are some tacit assumptions governing this draft to which AMAFI objects because they are contrary to current practices in underwriting and placing activities:

- Investment firms do not decide on the issuance process independently from the issuer, they do not have power over the process that is greater than the issuer's. The issuer is an active participant in the process; the investment firm and the issuer work as a team on the offer because they both have interest in its success. This involves a close relationship with the issuer for the firm providing corporate advice.

- Investment firms are not necessarily involved in the process end-to-end; in a number of situations, they do not have a role other than placing and/or underwriting a portion of the securities, they are not financial adviser or in charge of the structuring of the issue and hence they participate in a position that is not as close to the issuer as the draft advice seems to imply in terms of information requirements to the issuer.

  Indeed, in practice, many firms of the syndicate group are not involved in the preparation of the issue. They solely act as placing agents and/or underwriters, appointed to assist in the placement or to underwrite, and do not provide corporate finance advice to the issuer.

Typically, the issuer first determines either alone or with a limited number of investment firms (often one or two), acting as corporate finance advisers, the main characteristics of the issue and then enters into agreements, sometimes very shortly before the launch of the placement with other firms whose role is limited to placing and/or underwriting the operation (it is not rare, for instance, that out of 15 firms in the syndicate, 12 are called the night before the placement is due to be launched at 8 am (or even just before 7 am of that same morning) to do strictly the placement and/or the underwriting of the operation and nothing more). Being involved so late in the process, those firms cannot by definition provide any advice or have a significant influence on the shape of the issue.

As a consequence, a clear distinction should be made in the MiFID II Level 2 measures between investment firms participating in an underwriting and placing operation, based on their degree of involvement in the preparation of the operation, and whether or not they provide advice to the issuer. In particular, as a matter of principle, it appears essential that the requirements related to the advising to undertake an offering and the provision of "*corporate finance advice*", set out in paragraph 3 of the draft technical advice, do not apply to investment firms merely acting as underwriters. For our detailed comments on ESMA's proposal, see below.

- Pricing an issue is not a science; it is only with hindsight that one knows if the issue price was the "right" one. Many legitimate factors can explain that an issue in considered under-priced or over-priced, on which the investment firm has neither control nor foresight.

- The draft requirements, some of which go into much detail, involve a heavy administrative burden and a high degree of bureaucracy. The cost/benefit of these measures should be assessed thoroughly. Many of them seem to have for sole purpose the formalisation of a process that has not proved deficient as such.

Secondly, it seems like the draft was written considering new issues of stocks or bonds, without including the placing of securities blocks (notably, the use of the term "issuer" and the absences of the term "seller" is an indication of this). It should therefore be clarified that placing of blocks are out of scope of the draft technical advice. If not, the requirements applicable to them should be precisely identified.

In addition to these general comments, specific observations on different aspects of the draft technical advice are set here forth.

- *Paragraph 10*

This paragraph states that a firm may "*have an interest in keeping a key competitor out of the syndicate group for a lucrative offering, at the expense of the issuer client*". However, this statement is irrelevant because it is the issuer, and only the issuer, who decides who will be part of the syndicate, often after receiving from some chosen investment firms their terms of services following a request for proposal.

- *Paragraph 3.i.*

It is not always relevant for the firm managing the offering to propose to the issuer client "*various financing alternatives available*". The firm may have been chosen by the issuer following a decision process that has already occurred at the issuer, i.e. the issuer may have already considered the various alternatives and may already have his mind set on the type of offering it wants to undertake. It may even have started the project already and merely invites the firm to join in for execution or asks the firm its view on the projected transaction to compare it with others. This is the case for example when the issuer uses the advice of other advisors (such as boutiques). The firm may therefore be used as a pure underwriter or placing agent but not as an advisor.

This requirement should therefore not be maintained. If this requirement were nevertheless maintained, it should only apply to investment firms involved in an issue both as underwriter, or placing agent, and corporate finance adviser.

Similarly, other references in the draft technical advice to "*corporate finance advice*" and to "*advising to undertake an offering*" should be amended accordingly.

If ESMA considers that the risk to be mitigated here is the one that the issuer may be driven to execute a transaction that is not in its best interest then it should be remembered, as stated above, that the issuer is not passive in the process and not dependent on the firm's action.

- *Paragraphs 3.ii and iii*

It is not clear what benefit these two disclosures will bring. As regards communicating the time it will take for the firm to provide the advice for the pricing and for the placing, it is not clear what ESMA is trying to achieve. These advices are not a science or the result of a straight-through process; it will be difficult for firms to provide timing other than very general ones.

It is not clear either what is the advice in respect to placing of the offering: we suppose it is not the advice on the structure of the offering (i.e. convertibles, straight bonds, etc.) but the advice on which types of investors can be targeted, which geographical areas, etc.?

Besides, as mentioned above, a firm may sometimes be a pure underwriter or placing agent, which does not provide corporate finance advice to the issuer. Hence, if the requirements for investment firms to disclose the timing and process to reach their corporate finance advice in respect of the pricing and the placing of the offering were maintained, they should be limited to those actually providing such advice.

- *Paragraph 3.iv*

While it is commonly the role of investment firms to target the investors of an issue, it may happen in many situations that an investment firm is not able due to a lack of time to explain the details of the targeted investors, as required in the draft technical advice. For instance, where the firm acts as a pure underwriter or placing agent, and is involved really late in the placement process, sometimes only a few hours before the launch of the operation, it sets up and provides to the issuer a list of investors who might be interested in the issue, but does not give further explanations on those investors.

Having said that, there may be situations where the issuer has its own view of the investors it wants to target or that the final targeted investors are the result of a discussion between the issuer and the investment firm. In such situations, the investor targeting, is not a one-sided process led by the investment firm.

For these reasons, it would be appropriate to delete this requirement, or at least to indicate that in some situations, such as where investment firms are contacted at the last moment, they are not required to explain the details of the targeted investors.

- *Paragraph 3.v*

This requirement is unclear: is the firm supposed to give the names the staff members who will be involved in the corporate advice? It is obvious that the deal team in relation with the issuer will introduce itself – what is the purpose of this formalism?

Furthermore, the corporate finance department of the investment firm is not involved on matters related to the price and allotment of the issue, so that the requirement to disclose the identity of individuals who produce "*corporate finance advice on the price and allotment*" appears inappropriate.

As a consequence, we recommend that this requirement be deleted.

- *Paragraph 3.vi.*

The firm should explain to the issuer "*how it intends to manage conflicts of interest that may arise where it places the relevant securities with investment clients of the firm or with its own proprietary book*". This requirement raises several concerns:

- What do the terms "*relevant securities*" refer to? Is the concern related to firms issuing and placing their own securities to retail clients?

- More generally, AMAFI strongly objects to having an additional requirement in relation to conflicts of interest, specific to underwriting and placing for the following reasons:

  - According to Article 22 of MiFID I implementing directive, firms are already required to have a policy on conflicts of interests and to make it available to clients.
  - Similarly, they must have in place organisational arrangements to prevent and manage such conflicts, in relation to any investment services they carry out, which may include underwriting and placing (*MIFID I implementing directive, Article 22 and MiFID II, Article 16.3*).
  - Finally, when a conflict of interest does occur, and when the arrangements are not sufficient to ensure that the risk of detriment to clients will be avoided, the firms must disclose to clients the nature or source of the conflict and the measures taken to mitigate these risks (*MiFID II, Article 23*).

This framework is in our view exhaustive as it allows for proper ex-ante information to clients and mitigation of potential conflicts of interest. It already currently results in each corporate finance transaction being analysed from the angle of conflicts of interest before it is carried out. It also translates into organisation requirements ensuring separation between the teams in charge of relationships with issuers and the ones in charge of selling the securities.

The proposed requirement of explaining to the issuer how the firm intends to manage conflicts of interest would thus be an addition to the current arrangements whose purpose is not clear. That would create an administrative burden with no added value for clients in terms of protection.

AMAFI would like to stress as well that the examples of conflicts in paragraph 16 of the analysis seem very blunt and black and white and would need qualifying:

- Example i. seems theoretical since to maximise its fees, the firm would actually have to take on more risk (and undertakes underwriting for example); when the risk is lower for firms, the fee is as well, especially in a competitive environment.

- Example ii. can be a potential conflict of interest but it may well be totally legitimate for the issuer to repay its debt to the investment firm via the issuance of securities lead-managed by the firm, as for an issuer to change its mix of financing is quite usual. It is not per se an issue, only the specific circumstances of the case can tell if the firm has provided biased advice detrimental to the client.

- Example iv. is really weird; in economy, such a view could apply theoretically to any long standing commercial relationship, as it is true that a satisfied client is dis-incentivised to search for the same service elsewhere... It is surprising that this would be an issue so acute in underwriting and placing that specific measures should be required, all the more that, as regards this activity, there is no evidence that issuers do not shop around. On the opposite, issuers do change frequently the firms they work with for their financing transactions, without negative market reaction.

More generally, AMAFI is supportive of the requirement for firms to have arrangements in place to prevent and manage conflicts, but it is not supportive of the approach consisting in assuming that, as regards underwriting and placing, firms behave without consideration of these arrangements, hence requiring additional disclosure (whose benefit is questionable by the way in relation to the examples provided).

At a minimum, if such a disclosure were to be maintained, it should be made available to issuers on request, rather than being communicated systematically for each new transaction. Some transactions take place in a matter of hours, so that applying administrative measures to these would not be feasible. Some issuers may be interested in assessing the arrangements of the firm, while others will not be. Issuers who want to assess the measures taken by the firm to prevent and manage conflicts of interest, already ask details to the firm (sometimes via a questionnaire included in their request for proposal), so that this additional regulatory obligation seems superfluous, rigidifying the process without additional value.

- *Paragraphs 4.i and 4.ii*

Generally speaking, as mentioned above, in a number of situations, an investment firm involved in placing securities does not participate in the other stages of the offer and therefore does not participate in setting its price. The paragraph on pricing should therefore only apply to firms involved in the price setting.

The statement that "*the pricing of the offer does not promote the interests of other clients or the investment firm's interest, which are distinct from the issuer client's interests*" seems fine at first sight. However, it is so general that it is difficult to envision what firms should implement as a consequence, other than what they have already in place. It is also disconcerting in terms of burden of proof – what are the expectations in terms of proving compliance?

The pricing process is such that ultimately it is the law of supply and demand that fully applies, hence ensuring that diverse and contrasting interests are taken into account, i.e. the ones of the issuer client as well as the ones of the investor clients. No interest should be promoted but all will concur to fixing the price. The draft technical advice should be more precise as to what is expected in practice from firms.

Today, firms have internal arrangements ensuring that the book building, where applicable, is organised properly (with communication between the syndicate members if applicable) and that interests of both types of clients are considered when validating the pricing of the transaction.

It means in particular that client facing staff, who place the securities with investors, are an integral part of the process. This will translate eventually by the attendance of a representative of the sales staff at the committee proposing a price for the transaction, together with the one representing the issuer, to ensure a balanced view. Would that be infringement of paragraph 4.ii, which forbids that "*individuals ordinarily responsible for providing services to the firm's investment clients are involved directly in decisions about corporate finance advice to the issuer client on pricing*"? But if so, how would the firm ensure that the investors' view is properly taken into account as well? AMAFI therefore suggests deleting paragraph ii.

- *Paragraph 5*

This paragraph is another example of the one-sided approach taken. The timing and pricing of the offering is not in the hands of the investment firm. It is an iterative process, involving back and forth among the syndicate members, if applicable, and with the issuer. The issuer may receive several advices on price and timing from different firms and will decide based on those, or it may make its decision following discussions with the lead manager. In any case, it is not the investment firm who determines the price of the offering; sometimes it may even be difficult for it to convey its view to the issuer when it is not satisfied with the feedback received.

As mentioned before, pricing is an art, not a science. Firms will set a price range and only the demand will definitively set the price. In this context, under- or over-pricing by firms is not intentional on their part.

As regards point i., see Q59.

In point ii., if informing the issuer client "*on developments relevant to the pricing during the offering process*" refers to providing feedback on the book-building, this is already current practice. But it should be written more clearly then.

Finally, the heading of paragraph 5 should refer to "*issuer clients*" instead of "*clients*".

- *Paragraph 7*

Same comment as paragraph 5. A representative of sales staff may be involved in order to represent the demand side of the offering and to ensure a balanced decision is made. He/she will also play a role to even out clients' demands as part of a collective decision. Although it has no direct relationship with the issuer, his/her involvement is essential.

- *Paragraph 8*

AMAFI agrees with the example provided in point i. . We are however concerned that, as investors are clients of the firm for its other activities, it may be difficult for the firm to prove that the fees received in this respect are unrelated to the allocation made previously in the context of an offering, especially as regards the criterion relative to the volume of business undertaken and criterion iii linked to the receipt of future orders or the purchase of any other service.

