Brussels, 18 May 2020

EACB Answer to

European Commission's public consultation on the review of the

MiFID II/ MIFIR regulatory framework

May 2020

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 210 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 79 million members and 749,000 employees and have a total average market share of about 20%.

For further details, please visit www.eacb.coop

Introduction

Co-operative banks have generally been supportive of the introduction of the 'Markets in Financial Instruments Directive' (MiFID) II and its accompanying 'Markets in Financial Instruments Regulation' (MiFIR), as they are the legal basis for disclosure requirements that provide end clients with clear, correct and comparable information on all costs and charges relating to the provision of investment services and financial instruments. Having said that, the implementation of these legal texts has not been without difficulties. Resolution of such implementation issues has been an ongoing priority topic for EACB members since entry into force of MiFID II and MIFIR.

In fact, EACB members have carried out a cost-benefit and legal analysis of the implementation issues generated from MiFID II/ MiFIR, even before the publication of this consultation. The analysis was finalised in a whitepaper dated 6 November 2019, titled EACB proposal for a MiFID II Refit: "Towards a more effective framework respecting diversity and consumer choice" and which was publically discussed with the European Commission and members of the European Parliament and permanent representations of the EU Member States in an event held on 20 February 2020.

Therefore, the EACB welcomes this opportunity to participate in the European Commission's consultation on the review of the MiFID II/ MiFIR regulatory framework which also goes further (in terms of certain topics) than the EACB proposal dated 6 November 2019. Our feedback can be found hereunder.

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

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

2 - Unsatisfied

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

It is widely known that the DNA of cooperative banks is on the retail market and financing to SMEs. Therefore, the EACB strongly supports the objectives that MiFID II tried to achieve in support of the Commission's vision for an integrated EU capital markets union (CMU): to unlock retail investment by improving investor protection through increased transparency requirements and capturing the widest scope possible in terms of financial market participants and instruments. The reality however has shown that MIFID II has had some unintended consequences affecting cooperative banks and their clients which have also detracted from achieving the objectives of the CMU:

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Access of retail clients to capital markets: Overall, our members have reported that retail clients (but also professional clients and ECPs) are withdrawing from capital markets due to experiencing information overload from the various transparency requirements e.g. cost reporting, information on services and products, the various policies and questionnaires provided to clients, etc. Clients explain that they are not able to assess the relevant risks, investment opportunities and costs to enter and remain in capital markets due to information overload. The complexity of this information is made worse due to the fact that there is a lack of convergence with other securities markets legislation such as the costs and charges disclosures in the PRIIPs KID and UCITS KIID. In addition, our members have recorded an increase of up to 50% in the time taken to fulfil all the mandatory requirements when giving investment advice which is also discouraging to investors.

Transparency regulations have also generated substantial direct and indirect costs and burdens to our co-operative banks, leading to adaptation of business models and in several cases withdrawal from providing investment services or investment advice altogether, which impacts consumer choice. Initial implementation and running costs combined are in some cases higher than for core banking regulation rules deriving from CRR/CRD for many of our members. Reporting requirements further to the rules for efficient market infrastructure (notably Article 26 MiFIR) have also contributed to the above burdens without notable prevention of market abuse and insider trading. In our opinion a European Commission consumer test would have helped to underline both the negative and positive effects of MiFID II, at least in the area of investor protection.

Simplification of both transparency and reporting requirements is thus important in improving investor protection. This can be done through convergence with other legislation, and deregulation of certain requirements depending on the client or product type.

Availability of capital for SMEs: Another opportunity for improvement is in relation to the research unbundling rules. We have noted that research unbundling has decreased research available for investors. This is particularly true for research coverage of SMEs, which are significantly financed by co-operative banks (one third of market share in Europe), and thus exposing our members and their clients on a greater level to the negative repercussions of this regime.

Market Diversity: We believe that a financial market that acknowledges different business models and sizes, is a better, richer, more robust and fairer financial market. Therefore, we see an opportunity to enrich such "bio-diversity" also in the banking sector. This requires a look at the scope of firms under MiFID II. For example, banks offering ancillary services such as corporate advice and custody (and that do not undertake client investment business) are still required to comply with MiFID II requirements, which creates an uneven playing field. Our members also note that the principle of proportionality in this regard needs to be revisited with respect to the unclear

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and inconsistent pattern of exemptions intended under MiFID II for small and non-complex institutions – SNCBs under the meaning of CRR. Furthermore, an efficient regulatory framework should also be one that clarifies the extraterritorial scope of the legislation, i.e. whether the MiFID II requirements are not applicable with regards to provision of services by non-EEA branches of EU investment firms (including when these services are provided to EEA clients), or if this differs depending on the specific requirements.

In order to ensure that all this is done in an efficient and effective manner, we recommend a REFIT-type review also taking into account Brexit implications, and the use of digitisation in order to achieve the sustainable finance agenda. We also feel that any changes to the Level 2 text should be published at the same time as the changes to Level 1 so as not to put further strain on the financial markets (of which firms must update their systems) but also investors (who struggle to keep up with the volume and complexity of the information disclosed to them).