- *Paragraphs 9 and 10*

The requirement to provide an allocation policy to the issuer before agreeing to undertake a placing seems a useless administrative task, since this will not be a criterion considered by the issuer to decide which firm it should give the mandate to. In addition, the allocation methodology is quite standard as to its principles and is not specific to each transaction, and should not be because consistency across offerings is important. The issuer, at the stage of allocation, may well put forward some specific requests. The agreement of the issuer will therefore take place at a later stage on the allocation itself, rather than on the policy. It should be noted that it is already common market practice for the issuer to be involved in the allocation. Generally speaking though, the issuer is in no better position than the investment firm to decide on the allocation.

The second sentence of paragraph 9 should therefore be deleted and the last sentence should read: "*the policy should set out relevant information ~~(to the extent it is known at that stage)~~ about the ~~proposed~~ allocation methodology ~~for the issue~~*". Paragraph 10 should state "*for example by obtaining the issuer client's agreement to its proposed allocation ~~policy~~ for the transaction*".

- *Paragraph 11*

It is very important, on the matter of inducements, to clarify a few aspects of this paragraph:

- The meaning of the terms "*underwriting fees*" should be clarified. Does this actually refer to fees received by the firm for the provision of placing, or also to fees received for the provision of the underwriting service or the placing on a firm commitment basis?

- In AMAFI's view, when the firm underwrites an offering, so that it does carry the risk for a period of time of not being able to sell the securities, the remuneration of this risk is not linked to the service offered subsequently to the investor. The margin retained by the investment firm in this case is the

fair remuneration of the market risk it takes. It does not pertain to Article 26(b) of MiFID Implementing directive. The same logic applies to placing on a firm commitment basis.

- When the firm does not carry such a risk, such as in the case of distribution of products through a re-offer technique, by which the distributor buys the products to the manufacturer, the mark-up does fall under Article 26(b) because there is a direct link with the service offered to the client, no market risk being borne by the firm.

Remuneration of underwriting services or placing on a firm commitment basis, involving bearing of market risk, should therefore not be considered as an inducement pertaining to Article 26(b) of the MiFID implementing directive.

- *Paragraph 14*

This paragraph is worded in such a way that it is implicit that arranging an offering for a client to whom the firm has extended lending is considered by essence not manageable with regard to conflicts of interest.

As mentioned before, although there are risks of conflicts of interest, these can be mitigated, so that a client does not have to seek advice from a different firm when they want to switch their financing from a bank loan to a market issuance.

First of all, when the offering is managed by a syndicate, such issue does not exist because the firm will not be the sole advisor to the issuer.

Furthermore, when the firm is the sole advisor to the issuer, and its internal arrangements to prevent and manage conflicts of interest, such as barriers to information and conflicts clearance are not sufficient to ensure the risk of client's detriment is avoided, it should follow the general rules on conflicts of interest.

- *Paragraph 16*

Where one entity within a group is acting as a credit provider, and another is acting as arranger for a securities offering, the investment firm's conflict of interest policy should not require the sharing of full information between these entities, which would be likely to be disproportionate and in breach of internal information barriers. Only information that needs to be known on the issuer's financial situation should be communicated and this should be done through appropriate internal channels.

- *Paragraph 17*

The requirement for a "*complete audit trail of all steps in the underwriting and placing process*" is too wide. It seems to imply a permanent taping of all actions taken at all steps of the process and the ability to link each record to a transaction. This is completely disproportionate. Only the output of the main steps of the process should be targeted, i.e. the advice provided to the client on the structure of the offering (if any), the price advised (if any) and the allocation carried out.

Besides, as regards the allocations made for each client, as investment firms must have in place an allocation policy and make it available to their issuer clients, they should not be asked to justify the final allocations, but only to demonstrate that these allocations are consistent with the methodology provided in the allocation policy.

- *Paragraphs 18 and 19*

These requirements do not seem to be new; arrangements are already in place in this respect.
As firms use "watch lists" to implement these, the terms should be used to ensure a better understanding of what the technical advice is referring to.

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?

It is not clear what the hedging strategy, coupled with the stabilisation strategy, is referring to. If, after the issuance, the firm is left with the securities it has underwritten then it is legitimate for it to try to sell them. This is the principle of underwriting: the issuer has secured its financing at an agreed price and the firm supports the risk to its P&L, though it does not have to support it forever. Compliance with regulations applicable to any trading (especially rules on market abuse and transparency) will ensure the sale is executed without a detrimental effect on the market.

Besides, as regards the agreed price at which the securities are bought by an underwriter, even though it can be different from the price at which this investment firm will ultimately sell the securities, this is not detrimental for the issuer. Indeed, the agreed price reflects the risk that the firm supports, and the price at which it will sell the securities is the price of the market, which is governed by the law of supply and demand.

If the issuer wishes to limit the type of hedging the firm can carry out, this can be agreed contractually upfront but there should not be a requirement to discuss hedging strategies as a matter of principle for each new issuance.

If the requirement only relates to stabilisation strategies, then it is perfectly natural that this should be discussed with the issuer and is already the case today, in accordance with applicable rules as set forth in the Market abuse directive. .

Finally, discussing with the issuer a stabilisation strategy at the time of setting the price of the offering would happen too early in the process, when the need for a stabilisation cannot yet be assessed precisely.

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

Yes, as mentioned in question 58, investment firms already have in place arrangements to prevent and manage conflicts of interest for the activities of underwriting and placing. These stem from current MiFID's obligations, which have not substantially changed at level 1 of MiFID II.

The level 2 proposed requirements would impose a particularly burdensome and administrative process on them, with unclear benefits for investors and issuers.

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

This is not clear at this stage and when the proposals seem impractical, there is no real change to make other than to stop exercising the activity concerned.

Apart from these impractical requirements, some of the consequences we can foresee are as follows:

- Templates would need to be designed for communication of the information required to issuers.
- Staff members would have to record some of their actions, or the reason why they have not carried out some actions, to provide for an audit trail.

- Additional controls would need to be implemented to make sure that the requirements are complied with.
- Some relationships between departments or involvement of some departments in the process would need to be reviewed with potentially adverse consequences for its smooth operation.
- Underwriting in relation to retail advice/distribution may not be possible anymore if the firm's margin were to be disclosed.
- Switching bank financing to market financing may not be possible anymore within the same investment firm.

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

Due to the very short timeframe left for consultation and the lack of detailed requirements, AMAFI is unable to answer this question.

2.11. Remuneration

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

No, AMAFI does not agree entirely with the scope. We would like to highlight the difficulty and even the potential undue cost of effort to measure and monitor benefits in-kind. Meanwhile, if we consider that non-financial remuneration can be career advancement, medical coverage, discounts or specific terms and the use of a company car or mobile phone, broad reimbursements of expense report… most of them are generally linked to the responsibility, the function and the seniority of an employee and not specifically linked to his/her individual performance. Moreover, we consider that this type of remuneration can only create conflict of interest situations in so far as they are sufficiently significant.

The scope of the requirements is too broad as regards the definition of remuneration. While it is justified that it cover both financial and non financial elements, the latter should be qualified somehow for two reasons:

- non financial benefits are often of a nature that is linked to the function or the seniority of the employee and not to its performance, such that they do not create conflicts with the duty act to fairly and honestly, in the interest of clients. If they were to be included, only the significant ones should be considered because of the difficulty it would otherwise create to identify and measure them.

- non financial elements should be considered only when they are objective and measurable. For instance, in-kind benefits such as allowances for cars or mobile phones are measurable. On the contrary, the career progression of an individual is subjective and cannot always be easily assessed (for example internal moves, at the same seniority level, may be seen as a career progression or not), so that it does not seem appropriate to include it within the scope of the remuneration and related incentives. Furthermore the career progression of an individual is already factored to some extent in the calculation of his remuneration through the related increase of his salary.

<u>We therefore strongly recommend limiting the scope of non financial elements to significant ones and removing the notion of "*career progression*".</u>

AMAFI would also like to draw ESMA's attention to the fact that difficulties may arise because of the ambiguous meaning of the word "*design*" used in paragraph 4 of the draft technical advice. There may be diverging readings of this notion: on one side, it can be understood that the management body must

approve the process set up to elaborate the firm's remuneration policy, but on the other side it can be understood that it is the principles of this policy that must be approved by the management body.

For instance, in the French translation of ESMA's guidelines on remuneration policies and practices (ESMA/2013/606), the expression "*the design of the remuneration's policies and practices*" is translated by "*la conception des politiques et pratiques de rémunérations*", that is to say the production of the remuneration's policies and practices.

As such a requirement on the form rather than the substance seems irrelevant, AMAFI proposes to replace the word "*design*" by "*principles*" in paragraph 4 of the technical advice. This will foster a common understanding of this provision by Member States.

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

No, AMAFI does not fully agree.

AMAFI agrees that non financial criteria such as compliance with rules of conduct and applicable regulations should be taken into account to determine the variable remuneration of relevant persons who have a material impact, directly or indirectly, on investment and ancillary services provided by the firm.

Nevertheless, it does not seem realistic to state that variable remuneration should be "*principally*" based on such criteria. The mix of financial/non financial criteria will vary depending on the circumstances, so that consideration of some criteria versus others may be totally different. For ecample., a staff member who has met his commercial objectives but who has been repeatedly in breach of compliance procedures would receive no variable remuneration, similarly to a staff member who has complied with applicable rules but has grossly underperformed from a commercial point of view, since it is the performance of the firm which determines ultimately the payment of variable remuneration. Assessment criteria should be aligned with the nature of the member of staff's function within the firm, with a predominance of some criteria on others that will change depending on the case at hand.

Therefore, it would be more proportionate that the Level 2 measures provide that both quantitative and qualitative criteria should be appropriately taken into account. This would be consistent with the CRD4 that specifies that "*when assessing individual performance, financial and non financial criteria are taken into account*", without prescribing any particular weighting. Another, more flexible option, more adapted to functions whose output is not measurable quantitatively could be to require that when quantitative criteria are used, qualitative criteria should also be considered.

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?

No. While AMAFI agrees that in order to be fair, clear and not misleading, information to retail clients or potential retail clients should generally be up-to-date, presented in the same language and in the same font size, we nevertheless consider that some amendments should be made to the draft technical advice as regards:

- the requirement that information be consistently presented to retail clients in the same language, provided in paragraph 2(iii); and

- the requirement that information addressed or likely to be received by retail clients be up-to-date, relevant to the method of communication used, provided in paragraph 2(iv).

On the first point, if the requirement may help enhance retail clients' protection, some exemptions should nonetheless be provided for consistency with other regulations and to accommodate for differing clients' situations.

Firstly, this requirement can be contradictory to other existing regulatory measures related to the language of financial information. For instance, pursuant to Article 19 of amended Directive No 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, in some well-defined circumstances, and as long as its summary is translated, the prospectus related to an offer of financial instruments to the public can be drawn up in a language customary to the sphere of international finance (*Amended Directive No 2003/71/EC, art. 19, 2 and 3*). A prospectus may thus be addressed to a retail client in a language different from their mother tongue or the one in which information are usually presented to them. Additionally, a level 2 text such as a technical standard would not be appropriate to set a requirement that goes against the approach implemented elsewhere by a level 1 text. All the more that this would be opposite to the logic governing the Prospectus directive, which is to facilitate the communication of information on financial instruments in the EU.

Additionally, due to the characteristics of the client, it may not be useful that information addressed to them be always in the same language. For example, where the retail client is a bilingual individual, the investment firm should be allowed to communicate in any of the two languages he speaks, without having to choose only one language for the relationship.

Cross-border situations are another reason for enabling investment firms to give information to retail clients in different languages. For example, if a French individual opens a bank account with a bank based in England, information he receives from his bank will generally be in English. Nevertheless, when he is contacted by the bank, it would be inappropriate to ban communication in French if it is the preferred language of the client.

Finally, the word "*consistently*" itself creates some uncertainties about the exact reach of this requirement as it can be translated in French as either "*systematically*" or "*repeatedly*". It should therefore be replaced by "*generally*", which is more proportionate.

For all these reasons, we suggest amending paragraph 2(iii) as follows:

> "*(iii) shall be* ***generally*** ~~*consistently*~~ *presented in the same language throughout all forms of information and marketing materials that are provided to each client* ***unless existing European and national measures, or the client's characteristics, authorise or require the use of another language****; (...)*".

On the second point, it seems necessary to clearly distinguish information addressed to clients from information made available to them.

Paragraph 2 of the draft technical advice targets "*information addressed to or likely to be received by retail clients*", which is unclear as to whether information only made available to clients is included. Only the analysis (*§ 10, p. 92*) shows that ESMA's seems to be intent on including it.

However, the requirement for information made available to be up-to-date could not practically be complied with if it implies real-time monitoring. Information on paper or on a website made available to clients may be periodically out of date for a limited period of time, as a time lag exists for the updating of information.

We therefore recommend amending paragraph 2 (iv) in order to distinguish, on one side, information addressed to retail clients which must be up-to-date, relevant to the method of communication used, and

on the other side, information made available to retail clients which must be updated by the investment firm on a regular basis.

This distinction should also apply to information addressed to and likely to be received by professional clients (*see Question 67*).

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?

Yes, AMAFI agrees.

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?

No, AMAFI disagrees for the reasons below:

- ***The conditions for information to professional clients to be fair, clear and not misleading***

AMAFI agrees that in order to be fair, clear and not misleading, the information to professional clients should comply with the conditions proposed in paragraphs 4(i) to 4(iii).