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

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

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problems in EU financial markets.						
The MiFID II/ MiFIR has provided EU added value.	x					

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

Our answer to Question 1 provides already the main qualitative elements that explain our answers to Question 2 on what is required to improve the implementation of MiFID II/ MiFIR, in terms of investor protection, increased retail participation in capital markets, better market diversity and more accessible financing to SMEs. In general, these main elements include:

Convergence with other legislation: In future, care should be taken when developing legislation to ensure greater consistency between thematically related legislative projects. For example, the fact that product costs are calculated differently under MiFID II and the PRIIPs regime causes major practical problems. Among other things, there is a difference in the treatment of inducements. While product costs under the PRIIPs Regulation include inducements, inducements under MiFID II are part of service costs, so MiFID II product costs have to be disclosed without inducements. This means clients are given different information about the product costs of one and the same product (if it is both a PRIIP and a financial instrument within the meaning of MiFID II) even if both information sheets base their calculations on the same investment amount of €10,000. In an example provided by a large German bank, the same product was shown to have product costs of €246.28 or 1.38% p.a. based on an investment of €10,000 when calculated under the PRIIPs Regulation and product costs of €111.27 or 0.56% p.a. based on the same investment amount but calculated in accordance with MiFID II. This discrepancy, which has to be explained to investors and which they find difficult to understand, results from a lack of consistency in the rules governing the calculation of costs. We are also aware that the UCITS KIID, does not meet the requirements on costs and charges in Article 50 of the Delegated Regulation. Therefore clients are being given two documents in order to disclose additional information that is not shown in the actual UCITS KIID. One way of achieving greater consistency would be to refrain from the presentation of costs in the PRIIPs KID or UCITS KIID if the product in question is a financial instrument within the meaning of MIFID II. Therefore, the customer would be solely presented with the MiFID II cost disclosures so as to avoid the above discrepancies/confusion to the client, whilst ensuring regulatory compliance. We also note the discrepancies between MiFIR and EMIR and support an amendment to Article 28 of MiFIR to clarify that the scope of transactions subject to the Derivatives Trading Obligation should be aligned with the transactions of the Clearing Obligation under EMIR. Furthermore, we note that the distinction between retail and wholesale clients in the Prospectus Regulation is different in comparison with MIFID II and the PRIIPS Regulation. As a result, a prospectus is not required when denomination per unit

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amounts to at least EUR 100,000 for an offer of securities to the public, but a KIID on the basis of the PRIIPs Regulation is required. This should be aligned.

Transition periods between levels of legislation and issues of legal certainty: Any changes to MiFID II which require transposition into national law should not start before all changes to MiFIR (and other relevant Level 2 and Level 3 legal acts) have been published so as to ensure legal certainty and no further double cost burdens. In this context, we also draw attention to the issues of interpretation when comparing Level 1 or Level 2 rules to ESMA's Level 3 questions and answers, or guidelines. Interpretations differ across Member States, and often lead to a substantial increase in the requirements and costs for banks' IT systems and human resources compared to the project carried out under the banks' interpretation in good faith based on the Level 1 and Level 2 requirements. This is not only because of timing issues but also due to several key concepts not being clearly defined such as in the case of "execution on trading venues" and "algorithmic trading". Therefore, there should be a transition period stipulated for the implementation of Level 3 acts, and any guidelines provided to the market should be sufficient and appropriate in order to avoid several interpretations; and

Costs vs. Benefits: Although MiFID II was already subjected to a cost-benefit analysis, research from our members shows that besides the initial implementation costs, banks have had significant running costs to consider due to MiFID II/ MiFIR obligations. Any future cost-benefit analysis should thus take into account not just initial cost impact but also accumulated costs. It should also provide evidence of the actual benefits of the legal provision as assessed against the negative impacts. Refer to our answer to question 31.1 for more quantitative details of this element.

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

3 – Neutral

3.1 Please explain your answer to question 3

We have seen amongst EACB members some inconsistencies in interpretation of the rules in the different EU Member States which may lead to comparability issues, but NOT specifically barriers to implementation of MiFID II and MiFIR due to existing national legislation.

The below are varying market practices noted by our members with respect to:-

- **Ex-ante individualised disclosure on costs and charges provided for every transaction as per Article 50 (par.5) of the Commission Delegated Regulation (2017/565):** In some Member States the cost information disclosed is either transaction based, product based, ISIN based or a combination of these options. There is also some differentation whether the disclosure is based on past costs and as of what a percentage are costs disclosed (e.g. Volume? Holdings?); and

- **Ex-ante cost disclosure requirement as stated in Article 50 (par.1) of Commission Delegated Regulation**: Questions 22 and 23 in the ESMA Q&A (ESMA35-43-349) provide limited application of Article 50(1) of the Commission Delegated Regulation for professional clients and eligible counterparties. This can be interpreted as a complete waiver or not depending on the Member State. That said, EACB members would favour that professional clients and eligible counterparties can completely opt-out of such provisions.