Nonetheless, as regards the requirement provided in paragraph 4(iii) that information to professional clients be "*up-to-date, relevant to the method of communication used*", it would be appropriate, as for information to retail clients (*see Q65***Erreur ! Source du renvoi introuvable.**), to make a distinction between information sent to professional clients and information made available to them.

We therefore recommend amending paragraph 4(iii) in order to distinguish, on one side, information addressed to professional clients which must be up-to-date, relevant to the method of communication used, and on the other side, information made available to those clients which must be updated by the investment firm on a regular basis.

- ***The distinction between retail clients and professional clients***

AMAFI considers that information to professional clients does not need to meet any of the other conditions proposed for retail clients in paragraphs 2(i) to 2(iv) of the draft technical advice. The three requirements proposed by ESMA are proportionate to relationships with professional clients, which should be considered in their own right. Being a distinct category of clients implies different needs and characteristics that should not be looked at with the prism of retail clients' experience.

- ***The exclusion of eligible counterparties from the scope of the Level 2 measures***

Finally, even though the draft technical advice only refers to "*professional clients or potential professional clients*", it is not clear whether eligible counterparties are excluded from its scope, especially since ESMA indicates in its analysis that "*some specific conduct of business rules in the area of information and reporting have been extended to eligible counterparties*" (*Consultation paper, p. 91, § 3*).

In this regard, while Article 30 of MiFID II provides that "*in their relationship with eligible counterparties, investment firms* (…) *communicate in a way which is fair, clear and not misleading*", this provision does not require that Level 2 measures be adopted on this topic. The fair, clear and not misleading nature of

information given by an investment firm to an eligible counterparty must be determined on an *ad-hoc* basis, and not according to conditions set out in delegated acts of the European Commission.

For the sake of clarify, it should therefore be added a new paragraph expressly stating that the conditions related to information to professional clients and potential professional clients, set out in paragraphs 4(i) to 4(iii), do not apply to communications with eligible counterparties.

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?

No, if AMAFI agrees with the objective of making clear to clients the distinction between independent and non independent advice, it does not agree with all of the proposals made to reach that objective.

The intention behind these proposals seems to be that independent advice is the norm and that non independent advice should strive to get closer to independent advice. The distinction between the two types of advice is blurred by the proposed level 2 measures, whereas the level 1 text makes it clear that the provision of independent advice is a possibility, not necessarily the norm. ESMA must recognise that this issue has been decided at level 1 and that there are significant differences, including cultural ones, among the Member States concerning this. If some countries such as the UK or the Netherlands have made the choice to promote independent advice, making it their favored choice or even compulsory in certain circumstances, it is not the case everywhere and certainly not in France. In this country, non independent advice is predominant, for historical reasons due mainly to the structure of the offering but also because of the reluctance of French people to pay separately for a service.

AMAFI sees the introduction of quasi-similar requirements for independent and non-independent advice in the proposed level 2 measures as a negation of the freedom offered by the level 1 text and a departure from the political agreement reached on this issue.

Our detailed comments are as follows.

- ***Information provided about whether investment advice is independent or not:***

Firms should not have to explain why their investment advice is not independent; it is enough to make clear to clients that the advice is not independent – we see no value in demonstrating to clients why it is not, as it is pretty obvious and there is nothing to be gained for the client by doing so. Such a requirement would be an administrative burden with no benefit to the client. It should also be remembered that the receipt of inducements linked to the provision of non-independent advice is restricted by MiFID II, which makes it conditional to the respect of the client's interest and the enhancement of the service provided. There is therefore no reason why a firm should justify to clients why it does not offer the so-called independent advice. If more clarity is needed, it is already provided for by the requirement in § 3 to explain the links the firm has with the issuers or providers of financial instruments.

The onus should be on firms claiming to give independent advice: they should be able to demonstrate why it is so because such a statement raises expectations on the part of clients.

AMAFI therefore proposes removing the words "*or not*" from the sentence "*Investment firms should explain in a clear and concise way whether and why investment advice could qualify as independent or not (…)*".

In addition, the meaning of the last part of the sentence "*the type and nature of the restrictions that apply*" is not clear: should the firm who informs its clients that it gives independent advice also inform them that it is not allowed to receive inducements? If so, it should be clearly stated.

- ***Information about the broad or restricted analysis of different types of financial instruments***

Paragraph 3 requires investment firms to explain "*the range of financial instruments that may be recommended*". Is the range not the same as the "*types*" of financial instruments referred to in paragraph 4? In our view, the word "*types*" should be used in order to be consistent with Art. 24(4) a. ii).

In paragraphs 4 and 5, the proposed requirements are similar, regardless of whether the advice provided is independent or not. However, as explained above, non-independent advice should not be assessed using the same logic as independent advice, except if one considers that non-independent advice should disappear... But the choice in this respect has already been made at level 1.

Such requirements would impose an administrative burden with no added-value for the client. This means in practice that if a firm provides non-independent advice, it would have to enter into an administrative process similar to the one required for independent advice. This would be of no use since there is no doubt that the firm does use close-linked entities in its offering and that this offering is not based on selecting third parties but rather manufacturing the right products.

Similarly, the requirements to provide the proportions and numbers of providers and instruments considered are ill-suited to non-independent advice, because by definition it does not claim to be independent and the numbers would just illustrate the non-independence. It is tautological, while involving a burdensome and administrative process.

Practically speaking, the feasibility of these measures is questionable as regards investment advice provided by front offices of investment banks. For example, in the case of non-independent advice delivered by corporate finance to professional clients (such as corporates) on derivatives, applying this requirement is not feasible: what could the firm disclose other than that it is the counterparty to the deal (or another entity linked to it)? Setting up a derivative contract with a client is not like choosing among a range of available products, it is a structuring process with a bilateral relationship. There is therefore no product selection process either.

Furthermore, it should be noted that this kind of service is already covered by the provisions of Article 24.2 concerning the manufacturing process, which involves recommending or marketing the financial instrument to the client only if it is in its own interest.

As regards non-independent advice, the requirements set at level 1 in Article 24.4 a) ii) should not need any further details and paragraphs 4 and 5 should only apply to firms providing independent advice. Another option could be to insert a requirement that firms providing non-independent advice provide further information to clients on request.

In paragraph 5, AMAFI also notes that firms should indicate the proportion of financial instruments provided or issued by entities "*not having any links*" with the investment firm. This wording could mean that no such entity would meet this criterion. Links can indeed refer to any type of relationships, hence covering a wide scope, even when there is no risk posed to the independence of the advice. AMAFI suggests referring instead to entities not having close links or close legal or economic relationships with the firm, which would be consistent with the rest of the paragraph.

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

No. The proposal should specifically consider the case of eligible counterparties because Article 24.4 applies to them, which is new compared to MiFID:

- The first paragraph of Article 31 of MiFID implementing Directive should be modified to state that firms provide the specified information "*taking into account, in particular, the client's categorisation as either a retail client, a professional client or an eligible counterparty*". This would be consistent with Article 24.14 that requires delegated acts to take into account the types of client concerned, and in particular the fact that it is an eligible counterparty as regard the application of paragraph 4 of this Article. This is important because most of the information that should be communicated as regard financial instruments is not adapted to eligible counterparties, who either have the same level of knowledge on the financial instrument as the firm or request quotes on financial instruments that they know already.

- A paragraph should be added to make clear that the obligation to indicate "*whether the financial instrument is intended for retail or professional clients, taking account of the identified target market in accordance with paragraph 2*" does not apply to relationships with eligible counterparties, as paragraph 2 of Article 24 is not applicable to them (*MiFID II, Article 30*).

Additionally, paragraph 10 raises question as to which instruments are targeted by the terms "*instruments composed of two or more different financial instruments or services*" and what is expected as to the description of the "legal nature" of these instruments.

Finally, to avoid duplication of information, it should be indicated that information on financial instruments may be provided by application of other EU regulation, such as the Prospectus Directive, PRIIPS, UCITS and AIFMD.

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.

No.

2.13. 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?

No, AMAFI does not agree. Regarding eligible counterparties and professional clients, AMAFI considers that an opt-in approach would be more adapted because it should be justified to assume that professional clients and eligible counterparties, due to their knowledge and experience, are sufficiently informed of the types of costs and fees applicable to their transactions and are therefore in a position to ask for the relevant information. The business relationships with these clients and counterparties are not similar to the ones with retail clients because expectations, needs and practices differ. The requirements applicable

to those should thus not be modeled on the retail ones. Moreover, they can request to be treated as retail clients in general or for particular transactions if they consider it is better adapted to their situation.

During the open hearing on investor protection, ESMA's representatives mentioned that only an opt-out approach is legally possible, considering that an opt-in alternative would be contrary to the level 1 text that makes eligible counterparties subject to Article 24.4 of MiFID II.

AMAFI would object that this interpretation is not accurate because Article 30 of MiFID II requiring application of Article 24.4 to eligible counterparties also states that "*Member States shall ensure that, in their relationship with eligible counterparties, investment firms act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business*". There is therefore recognition that the approach can take into account the specifics of relationships with eligible counterparties, because they are not all the same. Application of the provisions relevant to them can thus vary depending on the type and business of the counterparty. This means that a positive, but also a negative approach can be taken in applying the provisions, in such a way that they would apply when the counterparty deems it is appropriate for it.

Relationships with eligible counterparties, and especially regulated financial institutions, are not always governed by a written agreement, such that an opt-out approach would create an administrative burden of contracting with all eligible counterparties.

In addition, the consideration of the costs related to the transaction or the service is a pre-requisite of any decision made by an eligible counterparty to trade with an investment firm, whether it shows in the price/conditions proposed by the firm or commissions agreed ex-ante. A patent example of this is the business carried out though request for quotes. It seems therefore inadequate to set up administrative processes that will generally be of no interest to eligible counterparties.

ESMA mentioned during the open hearing that eligible counterparties must be protected because the litigations with municipalities that followed the financial crisis show that some eligible counterparties are in fact not sophisticated enough. However, the client categorisation has been amended by MiFID II to ensure that only public bodies at a national or regional level are now eligible counterparties by nature. In several Member States, such as France, municipalities are now classified as retail clients to ensure they get the highest protection available. The existence of eligible counterparties with less sophistication does not mean that the regime for eligible counterparties should be denatured to cater for clients who are not n fact eligible counterparties – it should however be designed to ensure that any counterparty can get the information they need, as provided for by the opt-in alternative.

In addition, the onus should be on providing product information to make sure that eligible counterparties understand their investments and make informed decisions, it should not be on extending information about costs and charges that are originally designed for retail clients. As stated in recital (104) of MiFID II, "(...) *it is appropriate to extend some information and reporting requirements to the relationship with eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and funds as well as information and reporting requirements concerning more complex financial instruments and transactions*". In this respect, extending some of the proposed requirements for retail clients to wholesale businesses with eligible counterparties seems disproportionate. This will cause some feasibility issues with no clear benefit for eligible counterparties, such as the requirement in § 7 to provide an annual post-sale information about all costs and charges or the one in § 17 to provide an illustration showing the cumulative effect of costs on return, as relationships with eligible counterparties most often do not fit within a client/service provider relationship and eligible counterparties are sophisticated enough to not need an illustration as long as they have the underlying information. We incidentally note that none of the examples provided in the analysis refer to the wholesale market.

Finally, the scope of the obligation for eligible counterparties and professional clients needs to be detailed further:

- The obligation to provide costs and associated charges is wider in scope ("*Detailed information on costs and associated charges should be made available to professional clients and eligible counterparties*") than the obligation applicable to retail clients, which is restricted to marketing or recommending financial instruments to clients and products for which a KID must be established (*§§ 3, 7 of the technical advice*). The scopes of both obligations should be the same, consistent with point 4.c) of Article 24 of MiFID II. If not, any service provided to an eligible counterparty will be in scope, regardless of the existence of a recommendation or marketing. For example, the provision of execution service to an eligible counterparty on any OTC instrument will require disclosure, with an obvious issue of determining who should disclose to whom since an eligible counterparty deals with another eligible counterparty, i.e. the triggering criterion for disclosing costs and charges should be the active behaviour of the investment firm in the form of a recommendation to invest or the marketing of a financial instrument.

- More generally, there is a need to clarify the scope of the technical advice in a heading paragraph to make sure that all subsequent obligations apply to the same scope (i.e. "costs and charges to be aggregated", "timing and format of disclosure", etc.).

- The combination of a wide scope (not restricted to marketing or a recommendation) and the restriction of the opt-out alternative to financial instruments that do not embed a derivative, if this turn of phrase includes plain derivatives, means in effect that the possibility to opt out will be negated to most eligible counterparties. This goes back to our previous comment that eligible counterparties and professional clients should be able to choose for themselves what the best in terms of reporting is and should therefore be able to opt in. Furthermore, the restriction of the opt-out alternative to financial instruments that do not embed a derivative must be limited to professional clients (other than regulated ones – see last paragraph below) and must be defined to clarify that it does not include derivatives instruments as such.