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

4 – Partially

4.1 Please explain your answer to question 4

We believe that there is a disconnect between transparency and what the client really wants, exhibited by the reality of 'information overload'. Transparency does not necessarily lead to investor protection. In 2019, Ruhr University Bochum conducted an *'Impact study of MiFID/MiFIR and PRIIPs Regulation: effectiveness and efficiency of the new rules against the backdrop of investor and consumer protection – a qualitative empirical analysis'* which showed that only 42.7% of clients see any benefit in the ex-ante information on costs for example. In addition, 54.2% of clients regard the additional information as actually (very) bothersome. The study reveals that clients are being overwhelmed with the scale of mandatory information (62% of respondents) indicating that they do not feel better informed with the additional disclosures (66%) and that the extensive mandatory information does not help them to better understand the content of the documents (77%). On the other hand all this extra information leads to higher regulatory costs which at the end will have to be paid by the investors. A publication by the German Federal Financial Supervisory Authority (BaFin) called *'MiFID II in practice'* (7 June 2019) also reveals a rather muted interest on the part of clients in the content of the information. In this survey, more than half of respondents (53%) who made an investment transaction after 3 January 2018 said they had not read the ex-ante information on costs. A further 5% of respondents said they did not know if they had looked at the information.

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

4 – Partially

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5.1 Please explain your answer to question 5

Please refer to answers in questions 25 and 26.

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

5 – Totally

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

The product governance and target market rules under MiFID II has had the biggest effect in narrowing the scope of financial instruments that can be distributed to retail clients. Additional barriers may also be created if insufficient and non-comparable details are provided when making changes to the product governance rules due to the Sustainable Finance regulatory agenda by the European Commission.

Furthermore, the obligations under the PRIIPs KID have also had an impact on product diversity. For example, the PRIIPs Regulation requires the language option that the KID must be provided in the retail client's home language which may not be as accessible as providing it in English for example (and in some states also French and German).

6.1 Please explain your answer to question 6

PRIIPS KID language option: Since many distributors across the EU may not be able to provide the KID in a *lingua franca* because English, for example, is not a national language, this poses a barrier to investment for investors who would like to invest in that local product.

Product governance rules: The product governance rules have forced manufacturers and distributors to narrow the scope of some instruments to retail clients. For example, only some derivatives, structured products and bond issuances are allowed to be distributed to retail clients, and private equity/private debt products are totally out of retail scope. Also in some bond emissions retail clients need to be carved out from the investor scope.

Target market & suitability: On 30 April 2019, ESMA published its post-consultation report on "integrating sustainability risks and factors in MiFID II" whereby it recommended to the European Commission, that it should still remain possible to identify a target market for clients without sustainability preferences, i.e. there is no negative target market in ESG product governance. However, the non-application of a negative target market in this area is not so clear under the draft amendments to the Commission Delegated Directive 2017/593 and Commission Delegated Regulation 2017/565 in relation to the target market and suitability assessment, both of which are

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still to be made public and adopted by the European Commission. Indeed it appears that should an assessment of sustainability preferences of the client, and sustainability factors and characteristics of the product be introduced in the regulation, the draft amendments to Article 10 (2) of the Delegated Directive seem to still refer to the need for firms to "identify any groups or clients for whose needs, characteristics and objectives the product or service is not compatible". In addition, the definition of a target market for environmental, social and governance products is still unclear and prompts the question of whether separate target markets would have to be identified.

The identification of the target market is also intrinsically linked to the 'suitability assessment' of the client's needs, characteristics and objectives when providing an investment service or giving investment advice. It is important to distinguish between the financial objectives and the sustainability objectives of clients when carrying out the suitability assessment, but it is also unclear if this would imply carrying out separate assessments for financial and sustainability objectives.

There is risk that further transparency to investors through the need for separate identifications of target markets or suitability assessments, could lead towards market bias towards certain products by manufacturers and distributors leading to a narrow range of ESG products on offer than intended from the European Commission's sustainable finance objective to transition to a more sustainable economy through long-term ESG investments in the EU capital markets. Customers may also be overwhelmed or confused by the different requirements and disclosures.

It is important that the European Commission therefore also takes into consideration all the developments in the Sustainable Finance agenda when reviewing the product governance rules, so as to prevent an impact also on the product range of sustainable investments.

Section 2. Specific questions on the existing regulatory framework

I. The establishment of an EU consolidated tape

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

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N/A
Lack of financial incentives for the running of a CT						x

Overly strict regulatory requirements for the running of a CT				x		
Competition by non-regulated entities such as data vendors						x
Lack of sufficient data quality, in particular for OTC transactions and transactions on systematic internalisers				x		
Other						x

7 Please specify what are the other reasons why an EU consolidated tape has not yet emerged?

The EACB notes that the complexity of the regulation, issues of data availability, and poor data quality, and increase in market data costs are all valid reasons why the CT has not yet emerged. However, our members also believe that the introduction of a consolidated tape provider via regulatory intervention has not emerged because it is not evident that such arrangement would solve the above issues particularly in the development of market prices.

7.1 Please explain your answers to question 7

Market data costs: Our members have recorded rising costs of market data in the EU over the recent years, creating inefficiencies in the use of trading data by firms and investors. The rise in prices is seen as compensating the revenue losses at trade execution services by exchanges. One of the causes for this is the fact that certain market structure features do not support the 'reasonable commercial basis' principle which was put in place with MiFID II. Another contributing factor to the elevated price level is the ability of venues and data vendors to bundle their services into a single product offering. This means the client is 'forced' to pay for trading, messaging and/or data services in one package. In addition, within the data offering, clients often have no choice but to pay for all the streams of data, whilst they would typically only use a comparatively small set.