- The technical advice should provide clarification of what is meant by recommending or marketing a financial instrument. In this respect, AMAFI does not agree with the explanation provided in § 18 that a general recommendation should be covered. A general recommendation is very broad in scope and includes investment research. It would therefore mean, for the wholesale business, that an investment firm providing to another investment firm execution service on a stock or a bond it has published research on would need to disclose costs related to the financial instrument and to the service. What would this mean in practice for a listed stock or for an OTC bond? It should at a minimum be indicated that the terms "general recommendation", for this purpose, does not include investment research.

The objective to catch a wide scope in the draft technical advice by stating some general principles results in unintended consequences. Thorough thinking should take place to distinguish between the various types of financial instruments and clients to ensure that the technical advice sets feasible and value-added requirements for clients that firms can implement.

Due to the short time left for consultation, AMAFI is not able to make such a proposal but, at a minimum, the draft technical advice should be amended so that financial instruments traded (via the services of execution, trading on own account or reception and transmission of orders) between eligible counterparties and/or professional clients who are regulated entities as per I. (1) of Annex II of MiFID II, should be out of scope, as these instruments are neither recommended nor marketed and the parties involved are cognisant of the costs related to those. This would be without prejudice to the right of any such counterparty or client to request anyhow the information detailed in the technical advice.

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

AMAFI does not agree with the interpretation of what is a financial instrument "*recommended or marketed*", as detailed in our answer to Question 71.

In § 4, it should be made clear that the requirement is applicable "*where relevant*". On the wholesale markets in particular, the cost of service is generally not separate, i.e. there is a cost attached to the transaction but not a separate one for the service.

We do not agree that, as required by § 5, the disclosure should include costs charged by third parties, even if the client has been directed to this third party. This would create an unnecessarily complicated system, involving complex links between firms that are unrelated and in all likelihood it will function poorly due to the very high risk of not providing up-to-date and accurate information to clients.

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

No, because we are wondering what "*a continuing relationship*" is, especially in the context of the wholesale market. Post-sale information could make sense in a relationship with a retail client where the firm provides investment advice and offers periodic suitability reports in accordance with article 24 (4) (a) (iii) MiFID.

It does not make any sense for a relationship with a professional client or an eligible counterparty in a wholesale context. This is not the way these businesses work; costs are considered upfront before deciding to trade with the firm.

If this concept was maintained, the technical advice must define it and the requirement should apply to relationships with retail clients when the firm provides a periodic suitability report or when the client requests it.

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.

No, AMAFI does not agree. It is not possible to answer this question because the proposed technical advice is very unclear. To encompass a wide scope, it uses large concepts, mostly not defined, which are difficult to apply to real-life situations. If kept as such, the application of the technical advice will result in differing interpretations among Member States and firms and will not foster a harmonised regime. We reiterate that tackling the subject of cost disclosure with such level of detail would require a thorough analysis that should distinguish between the various investment services, types of financial instruments and clients (*see Question 71*).

Furthermore, it is essential to ensure consistency with the UCITS' key investor information document and the PRIIPS' key information document, which both set requirements for costs disclosure. For product manufacturers, complying with both regulations should deem compliance with MiFID II for the products concerned. Investors should also be able to get consistent information in terms of the types of costs disclosed, whatever the specific regulation under which the product concerned is regulated.

For example, the different items in the list of the Annex are not clear and not really illustrated by the examples provided in the analysis (§ 41 and following). The examples provided for each item in the third column of the tables need thus to be expanded to explain what they are referring to. Hereafter are a few, non exhaustive, examples of questions raised:

1st table (costs related to investment services):

- Switching costs: does this refer to portfolio management and the cost associated to the redemption of an investment for reinvestment in another instrument; but if so, is this not a cost related to the financial instrument, hence pertaining to the second table, rather than the service in itself?

- Broker commissions: it is not clear how broker commissions could relate to a service rather than to transactions (i.e. these commissions are calculated based on the transactions executed) – what does it mean here?

- Platform fees: what is it?

- **Marks up embedded in the transaction price: it is critical to indicate what this refers to.** At the ESMA's hearing, it was mentioned that this did not relate to the firm's margin but to a situation such as "*if the transaction price has some mark-ups which are not evident for the client, for instance payments which could come back to the broker once executing the service, they should be disclosed to the client*".
  This should be made explicit so that it is not interpreted as targeting the margin earned by the firm when manufacturing/issuing/selling a financial instrument, especially on OTC markets such as bond markets based on bid/ask spreads. Profit margins are not costs and charges. Clients will have a view on the price, and will be informed of the overall cost and its cumulative effect on the return of their investment because of the MIFID II provisions, such that information on margin is irrelevant, in addition to being confidential.
  It is acknowledgeable that mark-ups embedded in the transaction price is the form a cost or a charge can take when it is not paid as an amount separate form the price of the transaction but, in such a case, disclosure to clients should take place not because it takes the form of a mark-up but because it is by nature a cost or a charge. For example, a distribution cost for the sale of a product can impact directly the value delivered to the client so that the client receive a value of 99% for an issue at a nominal value of 100%, in which case the cost, which corresponds to the remuneration of the distributor, needs to be disclosed to the client. **Targeting the form (mark-up) instead of the substance (the distribution cost) would cause interpretation issues, as some NCAs may consider that profit margins should be disclosed, which AMAFI strongly objects to. Mark-ups embedded in the transaction price should therefore be removed from the annex because they are wider in scope than mere costs and charges.**
  Finally, it is not clear why this should be part of the first table whereas it is transaction related.

2nd table (costs related to the financial instrument):

- Structuring fees: what does this refer to?
- Costs and charges that are related to transactions that are performed by the manager of the financial instrument: is this referring to funds (i.e. concept of "manager")?

Finally, the cumulative view of costs at the point of sale is impossible to achieve if it is to include third parties' costs, due to the complexity of retrieving the appropriate information from independent third parties. For example, if client A purchases a product from manufacturer 1, via distributor 1, and end client B purchases the same product from manufacturer 1 but via another distributor 2 who applies different charges, adding to this 2 different custodians charging different fees as well, none of the parties is in a position to provide a correct aggregated view of all costs. Only the end client has access to this information.

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.***

Yes, AMAFI agrees although it should be highlighted that the generic basis is not consistent with the requirement to provide an aggregated view of the costs charged by all parties…

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

The methodology for calculating the point of sales figures should be aligned between Article 8(5)(c) of PRIIPs Regulation, MiFID Level 2 and PRIP disclosures.
In addition, we are afraid there is no methodology that would allow calculating aggregated costs across different parties due to the difficulties highlighted above.

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

Yes, as regards professional and eligible counterparties – see our answer to Question 71.

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

Due to the very short timeframe left for consultation and the uncertainties as to the exact requirements stemming from these level 2 measures, AMAFI is unable to answer this question.

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.***

No. Our answer is in two parts, the first is related to investment research, the second to other matters related to non-monetary benefits.

I. Investment research

AMAFI does not agree with the analysis that investment research is a non monetary benefit. Tackling via the inducements provisions the subject of investment research, by actually forbidding the payment of value-added research through dealing commissions, is in our view inadequate and out of scope of the legislator’s intention when these provisions were elaborated:

- Investment research is a service that is costly to develop and adds value to investors who are ready to pay for it, by its capacity to inform them through analysis. Investment research helps portfolio and fund managers to make their investment decisions more effective and allocate efficiently investors’ money. It is an ancillary service that is not free and not alike a benefit.

- Nothing at level 1 mentions that level 2 measures should be developed on research as an inducement. Recital (74) of MiFID II shows that restrictions on inducements are predominantly viewed from the angle of the distribution and placing of financial products to clients, i.e. the purpose is to avoid firms being improperly influenced in their investment decisions by receiving and

retaining benefits from product providers and issuers: "*in order to strengthen the protection of investors and increase clarity to clients as to the service they receive, it is also appropriate to further restrict the possibility for firms providing the service of investment advice on an independent basis and the service of portfolio management to accept and retain fees, commissions or any monetary and non-monetary benefits from third parties, and particularly from issuers or product providers*".

The proposed level 2 provisions thus are inconsistent with the primary intention of level 1 and are outside of the spirit of the rule, all the more that nowhere in MiFID II is investment research mentioned except in Annex I, which lists it as an ancillary service.

The policy that ESMA proposes comes thus as a complete surprise, without prior discussion nor impact assessment[5]. Whilst the bulk of research is paid by funds rather than managed portfolios, the approach via MiFID II instead of UCITS and AIFMD, comes as an opportunistic initiative lacking the political agreement that would be necessary for it to be taken. It seems rather inadequate to pre-empt an industry change through the back-door, via a legislation that only concerns a small portion of the business.

In this context, it is startling that ESMA seems so definitive on the affirmation that research is a benefit, as stated during the Open hearing on investor protection on 8 July 2014. This is especially so that such an interpretation will change radically the business model and endanger a whole range of brokers, independent providers of investment research and asset managers. Finally, as described below, it is the ability of the financial ecosystem to play its role for the financing of SMEs that is at stake. Considering the importance of the economic impact of this measure, the affirmation that research is a benefit cannot be accepted as such, especially since ESMA by no means demonstrate why its proposal would better protect investors. If it were to be maintained, the European Court of Justice will be the right place to have a final say on the matter. Such radical change needs a political decision at level 1 and should not stem from level 2 measures.

- ***The objectives of the proposal are not clear and unlikely to be reached that way***

The reasons for this proposal are not specified in the CP, which is somewhat unclear and shows some inconsistencies between the analysis and the draft advice (§ 13 to 15 of the analysis versus § 5 i. of the draft advice). On this basis, we understand that there could be several reasons for proposing this policy, although we consider that none justifies it, let alone an approach via the inducement rules.

Remuneration of research

An issue can be the way the service of investment research can be remunerated, i.e. when it is paid via implicit inclusion in broker's commissions, without clear separation between the cost of research and the cost of execution. If such issue was to be dealt with however, it should not be via the provisions on inducements because the way the service is remunerated cannot change alone the characterisation of the service so that it would be considered as a benefit.

On this point, AMAFI disagrees that investment research could be treated as an inducement. The firm does not take advantage of a non-monetary benefit (research) at the detriment of its clients' interest, as there is no interest for the firm in obtaining that information other than to use it to develop its investment decisions for the management of its clients' portfolios. In other words, this is not a "*benefit*" that the firm receives and retains for itself but a service that helps the firm makes its investment decision for the benefit of its clients. In addition, research is not a service that is free as it is paid by the way of broker commissions.

[5] Only data gathering may be carried out by the contractor chosen by ESMA, notwithstanding the fact that investment research is not listed as a particular focus of the data gathering to be carried out in respect of Article 24 (see ESMA's invitation to tender n° OJ/7/16/2013 – PROC/2013/05).

A parallel could be drawn between investment research and the service of execution: they both are services received by the firm from a third party and paid by its clients, which does not turn them into inducements by the mere fact that it is not the firm that pays for them. Similarly, other services offered by firms are not explicitly invoiced to clients even though they can be value-added for clients, such as for example, confirmation or settlement services embedded in brokers' activities. This does not make them inducements. AMAFI therefore considers that investment research is not an inducement as defined in Article 24 of MiFID II, i.e. a "non-*monetary benefit*" provided to the firms "*in connection with the provision of an investment service or an ancillary service*" because it is simply not a benefit.

Execution bias and existing safeguards

The issue of the firm potentially induced to channel order flows to brokers delivering the most value-added research, at the expense of execution, is a real one but it is already tackled by a number of existing rules in MiFID that act as safeguards in this respect. More specifically the rules on conflicts of interest and best execution, also applicable to portfolio managers, ensure that clients' interests are not harmed. It cannot be ignored that such behavior is already prohibited by existing rules in MiFID itself and can be sanctioned.

In addition, some countries have gone further in tightening these rules by implementing commission sharing agreements, under which cost of research and cost of execution can be split to ensure that each provider is remunerated at the level it should be. The CP ignores these arrangements, whereas by their very nature, they remove the incentives for improper execution, make objective the decision process followed by the manager and can certainly not be considered as inducements because they ensure the service is distinctly remunerated.

Allocation of cost of research to portfolios/funds

We understand that one of the objectives of this measure could be to make sure that managed portfolios, and later investment funds (via a potential modification of the UCITS and AIFM directives), are fairly allocated costs of research, i.e. that they are not charged more than what they actually consume to reach their investment objectives. The proposed change is yet unlikely to reach this objective because nothing in the proposal ensures that the costs that asset managers will bear directly will then be reallocated to the underlying portfolios more fairly than is done today.

- ***The economic impact of the proposal***

Although the proposal is restricted at the moment to independent advice and portfolio management, the intention to extend it to investment funds, makes the impact of this reform major, with no prior assessment by the Commisison.

- It is likely that managers will be prevented from fully passing the added costs onto clients because of the pressure on fees they face, triggered in particular by the current shift of the industry towards index funds. Such trend will be exacerbated as the cost differential between managed funds and index funds will be further heightened, which in turn increases the systemic effect of the industry, such index funds being by nature pro-cyclical.

- Such pressure will cause a reduction in the consumption of research and an additional barrier to entry into fund management (for the development of internal research or for having the capacity to bear the cost of research), at the detriment of investors' interest for a wide choice of providers.

- Independent brokers and research houses that still exist on the equity markets will be put at risk of disappearing, restricting further the universe of professionals covering SMEs and local businesses and making the latter less visible to investors. Above all, the end result will be detrimental to SMEs, at a time when their participation in the European growth requires facilitating their access to market funding and in contrast with the stated political will of fostering their development. Only the larger

players with international businesses, for whom coverage of these companies is relatively unprofitable, will be able to bear the cost of producing research, offsetting its costs through their other activities. The end result will be further concentration of the dealers industry into a cartel type of large international firms, less coverage of mid/small cap companies, higher costs to funds and a concentration of the asset management industry, with an advantage for asset managers with a US franchise.

- At a time when the fund management industry is globalising, it would put Europe at a major competitive disadvantage compared to the US where it does not appear that there is a debate on changing the way research is paid for. Using external research paid for by commissions as before, the US industry will be able to face lower costs and charge lower fees than their European counterparts. In this context, it is likely that US firms with European business would move the management of their funds to the US or at least would concentrate the information content in the US with onward feed to their European arms. As for European firms with businesses in the US, they would be at a severe competitive disadvantage because of their detrimental cost structure. Finally, managers would be more likely to invest outside of Europe and to see their choice of investments reduced across Europe, in contrast with investors' interest.

As a conclusion, AMAFI considers that ESMA has no legal ground to rule on the remuneration of investment research, disagrees with the details of the analysis provided, and considers that were this matter to be dealt with at European level, it would require discussions at a political level because of its major economic impact.

II. Other matters related to minor non-monetary benefits

No, AMAFI considers that the list of minor non-monetary benefits should not be exhaustive. Firms can experience situations that have not been envisaged and should be able therefore to consider other benefits as minor when they meet the criteria that are set in paragraph 4 of the draft advice. A degree of flexibility should be left to allow adaptation to real-life situations.

Furthermore, Article 24(13)(d) of MiFID II provides for delegated acts that include "*the criteria to assess compliance of firms receiving inducements with the obligation to act honestly, fairly and professionally in accordance with the best interest of the client*". It does not mandate the Commission for listing the inducements that are considered legitimate. Setting up an exhaustive list of minor non monetary benefits is therefore not compliant with level 1.

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?

No, in paragraph 6, the requirement to disclose the receipt of minor non-monetary benefits is not consistent with the requirement to prevent and manage conflicts of interest and to use disclosure only as a last resort when the risks of damage to client's interest cannot be prevented by the measures adopted by the firm, which is opposite to the very nature of minor non monetary benefits (since, by definition, they must be unlikely to influence the recipient's behaviour).

There are also practical issues in requiring disclosure of minor non monetary benefits. One issue is that they may not be linked to a product in particular nor a service, such that the connection with the service provided to the client is not evident. For example, the benefit (such as an invitation to a sport event) may have been received a few weeks/months ago, with no linkage to a specific product/service: would this qualify as a third party non monetary benefit, and if so until when such a benefit should it be disclosed? A second issue is the lack of feasibility of allocating a portion of the non monetary benefit to a specific client.

Another issue is linked to the value of the minor non monetary benefit which is generally limited by firms' policies. If any non monetary benefit were to be disclosed, it would require a burdensome process with no value for clients. Firms should at a minimum be able to apply a threshold of disclosure.

The objective should be to ensure that clients can be confident that firms do not receive disproportionate benefits that would distort their action (which is the purpose of a number of rules in MiFID); it should not be on providing them a list of these benefits that they will not even read or consider.

In any event, technically speaking, the draft advice should make clear that what is targeted here are third party, minor non-monetary benefits, i.e. those received from, or provided to, a third party except the client, in connection with the provision of an investment service or an ancillary service before providing the service should apply proportionately.

Paragraph 7. ii requires firms to provide their clients with the exact amount of the inducement received on an ex-post basis when they only disclosed ex-ante the method of calculation instead of the amount.

AMAFI thinks that such a requirement goes beyond level 1. Article 24.4 (c) second sub-paragraph does not provide the legal basis to set at level 2 an obligation to provide ex-post to the client the exact amount of inducements received.

Such a requirement would furthermore be disproportionate and with no value to the client in situations where the ex-ante disclosure provided a clear basis for its investment decision. For example, when distributing structured products, the cost for each client will depend on the final amount distributed among all clients, i.e. the distribution costs will be spread over a lower/higher number of clients or the distributor may decrease its remuneration. As the final size of the issue cannot be guessed ex-ante, costs are calculated on an estimated size and a maximum cost is disclosed to the client. Hence, clients are informed when they make their investment decision that in any case, they will not pay more than the maximum disclosed to them. In such circumstances, there is no value for the client in getting an ex-post disclosure with the exact amount, which can only be better than what was disclosed ex-ante.
In addition, this requirement would create similar issues as discussed above in terms of feasibility, since in many cases, it is not clear at all how firms could individualise the cost of an issue.

Client should have the right to require further details if needed, but a systematic obligation of information would be disproportionate.

Similarly, there is no legal basis for requiring disclosure of the total amount of on-going inducements on an annual basis as suggested by paragraph 7. iii. Also, it is difficult to see what value this will bring to clients as it will only aggregate disclosures that have already been made when the transaction was executed, though it will create significant costs for investment firms.

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.

No. AMAFI considers that defining quality enhancement negatively as proposed in paragraph 10 effectively prohibits the use of inducements for non-independent advice. Paragraph (i) in particular is likely to be impossible to comply with, such that no inducement can in effect be considered to enhance the quality of the service.

AMAFI considers that ESMA goes beyond its mandate by setting such criteria which are so stringent that non-independent advice will actually not be economically viable anymore. By doing so ESMA is

effectively pushing for the model of independent advice, whereas a political agreement on this subject has been reached.

MiFID II calls for a positive list of criteria since the Commission is empowered to adopt delegated acts to ensure that investment firms comply with the principles set out in Art. 25. If theoretical positive criteria cannot be found, at least examples of legitimate inducements should be provided.

On a more technical note, the duration of the recording set forth by paragraph 13 should be indicated.

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

These requirements would trigger costs but more importantly, potentially massive declines in revenues.

See Question 79 as regards the impact of prohibiting the payment of research via dealing commissions.

As for the other matters, they could also have a massive economic impact in terms of:

- Attrition amongst investment firms offering non independent advice, as their business model will not be viable anymore (more costs, less revenues)
- The cost of investment advice for clients, with only the wealthiest being able to pay for it.

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.

No, AMAFI does not agree.

The long list of criteria to fulfill in order to provide independent advice is in our view a deterrent to providing the service.

The prohibition to accept inducements for a firm offering independent advice is a major step forward and should ensure advice is not biased. In addition, suitability requirements constitute another safeguard for proper and unbiased advice. In this context, we believe that the proposed requirements are not useful and too cumbersome for the unclear benefit they would bring.

More specifically as regards paragraphs 1 and 2, we do not agree that the requirement of Article 24.7 to "*assess a sufficient range of financial instruments available on the market which must be sufficiently diverse*" should be interpreted as meaning that this should cover a "*substantial part of financial instruments (and) available on the market*". This interpretation is in our view not consistent with level 1. The level 1 requirement does not imply that a large number of different instruments should be assessed; the range rather means a sufficient diversity «*with regard to their type and issuers or product providers*".

Substantial could mean that more than 50% of the existing instruments for the type of investment concerned should be assessed. This is disproportionate and a bit of a theoretical exercise because not all financial instruments available on the market can be marketed (regulatory constraints), traded and settled by a firm. In addition, such a requirement is likely to prevent smaller independent advisors from offering independent advice because of the organisational arrangements it requires and administrative burden it creates.

Firms should be able to assess for each type of investment concerned what is "*sufficient*" – assessing mechanically a large number of financial instruments may not bring better results than assessing a selected number of those, identified on the basis of the commercial strategy of the firm, the reputation of their issuers, client experience, etc. Firms offering independent advice should not have to change themselves into investment portals; independence requires a selection process of a reasonable number of products, but not an assessment of a substantial part of the market.

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?

As AMAFI represents represent financial market participants in France, it is not directly concerned by this issue. It is however concerned that such separation could be an issue for smaller firms.

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

Yes, AMAFI anticipates additional costs, linked to the proposed selection process of financial instruments, the controls required, and possibly the separation of advisors, and the business impact of potentially not being able to provide independent advice because of the applicable requirements.

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?

No, AMAFI does not agree with all the proposed extensions.

- *Paragraph 1. iii*

Investment firms would be required to "*assess whether alternative financial instruments, less complex or with lower costs, could meet their client's profile*".

Firstly, such an obligation goes beyond level 1 which requires ensuring that the recommendation made is suitable, not considering other alternatives. This would drastically change the scope of the suitability assessment.

Additionally, the assumption that simplicity and low costs are the two criteria on which to judge the better suitability of alternative financial instruments is not correct – many other factors will need to be taken into account.

Finally, this statement seems to be written with the retail client in mind. For relationships with professional clients, there are a number of assumptions that apply as to the knowledge and experience of the clients, which make this requirement irrelevant.

Although AMAFI believes that this requirement should be removed, if it were to be kept, it should therefore target retail clients only.

- *Paragraph 1. iv*

This paragraph should be re-written to correspond to Article 35.5 of the MiFID Implementing Directive which states that no recommendation shall be made to the client if it is not suitable or if the firm does not have the necessary information to carry out the suitability assessment. This is not dependent on whether the firm has "*access to a limited range of instruments*".

- *Paragraph 1. v*

The requirement to demonstrate that the benefits of switching are greater than the costs assumes that the firm is able to anticipate what will be the performance of the new investment. Except when the performance is capped or guaranteed, it will not be possible for the firm to make such anticipation. This should be deleted.

- *Paragraph 1. vi*

The concept of "on-going relationship" is used without a definition.
As mentioned in our answer to Question 73, related to "*a continuing relationship*", we are wondering what is it referring to, or better, which relationships would not be covered, especially in the context of the wholesale market.

- *Paragraph 1. viii*

In sub-paragraph b., it is required to have "*robust processes for assessing the risk a client is willing and able to take*". How to assess the risk appetite of clients has been the focus of several studies in Member States since MiFID was implemented, with no clear conclusion yet on which method would be considered adapted. This calls on the application of cognitive sciences and we all know that it is not simple to find the right approach to assess the risk appetite of clients. Including such a general statement in the technical advice is in our view too forceful. If it were to be kept, it would need to be detailed further such that ESMA's expectations are made clear.

Sub-paragraph c. seems to imply that tools are required for firms to meet their suitability obligations. However, depending on their size and business, firms can meet suitability obligations without employing tools. In addition, tools should be "*designed for use with their clients*" and should be "*fit-for-purpose*", which has the same meaning.

AMAFI suggests writing instead "*ensuring ~~all tools employed in the~~* ***their arrangements for*** *suitability assessment ~~process~~ are appropriately designed for ~~use with~~ their clients* ***base*** *~~and are fit-for-purpose~~* (...)".

- *Paragraph 1. Ix*

Same comment as for paragraph 1. iii – this goes beyond level 1.

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?

No.

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?

AMAFI agrees that the suitability reports should be limited to retail clients.

The list of items the firm should provide in the suitability report is not exactly in line with the level 1 requirement on suitability assessment, i.e. personal circumstances and attitude to risk are not used at level 1 – the exact level 1 terms should be used in the draft advice.

Paragraph 2. iii states that it should be indicated what are the disadvantages of the recommended course of action. What does it mean? Clients should only be made aware of objective facts, such as the risks related to the recommended investment.

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?

Yes; bringing value to clients is key on this matter.

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?

AMAFI agrees with criterion ii. but does not agree with criterion i., which is too wide and imprecise to allow consistent interpretations by NCAs. The risk of diverging interpretations is too high to leave this criterion as is. It is not clear what products are specifically targeted at by ESMA, hence AMAFI is not in a position to make a proposal but this criterion, if it were to be kept, should be made more specific.

AMAFI strongly disagrees with the insertion of a statement labeling as complex the financial instruments described in Article 25(4)(a) of MiFID II that do not meet the specific requirements of any of the tests i) to v) of that Article.

The concept of complex financial instrument is not used at all in Article 25, there is therefore no legal basis to introduce such a concept at level 2.

The instances where there are references to "complex" or "more complex" financial instruments in MiFID II are in recitals (83) and (104), which do not have the same purpose as Article 25. These recitals aim at strengthening the information requirements applicable to different situations, including different types of clients such as eligible counterparties and complex or more complex financial instruments. The concept of a complex financial instrument is therefore used in these instances for a very different purpose than the application of the appropriateness test. The definition of complex instruments proposed by ESMA is not fit for this purpose (for example, what would be "more complex" for en eligible counterparty is unlikely to equate the "complex" financial instruments that would be defined in the context of Article 25).

As a conclusion, as (i) there is no legal basis for the introduction of this definition, (ii) the concept is not used in Article 25, and (iii) the proposed definition would not suit the situations where the concept is used elsewhere in the recitals of the Directive, point 2 of the draft technical advice should be removed.

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?

No.

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.