The introduction and maintenance of a CT should not cause additional costs for market participants who would have to bear the costs for data supplied by the CT and also for data supplied by regulated markets or other trading venues/ data vendors. To the contrary it should lead to more cost efficiency. In fact, we anticipate that the introduction and maintenance of a CT would cause significant additional costs for market participants who would have to bear the costs for data supplied by the CTP and for data supplied by regulated markets or other trading venues. Therefore a cost-benefit analysis should be carefully done to assess whether the benefits of introducing a CT outweigh the costs.

ISINS: MiFID II brought with it the multiplication of International Securities Identification Number (ISIN) with around 2 million ISIN codes having been created in Q4 2017 alone. There is around 280,000 ISIN for IRS (Fixed to Floating). This massive number of ISINs makes reporting ineffective. E.g. if you trade a standard 10Y EUR IRS Fixed vs Euribor 6M, the 03/04/2019, one specific ISIN will be provided, but you will get another ISIN if you trade it the following day. As the ISIN code is linked to the maturity this multiplies the number of ISINs, which is why there is a massive number of ISINs and the list keeps on growing on a daily/weekly basis. The characteristics of the transaction generating ISINs codes may need to be revised in the aim to avoid an exponential growth of those ISINs. The European Commission should launch a targeted consultation to address this issue. This data quality issue of ensuring the ISIN as a unique identifier was also brought up by respondents in ESMA's final report (ESMA70-156-1606) dated 5 December 2019.

Implementation issues of FIRDS and FITRS: ESMA's final report (ESMA70-156-1606) dated 5 December 2019 also mentioned issues with reference data. Indeed, we believe policymakers should carry out an in-depth analysis of implementation issues in both Financial Instruments Reference Database System (FIRDS) and Financial Instruments Transparency System (FITRS), in close dialogue with the market. In particular, we take the view that the concept of 'traded on a trading venue' (ToTV) is applied and whether there is a need to do further calibration for different asset classes. This is because the EACB is concerned that the current data quality is too low, and we are wary that the lack of reliability/accuracy of FIRDS creates a major impact on investment firms' 'ability to comply with MiFID II/ MiFIR.

We are skeptical that the introduction of a CTP by regulatory intervention could resolve the above issues because:

- There is no CTP which will be able to provide all data needed by market participants even if the CTP provides obligations that encompass a wide scope of data; and
- It is hardly possible to provide real-time or near real-time data especially due to the fragmentation in the European markets.

In this context, the CTP cannot efficiently satisfy the data demands of market participants and, thus, the services of trading venues and/or data vendors will still be required.

We wish to point out that even in markets like in the USA were a consolidated tape has been established for quite a few years, the fees for market data required by market participants have significantly increased in the last decade. Sources: Opinion of the SEC and the statement of the SEC chairman Jay Clayton:
https://www.sec.gov/litigation/opinions/2018/34-84432.pdf

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https://www.sec.gov/news/public-statement/statement-chairman-clayton-2018-10-16

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

Reference is made to our answer to question 7.1 which explains why we do not see the value added of creating a CT framework.

However, should the CT be established we believe that this should be set up only for post-trade equity in the absence of a proper cost-benefit analysis and considering the data and latency issues describe in our answer to question 7.1. In addition, the market data should be based on a reasonable commercial basis, and ideally, only the supply of raw data should be regulated in order to ensure competition on value-added data.

13 In your view, what link should there be between the CT and best execution obligations? Please explain your answer and provide if possible detailed suggestions (e.g. simplifying the best execution reporting through the use of an EBBO reference price benchmark):

We do not believe that the creation of a CT should be linked to the best execution obligations. First of all, RTS 27 MiFID II (Commission Delegated Regulation EU 2017/575) which governs best execution already takes into account various factors other than price such as costs, speed, size, nature, likelihood of execution and settlement, etc. In addition, although the CT may increase transparency of the "best price" to clients, the banks would execute the transaction for a higher price (due to the administrative burden).

We also agree with ESMA's statement in its final report (ESMA70-156-1606) dated 5 December 2019 that *"ESMA does not recommend at this stage to require the use of the CT to meet best execution requirements, but considers that the CT data would be useful for ex post best execution quality monitoring. It should be noted that, in particular for orders executed on behalf of retail clients, the price of a transaction is, together with the costs relating to execution, one of the key factors to meet the best execution requirements. This is also already reflected in RTS 27 and 28 which allow to use the CTP for measuring execution quality and support best execution."*

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

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	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N/A
Shares pre-trade	X					
Shares post-trade			X			
ETFs pre-trade	X					
ETFs post-trade	X					
Corporate bonds pre-trade	X					
Corporate bonds post-trade	X					
Government bonds pre-trade	X					
Government bonds post-trade	X					
Interest rate swaps pre-trade	X					
Interest rate swaps post-trade	X					
Credit default swaps pre-trade	X					
Credit default swaps post-trade	X					
Other	X					

15.1 Please explain your answers to question 15:

We think that if introduced, the CT should be restricted to post-trade equity instruments especially until a proper cost-benefit analysis could be completed. It is easier to get post-trade information on equity for liquidity purposes. Pre-trade is a bit harder due to liquidity issues, costliness and challenges in getting such information in real-time. Regarding bonds and derivatives, there are fewer trades on platforms than equity.