No, AMAFI does not agree with this proposal. At this point, the proposal that investment firms be required to enter into a written – or equivalent – agreement with their professional clients, at least for certain services (the proposal relating as a minimum to the investment service of investment advice and the ancillary service of safekeeping (custody) of financial instruments) is very unclear and therefore, in the absence of sufficient information on what is proposed, AMAFI cannot agree with it.

As indicated in the CP (§ 2.19, point 8), in practice, the terms and conditions under which such services are rendered are often recorded in writing, notably in order to provide legal certainty for both parties. But such terms may result for instance from general conditions which are sent to the client who accepts them expressly or tacitly, notably via a continuing business relationship with the investment firm. This means that in practice, quite often, there is no formal written agreement. Having said that, the draft technical advice (§2) provides for a written agreement "*in paper or another durable medium*". It is very important that ESMA clarifies what this means exactly.

If it requires a written agreement signed by the client, this is clearly not acceptable as it is not at all in line with current practice, the professional clients being reluctant, or simply very bad for practical purposes, at signing agreements.

If, on the other hand, the "*essential rights and obligations*" of the firm and the client may be evidenced by any type of written document (for instance, by electronic mail) and the agreement of the client to such terms may be given tacitly, for instance by a continuing relationship following the reception of general terms and conditions, then the proposal would be acceptable.

This point therefore requires clarification before a firm answer can be given to this 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?

Please refer to AMAFI's answer to Question 92. Subject to being satisfied that the requirement of a "*written (or equivalent) agreement*", as far as professional clients are concerned, can be construed as suggested in the penultimate paragraph of AMAFI's response to Question 92; then, AMAFI would agree

with the proposal that the requirement of a written agreement would only apply when the investment firm and the client have a continuing business relationship.

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?

Yes, AMAFI agrees with this requirement which already exists in France. It is most important to have a minimum harmonised regime throughout the EU on this matter.

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?

No, AMAFI does not agree with this proposal, subject to what follows. At least for professional clients, the content of the agreement should be left to the contractual freedom of the parties to provide as they think fit. As proposed, the requirement (if requirement there is – see AMAFI's response to Question 92), should be limited to "*the essential rights and obligations*" of the parties, and it should be up to them to decide on the level of detail which they want to provide in such agreement. It is unclear what is meant by "*describe in the client agreement any advice services, portfolio management services and custody services*" to be provided. If it is just a question of providing that one or two or three of these services is/are provided, there is no difficulty. But if the requirement goes more into detail, then AMAFI cannot agree to it. ESMA would have to explain in any case what is intended because at this stage, what the intended description is supposed to cover is very unclear.

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?

AMAFI's answer only concerns the execution of orders, and not portfolio management.

Even though, on the principle, AMAFI considers that information to professional clients should not be identical to information delivered to retail clients, we agree that, as regards specifically the content of execution reports, it can be the same in practice regardless of the category of clients concerned.

Nevertheless, it would be useful that ESMA indicates which behaviour is expected from an investment firm when a professional client asks not to receive execution reports. In practice, even though investment firms are required to provide their clients "*with adequate reports on the services provided*", pursuant to Article 25(6) of MiFID II, some clients, especially professional ones, may wish not to receive such reports.

If it can be considered that such requests by a retail client should not be accepted (although we may consider that a retail client could renounce to a protection as long as it is informed of its consequences), the situation is different when the request comes from a professional client who "*possesses the experience, knowledge and expertise to make its own investment decisions*" (Directive No 2014/65/EU, Annex II) and more particularly if this client is a regulated entity, such as a credit institution or an investment firm.

To bring more legal certainty on this issue, paragraph 3 should therefore be amended in order to indicate whether or not an investment firm is authorised not to send execution reports to a professional client, or a certain type of professional client, who expressly asks not to receive them.

Besides, apart from the issue of reporting obligations to professional clients, **as regards eligible counterparties**, paragraph 2 of the draft advice provides that investment firms "*enter into agreement with eligible counterparties to determine the nature and timing of reporting*".

Current market practice is such that eligible counterparties already agree between themselves what information to exchange. This does not necessarily take the form of a formal agreement though, and it can be amended as needed by a counterparty to suit its particular needs of the moment. This flexibility is important in relationships between eligible counterparties. They should be allowed to decide what will be the form of their agreement on the nature and timing of reporting. In this regard, the proposed advice prevents such flexibility and creates an unnecessary administrative burden on both sides.

A more adequate and proportionate approach would be to require eligible counterparties to agree between themselves the nature and timing of reporting.

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)?

As AMAFI represents represent financial market participants in France, it is not directly concerned by this issue.

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?

No, it should not be compulsory to indicate an estimated value of the financial instruments when a market price is not available. It may be very difficult to obtain accurate information to establish a reasonable estimate and the valuation can be intricate and costly. Providing an estimated value depending on the firm's internal valuation could prove misleading for the client.

The requirement should be to include the market value of the financial instrument, if any. When no market value is available, the firm would provide an estimated value only if it deems that it is a reasonable estimate considering the quality of information and the assumptions on which it is based. Investment firms shall have discretion to determine when it is appropriate to provide clients with an internal valuation, depending for example on the number of clients concerned, the cost of collecting the necessary information, the reliability of information and the nature of the assumptions made.

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?

As AMAFI represents financial market participants in France, it is not directly concerned by this issue.

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

AMAFI is not in a position to respond to this question.

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?

AMAFI welcomes several provisions of the draft technical advice on "Best execution" submitted by ESMA which clarify a number of issues which were unclear under MiFID I relating particularly (i) to the difference between the execution policy and the RTO/placing policy, notably in terms of consent (point 6), (ii) to the factors that may constitute a "material change" (*points 13 and 14*) and (iii) to the conditions under which the use of a single venue or entity for execution is possible (*points 15 and 16*).

Other provisions of the draft technical advice on "Best execution" raise certain questions or comments on the part of AMAFI as follows:

- It may be difficult to fulfil the requirement set out in point 3 for instruments other than cash equity because some of the factors listed in the level 1 legislation are not adapted for certain products (notably structured products). As a result, it would be helpful if ESMA could provide some guidance as to how this requirement may be adapted depending on the nature of the instrument concerned.
- The requirement in point 4 is unrealistic as it is impossible by definition, for bespoke OTC products, to prove the fairness of the product proposed to the client. For such products, the service rendered is neither that of reception and transmission of orders nor that of execution of orders. A contract for the creation of the product including a price proposal is established and negotiated with the client. The fairness of the product results *de facto* from the acceptance by client of the price proposed (particularly for professional clients). The requirement in point 4 should be either clarified or deleted.
- The requirement in point 8 to provide retail clients with a summary of the relevant policy needs to be clarified. Not only this implies for most investment firms that a third document be established (which means necessarily additional costs incurred) but it also implies that investment firms are able to provide the requested information. At this stage, the information to be provided, concerning particularly the price, is very unclear and it is unlikely that the investment firms will be able to provide in advance a very detailed price information. This point 8 should be clarified with realistic requirements in mind.
- For clarification purposes, points 10 and 11 could be redrafted in one single point.
- It is quite unrealistic to believe that the advantages or disadvanta ges of choosing one venue rather than another one will depend only on the information that can be provided to the client. It may also depend on the type of instruction given by the client and on the market conditions which may vary very quickly. It may well be therefore that the transparency requirements of point 12 - which is very heavy and costly for the investment firms – do not achieve their objective and appear therefore to be disproportionate.

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.

The policies and review procedures of the investment firms which are members of AMAFI vary from one firm to the other but it would seem that generally, they do not include at this stage all the details proposed in this chapter. A number of investment firms alternatively provide both the investment service of reception and transmission of orders and that of execution of orders. The requirement to have separate and customised policies depending on the class of instrument and on the type of service provided and the details set out in points 1 to 4 of the draft technical advice for instance (along with other details required in other points – see AMAFI's response to Question 101) will require significant modifications to the existing policies. This will inevitably result in significant additional costs both to establish such policies and distribute them to existing clients.

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.

No.

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?

AMAFI understands that ESMA's proposal consists in preventing that clients who have been classified professionals on request could be further considered as eligible counterparties, at their request. AMAFI understands therefore that this proposal does not change the possibility for clients who are professional by nature to be categorised as eligible counterparties *(MiFID implementing directive, Article 50.1, first paragraph)*.

If this understanding is correct, AMAFI agrees with the proposal.

If the proposal is to remove the possibility for a client, who is a professional client by nature, to be considered as an eligible counterparty, AMAFI is however opposed to it, as it would substantially harm the current relationships with these clients and the level of service that can be delivered to them.

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:

AMAFI understands from its members that such double opt-in would be quite exceptional.

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

AMAFI is not in a position to respond to this question.

2.23. Product intervention

Q107. Do you agree with the criteria proposed?

No. AMAFI is surprised by the proposed criteria because they basically cover any aspect of the design of a financial instrument and do not point at abnormal product features or firms' behaviors.

AMAFI expected that the criteria would point out features and behaviors that could be an issue for market integrity or investor protection. The list provided is in our view not helpful at all for NCAs who have to decide whether they should intervene because it provides no real guidance of what they should consider as being a problem.

Given that, AMAFI considers that it is not acceptable to consider that the presence of just one criterion would be sufficient to trigger product intervention (paragraphs 3 and 7).

Finally, considering that paragraph 8 authorises NCAS to intervene even when none of these factors are present, AMAFI questions the actual usefulness of this list.

For firms, the fundamental issue at stake on this subject is that any product intervention by an NCA or ESMA should be justified, but this proposal brings no answer to this concern, which remains intact.

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

No, see our answer to Question 107.

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.

No. AMAFI disagrees with the proposed liquidity thresholds. We understand that the cumulative nature of the four criteria under MIF II, as opposed to the situation under MIF I, can lead to a recalibration of the thresholds in order to capture at least an equivalent share of the European equities as liquid.

Nevertheless, the lowering of the free float threshold to €100m is not acceptable, since this can be detrimental for medium-sized companies which as far as we are concerned should benefit from a sufficiently favourable environment.

In our opinion, an appropriate calibration should be for the free float to be set at €200m, since that is the level of capitalisation below which a company is considered as a small and medium-sized enterprise under Article 4(1)(13) of MiFID.

Otherwise, we find that the calibration of the other criteria in scenario 5 acceptable.

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.

No. AMAFI considers that two situations must be taken into account.

When the underlying share is listed on an EU market, the free float for depositary receipts should be determined by the number of shares issued in the issuer's home market.

When the underlying share is not an "EU share", therefore the free float of the depositary receipt should be calculated.

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.

Yes, AMAFI agrees. We consider that, in order to avoid regulatory arbitrage between financial instruments which are intrinsically linked together, the liquidity thresholds for depositary receipts should be set at the same level as for shares.

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.

No. Considering our views on the equity thresholds stated in our answer to Q109, AMAFI disagrees with the liquidity thresholds proposed by ESMA for depositary receipts. As for equities, we believe the free float criterion should be set at least at €200m, so as not to affect SME markets.

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.

Yes. AMAFI agrees that the criterion of free float for ETFs could be addressed through the number of units issued for trading.

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.

Due to the very short timeframe left for consultation, and considering the need to carefully examine the various implications of this question, AMAFI is currently unable to answer it.

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).

Due to the very short timeframe left for consultation, and considering the need to carefully examine the various implications of this question, AMAFI is currently unable to answer it.

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

AMAFI is not aware of any other instruments that could be caught by the definition of certificates under Article 2(1)(27) of MiFIR.

As mentioned in our answer to Q102 in the Discussion Paper, we welcome the clarification made concerning the notion of certificates, for which the level 1 text creates an ambiguity.

In our view, the category designated as certificates in the level 1 text (translated by "certificats préférentiels" in French), and associated with the equity universe, should only concern a reduced number of instruments, as Spanish *participaciones preferentes* and German *Genussscheine* mentioned here, and certainly not securities with a subordinated element, such as redeemable subordinated notes or contingent convertibles (CoCo). Indeed, by nature, the latter are closer to the non-equity universe and should in our view be submitted to the same regime.

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.

AMAFI does not have sufficient data on these instruments to answer this question.

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

AMAFI has no objection to these thresholds.

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.

Yes. AMAFI agrees with an approach based on the issuance size for the free float criterion.

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?

No. AMAFI does not think that this discretion should be retained under MiFID II, so as to maintain a consistent regime all over the Union.

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?

No. AMAFI disagrees with ESMA's assessment. We are of the view that there should be the same definition as the final definition that will be contained in the Money Market Directive. Indeed, we consider that inconsistent regulation for the money market would be unhelpful, creating a distorted and fragmented market.

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.

First of all, AMAFI welcomes the introduction of quantitative thresholds in the definition of the systematic internalisers, since that would greatly clarify the situation for market participants.

Moreover, we would like to recall that some transactions should not be taken into account in the metrics used to define a systematic internaliser, a regime created for the investment firm to answer clients' needs. Therefore, a criterion such as "if the number of transactions executed by the investment firm on own account OTC […] is equal or larger than […]" does not reflect the nature of systematic internaliser, which should not comprise hedge or technical transactions, which do not contribute to the price formation and hence should be excluded.

At last, we think it necessary for an investment firm with a systematic internaliser status to get the possibility to intervene on own account on an ad hoc basis outside the scope of the systematic internaliser, provided it can show that all the transactions executed or the clients of these transactions are fundamentally different from the type of transactions or of clients carried out as systematic internaliser. This seems all the more important for firms opting in the systematic internaliser status.

This being stated, AMAFI considers that the levels proposed for equity are too low. We do not see any justification for these metrics.

We propose alternative levels, based on a figure set in the text of the Regulation. It appears that the 4% cap of the volume cap mechanism, set out in Article 5 of MiFIR, aims at the same objective, which is to limit dark pools. Hence, it would seem coherent to build the criteria for systematic internalisers from this level.

Since the methodology of the two thresholds are different (the 4% cap considers the activity on trading venues, while the one for the definition of a systematic internaliser all the trading is considered, with OTC which represents around 40% of the European volumes), the level for the range should be set, according to us, between 2.0% and 2.5%.

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?

Yes. AMAFI agrees that for illiquid instruments under Article 2(1)(17) of MiFIR, the frequent and systematic criterion should be met when the investment firm deals on own account OTC on average at least on a daily basis.

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.

AMAFI considers that these percentages are too low, especially for the proportion of turnover out of the total turnover in the Union, for which higher figures can find justification in the level text (*please see our answer to Q122*).

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.

Yes. AMAFI supports thresholds based on the turnover, considering the choice made by ESMA on the systematic and frequent criterion. We also agree with the definition of total trading adopted by ESMA

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

No for ETFs. AMAFI considers that these thresholds, which can be acceptable for depositary receipts and certificates, are clearly not adequate for ETFs, which are traded amongst a far more limited number of market participants.

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?

No. AMAFI is of the view that the timeframe proposed by ESMA is too frequent, with a risk of distortions due to seasonal variations.

Moreover, we consider that the one-month period for the compliance to the systematic internaliser regime is too stringent: we believe that a period of at least three months should be given to the firm.

It requires indeed sophisticated IT systems that the investment firms currently do not necessarily have. Having such systems up and running takes a lot of time and is very expensive. Making these assessments requires also more personnel.

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.

Not exactly. AMAFI reckons that a calculation per ISIN or at a more granular level will be too complicated and not operational. However, we consider that it would even be relevant to set the thresholds at a sub-asset level, in order to take into account the specificities of each type of instruments.

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.

AMAFI considers that thresholds based on the turnover are adequate for bonds. As for derivatives, we find it sufficient to let the "substantial basis" criterion be based on notional. Multiplying by price would result in very different results depending on whether the financial instrument is quoted as a price (typically in the region of 100) or as a rate (currently rates for some financial instruments are as low as 0).

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.

Yes. AMAFI agrees with this proposal.

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.

AMAFI understands that an approach based on some aggregation for derivatives would be more practicable. Nevertheless we consider that (i) such an approach is only valid for instruments which do not possess an ISIN, so that securitised derivatives should not be affected by it, and (ii), if such an aggregated approach is taken, there should be different thresholds, contrary to what ESMA proposes in its table 18.

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?

AMAFI considers, that by definition, there are situations when liquid derivatives will be in the scope of systematic internalisers, not only in the cases mentioned in point 22 (cases where the trading obligation does not apply), but also for securitised derivatives which are not concerned by the trading obligation.

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?

Yes. AMAFI agrees with this assessment period.

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.

AMAFI wonders how these ranges were settled, because no justification is put forward by ESMA. We consider that this matter will have to be investigated further.

We consider it is unclear how the total number of the transactions in the same financial instrument in the Union is calculated and by who. Calculating such figure is very challenging.

As for the levels, we consider that the proposed ones are very low and not what we would consider substantial. A firm having just over 0.5% of the flow (traded OTC, which is generally the case in non-order driven markets) in a given instrument would be considered as substantial.

On this matter, as stated in our answer to Q131, we consider that a more granular approach should be taken.

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.

Systematic internalisers in the non-equity universe is something newly established by the MIF II arrangement. As for today, we lack data on these instruments, which are mostly traded OTC. Even if ESMA is going to provide soma data from the beginning of 2016, it would be very difficult for investment firms to assess whether or not they fall under the regime of the systematic internaliser.

Moreover, for many instruments which are not traded frequently, the setting of percentages can have misleading consequences, since a high percentage can be reached very rapidly, which does not mean that the trading is systematic and frequent or substantial.

In this context, it would be more workable set up thresholds based on absolute numbers.

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

Due to the very short timeframe left for consultation, and considering the need to carefully examine the various implications of this question, AMAFI is currently unable to answer it.

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?

Yes. AMAFI agrees with this proposal.

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.

No. Exceptional circumstances should include an instrument going into auction on a relevant market and an instrument added to a restricted list.

Moreover AMAFI considers that an SI which withdraws its quotes should not be required to inform the NCA or its client that it has done so. Indeed, this information is in any case already publically available through an APA. Cancellation of the quote therefore serves as the notification itself.

And above all, AMAFI fully disagrees with ESMA's understanding concerning the updating and withdrawal of quotes. In our opinion ESMA reinterprets Level 1 and aims to limit the possibility of updating to exceptional circumstances.

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?

Yes. AMAFI agrees with this proposal.

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.

Yes. AMAFI agrees with this proposal.

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?

Yes. AMAFI agrees that systematic internaliser faces similar risks than liquidity providers on request for quotes systems.

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

Yes. AMAFI fully agrees with ESMA's proposal.

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?

Yes. AMAFI agrees with this proposal.

Q144. Do you agree with the proposed definition of "normal trading hours"? Should the publication time be extended?

Yes. AMAFI agrees with this proposal.

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

No. In general, AMAFI agrees with the proposal, except for point ii where ESMA recommends that when a systematic internaliser is also a registered as a market maker on the trading venue, publication should take place in any case through the trading venues arrangements.

Indeed, market making activities and systematic internalisation may follow different commercial, economic and strategic objectives within an investment firm. Besides that, there is no reason to liaise theses activities which would give trading venues an economic advantage for an activity whose main rational is to take place outside trading venues. Moreover, in case an investment firm is registered as a market maker on a given instrument, it is not clear how ESMA's recommendation can practically work.

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

Yes. AMAFI agrees with this proposal.

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

AMAFI does not see any other means of communication at this stage.

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

Yes. AMAFI agrees with this statement.

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

Due to the very short timeframe left for consultation, and considering the need to carefully examine the details of the standards, AMAFI is currently unable to answer it.

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?

No. AMAFI does not agree with the imposing of the publication on a "human readeable" manner to investment firms publishing their quotes through their own website. First, it is not clear what "understandable for a human average reader" means. Then, it would lead to a discrepancy of information (at least in time but also in content), which would be misleading and confusing. Last, the publication of quotes on a "machine-readable" way is sufficient for market participants which have all the capacity to translate the information in their own langage.

Q151. Do you agree with the requirements to consider that the publication is 'easily accessible'?

Please refer to our answer on Q151.

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?

AMAFI agrees with ESMA's assessment that execution would be facilitated by the publication of unexecuted orders trhough a data reporting service or through an investment firms website.

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

Yes. AMAFI agrees with ESMA's proposal.

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?

Beforehand, AMAFI considers it is vital to act in that field, since many market participants registered a large increase in the price of market data in the past few years. We had recently carried out a survey amoung or members on this matter: it revealed the extent of this problem, which is a cause of great concern for many market participants. According to our survey, we evaluate the increase of market data for them at about 35 % between 2009 and 2013. Moreover, the survey shows that the European model, which implies both markets venues and data vendors is complicated, not transparent and difficult to understand. The survey also reveals the emergence of "non display data" practices and tarrifs which limit the dissemination of market data and therefore drasticly increase their costs.

Therefore, even though we welcome the new provisions, AMAFI considers that there is a need to review the whole chain of distribution of market data in Europe and to change the market practices. We reaffirm that a good way of establishing a situation conducive to all market participants in terms of access to market data at a reasonable price would be the institution of a single consolidated tape through a competitive tender process, and we regret that the new MIF arrangement does not follow this approach.

That being stated, AMAFI believes that the disclosure requirements proposed by ESMA's Option A will have a positive effect on pricing and direct the prices towards a reasonable commercial basis.

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

AMAFI does not see so far any other requirements in this context. We consider the elements of point 15 would be sufficient.

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

AMAFI considers that transparency is a good tool to reach the aim of a reasonable commercial basis. This would have had better results with a single consolidated tape, as stated in our answer to Q154.

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

AMAFI is of the opinion that such a control would not be a positive evolution, in spite of the commendable motivations. MiFID is based on the principle of competition between trading venues. Limiting the share of revenue that market data services can represent for trading venues would illegitimately bend their freedom of competition. Such a limitation would at least require highlighting a market failure which would not be manageable by the way of higher transparency as exposed above (*see Q154*).

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

As stated in our answer to Q157, AMAFI does not consider any such limitation as desirable.

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?

AMAFI wants to reaffirm its opposition to a definition of "reasonable commercial basis" based on costs. For the reasons exposed above (*see Q 157*), we consider such an approach as inappropriate.

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?

AMAFI considers that such a model would be far too complicated to maintain for suppliers, and would induce risks of heterogeneous practices. See also Q159 and Q157.

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?

AMAFI believes that the definition should be comprehensive for all markets.

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.

As expressed in the above answers, AMAFI is really concerned by the consequences of options B and C on the industry, where the regulators would interfere too much in the business model of market operators and investment firms operating platforms. Hence we considered that option A is the only one possible.

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

AMAFI considers that option A is the only proposed option which will not have excessive costs. We believe that the costs of option C will be far too high for the operators and the regulators, and that the issue at stake does not justify such costs. Option B can have dramatic effects on venues, which already face difficulties.

In our view, an increased price transparency, combined with the data disaggregation exposed in the Discussion Paper, should benefit the whole ecosystem.

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

AMAFI reiterates that the establishment of a single European consolidated tape would have positive effects on the cost of market data.

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?

AMAFI considers that a 'per-user' pricing model designed to prevent multiple charging for the same information, seems a good theoretical answer. Nevertheless, we consider that it would be very complicated to implement such a solution, which would need a consolidated reporting from very diverse systems.

We then agree that it should be proposed by trading venues, even if we doubt that this will give the anticipated effects any time soon.

A more practical solution would be to create a 'per-user' licence only for data flows coming from data vendors such as Reuters and Bloomberg.

Q166. If yes, in which circumstances?

See our response to Q165 above.

5. Micro-structural issues

5.1. Algorithmic and high frequency trading (HFT)

Q167. Which would be your preferred option? Why?

AMAFI considers that both options have serious drawbacks. If the intent of the Directive is to identify pure HFT players, to impose them adequate obligations and supervise them, which is our reading of the directive, then the proposed definitions fail**s** to meet the objective.

We believe that option 1 risks being arbitrary if the approach is qualitative or rapidly obsolete if quantitative since it is very dependent on the level of technology, and would then need frequent reviews. The only criterion in Option 1 that would be decisive, but not sufficient, to distinguish between HFT and other trading would actually be criterion i, as the other criteria may catch usual trading (most of the bandwidth is used by incoming messages from the markets, and the trading frequency of 2 messages per second is too low to be differentiating). More specifically, the latency criterion can be criticised, since the most aggressive HFT players today have a latency of 0.

Therefore, we favour option 2 which, in spite of its insufficiencies (see our answer to Question 167), seems to be more practicable and in line with the market practices and evolutions.

Nevertheless, we want ESMA to consider a major concern raised by several of our members related to the risks implied by such a definition for market makers, and expressed in our following answers.

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

As stated above, AMAFI considers that option 2 is preferable, even if it is based on a purely relative criterion which is highly debatable in case it is applied alone. This definition means that there would be HFT in each and every market, regardless of the absolute frequency or latency used: we then greatly favour its improvement with an additional criterion.

Moreover, this definition **does not allow the capture of HFTs acting as liquidity takers** (liquidity-taker trades at the best available market prices. His orders do not wait in the order book to be executed but are matched instantaneously with orders which have already been placed by other market participants, usually market makers. The orders of a liquidity taker are referred as "market orders" or "aggressive orders" as opposed to passive orders). For that purpose, the definition should also incorporate an additional ratio measuring the proportion of aggressive orders vs passive orders.

More broadly, AMAFI considers that in drafting the definition, a special attention should be paid to the unintended consequences of capturing market makers.

It should be remembered that market makers serve a special purpose and should not be affected by the regulatory treatment applied to HFT.

- Most high-frequency traders who are not market makers (such as proprietary boutiques operating as hedge funds) have **very little to no regulatory obligations** and are subject to very light regulatory oversight. Furthermore, their activity on trading venues is not constrained by any liquidity commitment such as the obligation to provide continuous quotation on a pre-defined set of stocks or instruments.