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

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

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We think that the consolidated tape should be restricted for now to post-trade equity transparency until a proper cost-benefit analysis could be completed.

17 Please specify what other shares should in your view be included in the Official List of shares defining the scope of the EU consolidated tape?

We do not support the need for a mandatory EU consolidated tape without a proper cost-benefit analysis but if this had to be set up, we believe it should be restricted to post-trade data for shares.

17.1 Please explain your answers to question 17

Please refer to answers to questions 7.1 and 8.

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

We do not support the need for a mandatory EU consolidated tape without a proper cost-benefit analysis but if this had to be set up, we believe it should be restricted to post-trade data for sufficiently liquid shares.

19 What flexibility should be provided to permit the inclusion in the EU consolidated tape of shares not (or not only) admitted to an EU regulated market or an EU MTF? Please explain your answer:

We do not support the need for a mandatory EU consolidated tape without a proper cost-benefit analysis but if this had to be set up, we believe it should be restricted to post-trade data without permitting the inclusion in the EU consolidated tape of shares not (or not only) admitted to an EU regulated market or EU MTF.

20 What do you consider to be the most appropriate way of determining the Official List of ETFs, bonds and derivatives defining the scope of the EU consolidated tape? Please explain your answer and provide your details by asset class:

We do not support the need for a mandatory EU consolidated tape without a proper cost-benefit analysis but if this had to be set up, we believe it should be restricted to post-trade data for shares.

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21 What is your appraisal of the impact of the share trading obligation on the transparency of share trading and the competitiveness of EU exchanges and market participants? Please explain your answer:

Since the scope of the STO is too broad, thus creating legal uncertainties and unintended consequences, we believe that this obligation should be removed from MiFID II/ MiFIR.

An alternative option - should removal be impossible – is that the STO should focus its application on shares listed in the EU. Therefore, it should be avoided that the scope of the obligation overlaps with third countries. By way of example, should EU shares remain being listed on UK trading venues then banks in the EU and UK may encounter conflicting rules e.g. ISIN-approach (plus currency) as the method of share identification subject to the STO. In the case of dual listings between EU and Switzerland, for example, there has also contradictory situations e.g. ABB listed in Stockholm and on SIX or Lafarge listed on SIX and Paris Euronext. Furthermore, the current EU STO demands that firms execute transactions on EU trading venues despite the majority of liquidity for these particular examples sits outside the EU.

Therefore, we support that third country shares that are traded on EU trading venues remain out of the STO scope, and that the tick size regime should also be restricted to EU27 shares with an EU27 ISIN. In this way, retail investors would be able to trade these shares at prices comparable to the share’s home markets. This would improve competitiveness of EU trading venues and improve trading volume, as third country shares would not be impacted by larger spreads and higher costs due to the tick size calibrations.

22.1 Please explain your answer to question 22

Reference is made to answer to question 21.

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

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N/A
Maintain the STO (status quo)	x					
Maintain the STO with adjustments (please specify)	x					

Repeal the STO altogether					x	

23.1 Please explain your answers to Question 23

Reference is made to answer to question 21.

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

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

24 Please explain in what other way(s) the status of systematic internalisers, which are eligible venues for compliance with the STO, should be revisited:

We favour the STO being repealed altogether. However should this be maintained, we believe that SIs should remain eligible execution venues for compliance with the STO.

24.1 Please explain your answers to question 24:

We fully support that Systematic Internalisers (SIs) remain eligible execution places for the purposes of the share trading obligation. First of all, we do not concur with the argument that SIs contribute to the fragmentation of liquidity. To the contrary, SIs in fact contribute liquidity to the market as they are willing to enter into risk taking transactions with other market participants. Further, ESMA research shows that the overall number of SI trades in shares as well as the volume of SI trading in shares is low and, therefore, the market fragmentation cannot be attributed to SIs. In contrast, we rather consider the steadily increasing number of MTFs and the vast number of shares which can be traded on these MTFs as the main driver for the fragmentation of liquidity. While FIRDS database shows that liquid shares of European issuers can be regularly traded on more than 50 EU trading venues, in practice most shares listed on

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MTFs lack sufficient liquidity to ensure best execution of orders on an ongoing basis Counting SIs out of the scope would also negatively impact the end investor who will lack an additional source of liquidity due to the inability to execute large orders without market impact.

Second, the regulatory framework applicable SIs ensures an appropriate standard of pre- and post-trading transparency and legal changes such as the introduction of the tick-size regime for SIs in shares led to a level playing field of trading venues and SIs. Therefore, we do not see any unfair competition between trading venues and SIs. Consequently, there is absolutely no reason for changing the eligibility of SIs under the share trading obligation.

25 Do you consider that other aspects of the regulatory framework applying to systematic internalisers should be revisited and how? Please explain your answer:

Although SIs have contributed to pre-trade transparency, we note that there is no real need for pre-trade data from SIs with respect to non-equity instruments. Therefore, SIs should be out of scope of pre-trade transparency obligations.

This is because normally an institution/client would trade with an SI only if they have developed a business relationship. The costs for building up a trading-relationship for only one quote (KYC-processes, etc.) would thus be an unlikely scenario even if it presumably leads to purchasing an instrument for a slightly better quote. In the case where a business relationship is already established, we hold the same opinion because usually clients would ask for individual quotes and this rules out the possibility of comparability of prices. Demand for SIs is often tailor-made and not comparable and, thus, of no use for other market participants.

26 What would you consider to be appropriate steps to ensure a level playing field between trading venues and systematic internalisers? Please explain your answer:

It is hard to align trading venues and SIs due to the different model of trading. Reference is made to our answer to question 25.

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

1 – Disagree

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28.1 Please explain your answer to question 28:

We believe that the STO should be repealed altogether.

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

1 – Disagree

29.1 Please explain your answer to question 29:

We do not support the need for a mandatory EU consolidated tape without a proper cost-benefit analysis but if this had to be set up, we believe it should be restricted to post-trade data for shares.

II. Investor Protection

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

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N/A
The EU intervention has been successful in achieving or progressing towards more investor protection		X				
The MiFID II/ MiFIR costs and benefits are balanced (in particular regarding the regulatory burden)	X					
The different components of the framework operate well together to achieve more investor protection		X				

More investor protection corresponds with the needs and problems in EU financial markets		**X**				
The investor protection rules in MiFID II/ MiFIR have provided EU added value	**X**					

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

We reiterate the elements explained in our answer to Questions 2.1 and 4.1, particularly in relation to the disconnect between transparency and investor protection (concept of 'information overload' clearly demonstrated in the Ruhr University Bochum study for example).

In addition it is important to consider the retail investment landscape. According to the ECB Household Sector Report 2019 Q3, the investment of households in investment fund shares, equity and debt securities per capita, has greatly diminished in the last few years which could be for various reasons but ultimately highlights the ineffectiveness of investor protection rules under MiFID II. This impact varies from Member State to another.

In Spain for example an analysis by INVERCO (2019 Q3) has assessed the historical evolution of Spanish retail investors in different financial asset classes ("Ahorro financiero de las familias"), and there are striking conclusions:

- In the last 20 years, total financial investment of Spanish families has increased as a share of GDP: From 160% in 2000 to 189.4% in Q3 2019;
- However, Spanish retail investors are not increasing the share of their savings that go into long-term oriented asset classes (such as investment funds, pension funds, shares or bonds). As a matter of fact, the share of total financial assets invested in Deposits and cash has kept very high and stable (from 38.8% to 38.6%). Investment funds have gone only from 13.9% to 14.1% and pension funds from 5% to 5.2%.

This is a worrisome prospect at a time when the European population is ageing, when the retirement years have greatly increased in length, when interest rates for guaranteed products are nil or even negative, and when access to information and transparency has never been so high, this data shows that following current trends,

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Spanish families are not well prepared for their future financial needs and that they tend to invest too little on long-term, above-inflation yielding assets.

Another study from Johannes Kepler University Linz shows that notably smaller banks have retired from investment services due to the cost-benefit-ratio. The implementation of MiFID II requires, apart from the teaching/retraining of employees, the development of one-off services (software solutions for account conversions, consultation services) and entails numerous subsequent ongoing services. Investor profiles need to be recreated and if necessary, securities have to be sold in order to purchase equivalent ones. The comprehensive documentation obligations don't provide better guidance for investment advice. All these requirements are time-consuming and are reflected in elevated costs for the credit institutions (either directly or indirectly).

Quantitative elements for questions 31.1:

Our members have also provided data on company level cost and resource impacts:

Spain: One large regional co-operative banking group in Spain has provided annualised data for Q-Q3 2019 on new costs that MiFID II has brought just in the context of giving investment advice to retail clients. It has identified that these costs are mainly due to: (i) the increase in ex-ante and ex-post cost disclosures; (ii) recording of investor conversations (by telephone and in written minutes); and (iii) the requirement to comply with the "Quality enhancement criteria" which entails the periodic evaluation of suitability, a new proposal for asset allocation, third-party investment products etc. The bank has estimated an additional average personnel hourly cost of €40 after implementation of MiFID II, which translates into €43 as "year 1 variable cost" and €30 as "recurring variable costs". These costs do not even take into account variables such as printing, delivery by post of ex-post information, tax collection, tax reporting, and all information services permanently available to clients at branch level. The data study also does not cover fixed and overhead costs such as recurring and personnel training, product development/marketing/compliance, physical infrastructure, and risks (operational, regulatory, legal). These yearly additional costs have a huge impact on smaller investors. In the case of this bank, the average subscription under investment advice is just 26,000 €, thus making uneconomical (both for the bank and the client) the provision of advice.
Finland: Our Finnish member's regional banking group has recorded that the project costs for MiFID II (which in addition to large IT work and retraining, included added value services created for clients relating to inducements) amounted to around €59 million. Ongoing charges have been on average €2 million (MiFID I and MiFID II) yearly e.g. for extra staff and other costs. Total printing and mailing costs = €1.5 million (2017), whereas in 2018 the same amount was already spent by August 2018 alone (inclusive). In terms of the paperwork required in order to comply with MiFID II reporting requirements: (i) First ex-post reports: January to May 2019, 405,000 pages printed and sent in paper; and (ii) End-of-the year reports and first quarterly report 2019: 8.8 million pages (of which 5.8 million pages were sent to customers' online