- On the other hand, market makers are regulated entities which have strict liquidity obligations towards the exchanges with whom they have signed liquidity provision contracts. This interpretation is consistent with the definition of a market making strategy under Article 17(3) and 17(4) of the Directive. These articles confirm that market makers have two defining and unequivocal characteristics: (i) they have **binding liquidity agreements** with one or several trading venues (ii) whereby they commit to **supply liquidity** to these venues under strict conditions (constant provision of 2 ways quotes of comparable sizes at competitive prices during a certain proportion of the venue's trading hours). These criteria create a further difference between HFT and market makers: engaging into market making strategies has significant entry and running cost associated with it as opposed to implementing pure high-frequency strategies.

- We acknowledge that market makers have certain characteristics in common with HFTs, which is probably where the confusion comes from: they make use of high speed infrastructures and also place large volume of orders part of which are subsequently cancelled. But one has to bear in mind that **being a market maker requires execution speed and frequent quote adjustments**. This requirement applies to all stocks and derivatives markets (futures and options) on which market makers are active. The market makers who would not use such techniques would be outliers in the market as they would not be in a position to fulfil their role as liquidity providers in an effective and competitive manner. In particular, the market makers who would not be fast enough in adjusting their quotes would be arbitraged by faster HFTs having the capacity to spot instantaneously off-market quotes.

- Finally we believe that the classification of market makers as HFT would **not bring any additional comfort to the regulators**: MIFID II already prescribes minimum organisational and operational standards to market makers under recital (60). Thus, classifying them as HFT will not change anything to the way these entities will operate after the entry into force of MIFID II. It could even have **negative consequences on the public image of market makers** if their name was associated to the largely negative media coverage of high frequency trading. As a result, there is a high risk that some of them seriously reconsider their role as liquidity providers and cease performing it to avoid facing **sensitive political and reputational issues.**

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

In order to limit the drawbacks identified in Q168, AMAFI proposes (i) to enrich the definition with a new threshold and (ii) to determine the orders which should be taken into account in the calculation of the median daily lifetime.

(i) Since the relative criterion is based on the median life of orders, we are of the view that it should be complemented with an absolute criterion related to this measure. Moreover, a maker-taker ratio could be devised.

(ii) To ensure that entities which only carry out market making activities as per Article 17(3) and 17(4) of MiFID are not captured by the HFT qualification, we propose to exclude the orders linked to that activity (market making and hedging of market making activities, e.g. the cash activities to hedge market making arrangements on the derivatives market).

Thus, our proposed definition of HFT is: **A member/participant should be considered as HFT when the median daily lifetime of his orders, excluding the orders linked to market making or to the hedging of market making is below 500 milliseconds and below the median daily lifetime of orders on the relevant venue AND his ratio of aggressive orders to passive orders is above a threshold to be defined.**

AMAFI currently estimates that this threshold should be set at 75%.

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.***

AMAFI reckons that, provided option 2 is complemented by the test proposed in the previous question, it would be acceptable to take into account orders sent for illiquid instruments. That would indeed greatly simplify the calculation.

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

AMAFI agrees with the above assessment.

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?

AMAFI considers that a clarification of the definitions of DEA, DMA and SA provided in MiFID is necessary, notably because of diverging interpretations in the Union.

This being stated, AMAFI considers that the definitions of DMA and SA in MiFID II are very close. In this respect, it would be helpful to clarify what it means, as per the definition of sponsored access, to use arrangements where the infrastructure of the member "*is not used*". If this covers naked SA, that is to say situations where the order is transmitted without the broker pre controlling orders (as the order is outside the member's system), AMAFI is of the opinion that it should be forbidden. If it covers situations where controls are implemented by the client in its own infrastructure, as agreed contractually with the member, then the consequences in terms of monitoring requirements for the member should be detailed, i.e. for example, real-time monitoring by the member would not be feasible.

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?

AMAFI is not opposed in principle to include AORs in the scope of DEA, as long as an AOR is defined as proposed by IOSCO. In such a case, orders are not subject to the discretion of the member/participant but are routed "*automatically"* to a trading venue selected at the discretion of the AOR user, i.e. the AOR does not include the broker's smart order router. It could then be considered that the AOR enables the orders to be transmitted by the client "*directly to the trading venue*" (as per Article 4(1)(41) of MiFID II) even though they go through the broker's infrastructure. Actually, it can be argues that any DEA order goes through the broker's AOR anyway, the AOR being only a technical means of implementing the DEA, so that such an extension of the definition of a DEA may not add real value.

For the sake of clarity though, AMAFI does not consider order flows that utilise a broker's algorithm, including a smart order router, as being in the scope of DEA trading. In such cases, the broker maintains discretion in the execution of the order and determines some combination of the venue, size, time and price of the execution. In other words, orders are not transmitted "*directly to the trading venue*" by the client, as required by the definition of a DEA in Article 4(1)(41) of MiFID II.

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

AMAFI understands that "*shared connectivity arrangements*" are information systems from third parties such as Bloomberg, used to transmit orders between a client and a broker.

With this understanding, AMAFI considers that electronic order transmission systems through shared connectivity are significantly different from the DEA definition since they imply intermediation by the broker and they are only a means of communicating orders to the broker. They should therefore not be included within the scope of DEA.

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?

AMAFI wonders whether this question is relevant, i.e. the means to implement a DEA service are not the DEA service itself. These are two separate things.

Whatever the connectivity system used to carry out the DEA service, it needs to function properly and should be part of the testing of the DEA anyway.

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?

Beforehand, AMAFI regrets that these newly established SME Growth Markets are only a label given to MTF under specific conditions, without any exemptions to the common rules applicable to MTFs. We consider that the financing of SMEs is key for European growth and that these companies should benefit from a specific and advantageous treatment on the financial markets, which is clearly not the case with this new set of measures.

AMAFI also underlines that the designation “SME Growth Market” is somewhat confusing since it may give the impression of being a market for SME growth companies rather than a market on which SMEs can raise growth capital.

AMAFI supports assessing the percentage of issuers on the basis of number of issuers only, which seems to be the most practicable solution.

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?

AMAFI agrees with ESMA on the third option (figures based on the market capitalisation at the end of each month with an average calculated on 31 December) as the most appropriate alternative for the assessment whether at least 50% of issuers on an SME-GM were SMEs.

Q178. Do you agree with the approach described above (in the box above), 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?

Yes. AMAFI shares this view with ESMA that falling below the qualifying 50% threshold for a number of three consecutive years should lead to deregistration as a SME-GM. Given the time that it takes for companies to come to market and taking into accounts periods where there may be lesser listing activity this seems to strike an appropriate balance.

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

AMAFI agrees with ESMA’s position that SME-GM which falls below the 50% threshold in one calendar year should not be required to disclose that fact to the market, since we do not see the benefit of requiring such a disclosure.

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.

AMAFI is of the view that option (c), i.e. a non-equity issuer is considered a SMEs for the purpose of determining whether an SME-GM meets the requirement of having at least 50% SME issuers if the issuer is classified as an SME pursuant to article 2(1)(f) of the Prospectus Directive, as an appropriate option.

This definition of SME ensures a consistent definition across the EU regulations (MiFID II and EU Prospectus Directive).

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)?

In AMAFI's view, the market operator should have the flexibility to decide the basis on which it wants to operate the market and the extent it wants to delegate certain matters to other market parties active in the capital markets ecosystem.

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"?

AMAFI considers that the "appropriate" test should be limited to certain principal features only, such as free transferability and fungibility of securities and availability of clearing and settlement of transactions. We are of the view that making these principal features part of MiFID Level II requirements is desirable. Other features, such as corporate governance, financial position, should be within the remit of the market operators.

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?

AMAFI is not sure to which factors ESMA is referring to.

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?

No. AMAFI is not in favour of introducing an appropriateness test for an SME-GM issuer's management and board at this level. In general, pursuant to applicable corporate governance rules and company law management and board members are subject to periodic evaluations and fiduciary duties. Stakeholders (including shareholders) can hold management and board members accountable in general meetings or other forums (e.g. works council meetings).

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?

No. AMAFI is of the view that, although an appropriate test can help in assessing whether a company is able to fulfil its ongoing obligation, it is no guarantee that it will do so.

Instead we consider that the SME-GM should have the power to disclose the names of non-compliant issuers to the trading members, the investment community and the public at large. See also the answer to Q195 below.

Q186. Do you agree with i, i or iii?

AMAFI supports option iii, considering that future Level 2 Regulation should remain silent on the adequacy of an issuer's working capital.

It should be noted in this context that, as far as we know, audit firms do not issue an opinion on the accounts of a company that does not have sufficient working capital for the next 12 months and as such some of this is already captured.

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?

In AMAFI's opinion, the market operator should have the flexibility to introduce criteria in order to meet its obligations so as to ensure the fair and orderly working of the SME-GM.

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?

Yes. AMAFI is of the opinion that it is key that investors are able to make an informed investment decision based on information consolidated in an admission document made available by the issuer. That being stated, the initial disclosure requirements should allow for enough flexibility enabling issuers to make use of the (public) capital markets in a (cost) efficient way.

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?

AMAFI agrees that SME-GMs should be able to take both approaches, so as to allow for sufficient information being made available to investors.

We consider however that this should not lead to a difference in perception with issuers as to whether one market has a lighter regime than another SME-GM, whilst this is not the case in practice.

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?

No (first question). AMAFI considers that the introduction of these types of rules would not give the flexibility required to operate a SME-GM.

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)?

Please see response to Q190 above.

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?

No. AMAFI is of the view that the responsibility for ensuring that the information contained in an admission document is complete and accurate should lie unequivocally with the issuer. Moreover, financial intermediaries and other advisors engaged by the issuer are responsible for advising the issuer on what information should be part of the admission document.

An alternative way of facilitating assurance is introduction of an optional approval from the relevant NCA (i.e. applying the Prospectus Directive rules) in relation to admission documents at the request of the relevant issuer.

Q193. Do you agree with this initial assessment by ESMA?

Yes. AMAFI agrees with ESMA’s initial assessment. We believe that the applicable requirements should be of such a standard to maintain high levels of investor protection to promote investor confidence in those markets.

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?

AMAFI is of the opinion that the ongoing periodic financial reporting requirements set by the Transparency Directive provide the appropriate standard to maintain high levels of investor protection to promote investor confidence in SME-GMs.

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

AMAFI considers that market operators should be in a position to apply listing measures if an issuer does not comply with the reporting obligations. These listing measures could comprise (i) publication of the non-compliance to the market, (ii) allocation of the issuer's instrument to a special trading segment (penalty bench), (iii) trading suspension and (iv) – as ultimate remedy – a delisting.

Q196. Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph 23) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?

No. AMAFI considers the extended deadlines as being too long. They do not strike the right balance between on the one hand providing issuers with flexibility and on the other maintaining investor confidence.

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?

Yes. AMAFI agrees with ESMA that the MiFID II framework should not impose any additional requirements or relief to those envisaged by MAR.

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

AMAFI is of the view that information of issuers admitted on a SME-GM should be made available on both their own website and the website of the market operator.

To the extent a market operator of a SME-GM would be required to make available and store information received from issuers it should also be in a position to commercially exploit such information to cover costs associated with such requirements.

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?

AMAFI is of the view that, as for the ongoing reporting obligations, market operators should be in a position to apply listing measures if an issuer does not satisfy the dissemination and storage requirements comply with its the reporting obligations. Such listing measures could comprise (i) publication of the non-compliance to the market, (ii) allocation of the issuer's instrument to a special trading segment (penalty bench), (iii) trading suspension and (iv) – as ultimate remedy – a delisting.

AMAFI opines that issuers admitted on a SME-GM should make information available on both their own website and the website of the market operator.

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)?

In AMAFI's view, the information published and disseminated should be available for a period of 5 years, so as to be coherent with the requirements under MAD and the Transparency Directive.

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

Yes. AMAFI agrees that the MiFID II framework should not impose any additional requirements or relief to those presented in MAR.

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?

Due to the very short timeframe left for consultation, AMAFI has not been able to consider all the implications of this question with it members. Nevertheless ESMA's approach seems to make sense.

Q203. Do you agree that NCAs would also need to consider the criteria described in paragraph 6, iii and iv, when making an assessment of relevant costs or risks?

Due to the very short timeframe left for consultation, AMAFI has not been able to consider all the implications of this question with it members. Nevertheless ESMA's proposal to consider the criteria described in paragraph 6 iii and iv seems to make sense.

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

Due to the very short timeframe left for consultation, AMAFI has not been able to consider all the implications of this question with it members. Nevertheless ESMA's proposed examples seem adequate.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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.

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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.

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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.

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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"?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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.

Yes, AMAFI agrees on ESMA's proposal.

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.

Yes, AMAFI agrees on ESMA's proposal.

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?

Yes, AMAFI agrees on ESMA's proposal.

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?

AMAFI would like to clarify that "*ii. significant and abrupt rise in the demand of a commodity*" is not a relevant element as it may be due to the course of a normal evolution of the market without necessarily be constitutive of a dysfunctioning of the market.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

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

Due to the very short timeframe left for consultation, and considering the different priorities within the whole consultation, AMAFI is currently unable to answer it.

Portfolio compression

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

Due to the very short timeframe left for consultation, and considering the need to carefully examine the details of the standards, AMAFI is currently unable to answer it.

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?

Due to the very short timeframe left for consultation, and considering the need to carefully examine the details of the standards, AMAFI is currently unable to answer it.