accounts and 3 million pages were sent to clients in printed paper). In addition, 9000 of the banking group's 12,200 employees have phones that have to be recorded. These persons are involved with clients' banking, finance and/or insurance services and their phone calls have to be recorded. One active phone user's phone costs are round €100/month. There is no fixed sum that can be taken from this that would relate directly to telephone recording because the phone service is an overall service that includes the phone, phone calls and the recording. However, if one considers around €14/month/person for recording alone, this would amount to costs of approximately €1.5million per year relating to telephone recording. Although Finland has a long history of phone call recording since before MiFID II, the banking group in question has estimated that if it could use cheaper non-recording internet call lines then its savings could easily exceed this €1.5 million. Finally, 5400 of the 12,200 employees were retrained to use the new IT systems developed for MiFID II.

Germany: According to the study by Ruhr University Bochum, the average implementation costs for MiFID II/ MiFIR and PRIIPs implementation (without considering future costs) has amounted to €3.7 million and running costs have averaged €50,800 p.a. per bank. For big banks in Germany this was even higher at €35 million for implementation costs and running costs of €4.2 million p.a. per bank.

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

	Yes	No	N/A
Product governance requirements	X		
Costs and charges requirements	X		
Conduct requirements	X		
Other	X		

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

Prior to highlighting other requirements that should be amended, we wish to point out the reference to "simple investment products" made in question 32. The EACB believes that a more cohesive, material definition "simple investment products" should be clarified, which may allow for certain instruments to be included in the definition.

PRIIPs KID obligation: please refer to answer under question 6.1

Client classification: Client classification: The classification of clients into retail category prevents such clients from being able to access products that could be relevant to them (e.g. derivatives, structured products, private equity and private debt products, and in some bond emissions). There are private retail clients with substantial assets and some experience that are interested in investing in products that are now out of scope as it would help diversify their portfolio. The most practical solution would be to change the limits when retail client can be classified as professional client. However, the issue with client category thresholds is not just that they are too high, but above all, that: (a) some of them are almost impossible to measure: How can a bank know whether a client has made operations in a particular asset, 'in significant size', of at least 10 times per quarter in the last 4 quarters?; and (b) some of them are hard to find: "the client has worked in the financial sector in a professional position". That is why we believe, that in order to bring any real benefit, a change in the classification system should imply an overhaul of the current system, not just changing the thresholds.

Some concrete proposals include:

(i) **Client's financial instrument portfolio:** The minimum threshold of EUR 500,000 to be exceeded for classification of a professional client could be reduced to EUR 200,000;

(ii) **Frequency and relevant market of transactions:** The condition that "the Client has carried out transactions, of significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters" should be changed instead to "the Client has carried out 10 transactions in any market per year". In some instruments, e.g. funds or structured products or even bonds it is not a common practice to trade so frequently. Even the most sophisticated clients do not trade that often in certain "relevant market" transactions, for example in real estate funds. The reference to "significant size" is also not clear in this regard and so we propose to delete it;

(iii) **Experience:** The condition that "the client works or has worked in the financial sector for at least one year in a professional position" is not very realistic as there are many experienced clients who have never worked in the financial sector. We propose that this is changed to "has knowledge of the financial instruments or markets envisaged for trade of at least one year". If the client does not satisfy this condition, then we propose to take their level of studies as an alternative. There are many experienced clients who have never worked in financial markets so this condition could definitely be made more flexible.

(iv) **Size of transactions:** We propose another condition that the "transaction or transactions made by the client is/are EUR 100,000 or more". If the client makes these kind of large transactions then this signals a clear sign of being a professional client. This EUR 100,000 threshold would also be in line with the threshold not to produce a prospectus under the Prospectus Regulation (EU) 2017/1129. It is also a widely used limit in wholesale markets.

(v) **To qualify as a professional client, two of the above four conditions must be satisfied (e.g. the client's financial instrument portfolio threshold and the condition (iv) on size of transactions)**

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Statements of client financial instruments or client funds in accordance with Article 63(1) of the MiFID II Delegated Regulation: According to Article 63 (1) of the Delegated Regulation, investment firms that hold client financial instruments or client funds shall send at least on a quarterly basis a statement in a durable medium of those financial instruments or funds. Given that clients are widely able to view their portfolio online (or contact their investment advisor where necessary), providing them with such statements is superfluous. Compliance with this new requirement introduced under MiFID II imposes a considerable cost burden on banks. This is mainly because the statement cannot be sent to many clients electronically, as they do not have an electronic mailbox. In the case of co-operative banks, for example, up to half of clients may have one. The statement has to be sent to all other clients by post, which is expensive (paper, postage, etc.). The above quarterly reporting requirements, compliance with which entails enormous costs every year, should be dropped in the course of the MiFID II review.

32.1 Please explain your answer to question 32:

Conduct requirements: The EACB supports the purpose of the suitability statement in showing the retail client the advice given and how the advice meets their preferences, objectives and other characteristics of the retail client. However, we do not understand the rationale behind issuance of the suitability statement for every investment advice as required on the basis of Article 25 paragraph 6 of MiFID II as the investment advice given has to be based on the suitability assessment in the first place. We would propose to remove from MiFID II the obligation to provide the client with the statement of suitability relating to each and every investment advice. If this is not possible, we would propose that all clients – including retail clients - should be able to opt-out from this requirement. Ultimately, this article should be amended or clarified to ensure that this ineffective papering to clients is eradicated.

Product governance rules: Please refer to answer under question 6.1 including section on "**Target Market & suitability" and question 46.1.**

Cost and charges requirements: We believe that simplification of the transparency obligations to clients related to costs and charges is required**.** Further information can be found below and in our answer to question 34, 34.1 and 53:

- **Deregulation of ex-ante information on costs in case of sales:** Pursuant to Article 24 (5) first sentence of the MiFID II clients must be reasonably able to take investment decisions on an informed basis. Hence, there is strong indication the EU legislator wanted to cover only the purchase of financial products as clients only take investment decisions when they are purchasing financial products. In case of sales of investments, usually other aspects than the costs are decision drivers (e.g. loss of liquidity, expected decreased value of the investment).
- **Deregulation of ex-ante information on costs regarding distance communication (telephone-based business)**: It should be allowed in cases

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of distance marketing transactions to provide clients with ex-ante information on costs following a telephone conversation. ESMA has acknowledged this problem and outlined a degree of flexibility in its Q&As on investor protection issues and intermediaries topics that helps to some extent. However, there is no legal provision corresponding to that, for example, with regard to the suitability statement (Article 25(6) MiFID II) that allow for an exemption to provide cost information after the transaction in certain cases. We advocate for a similar legal provision to be added to MiFID II for ex-ante cost transparency, in order to address this regulatory gap. The existing gap in regulation continues to lead to practical problems and to annoyance on the part of clients. It should therefore be directly addressed in MiFID II (see question 53 below);

- **Exemption from information requirements according to Art. 24 (1) sentence 1 MiFID II for professional clients and eligible counterparties,** because these requirements (e.g. about the investment firm and its services, the financial instruments and proposed investment strategies and execution venues) do not benefit these client groups but represent a bureaucratic burden. A mere possibility of an opt-out would not be sufficient because this too would create a continuing bureaucratic burden (see also question 34 below);
- **Exemption from ex-post information on costs for professional clients and eligible counterparties**: Professional clients and eligible counterparties are familiar with the way capital markets function. They have significantly more knowledge and experience than retail clients as rightly assumed under Articles 54(3) and 56(1) of Delegated Regulation insofar as no assessment of appropriateness has to be carried out for these types of clients. Given the expertise of eligible counterparties and professional clients, it should be remembered with the principle of proportionality in mind that the provision of annual ex-post cost information about costs and charges generates a lot of additional bureaucracy and information overload. Under Article 59 of the Delegated Regulation, all clients already receive a statement immediately after the execution of their order containing, in a durable medium, the essential information concerning the execution. Under Article 59(4)(m) of the Delegated Regulation, the client already has the option of requesting an itemised breakdown of the commissions and expenses charged – just as in the context of ex-post cost information. As a result, clients already have all relevant information at their disposal about the costs incurred. An annual summary of ex-post cost information is therefore merely a duplication of information already received and generates additional costs for all involved;
- **Standardised cost information:** With regard to the cost and charges requirements we note that many "simple investment products" do not contain product costs. This means that the ex-ante information a client is provided with would be nearly the same irrespective of the share or the corporate bonds the client wishes to purchase. Many clients complain that they receive redundant cost information that delays the order process but has no added value for them. Therefore, our members have positively received the ESMA clarification that cost information on products without product costs (like shares and many bonds) can

be provided via standardised grids so that the client does not need to be bothered by redundant transaction based information. It would be useful, however, that similar clarification is made at Level I or II for legal certainty.

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

4 - Rather agree

33.1 If your answer to question 33 is on the negative side, please indicate in the text box which amendments you would like to see introduced to ensure that retail investors receive adequate protection when purchasing products considered as complex under MiFID II/ MiFIR:
N/A

33.1 Please explain your answer to question 33:

In reality, the level of investor protection is actually too high leading to unnecessary bureaucracy and carving out scope of retail investors to diversify their portfolio with what are classified as complex products. The investor protection rules should be scaled back as explained in our answer to question 32 and 32.1.

Further to these amendments, there is also an issue with the loss reporting requirement which is a transparency rule creating confusion with clients in terms of complex products. For example derivatives (as a complex product) can be bought for hedging purposes and because of the regular price fluctuations in these products assessed in combination with the underlying value, the information reported to clients may be misleading. The specific ex-ante cost disclosure on a transactions basis will thus often be unworkable because clients want to act quickly in the market. For more information please refer to our answer to question 94.

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

	Yes	No	N/A
Professional clients and ECPs should be exempted without specific conditions	X		
Only ECPs should be able to opt-out unilaterally		X	
Professional clients and ECPs should be able to opt-out if specific conditions are met		X	

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All client categories should be able to opt out if specific conditions are met		**X**	
Other	**X**		

34 Please specify what is your other view on whether all clients, namely retail, professional clients per se and on request and ECPs should be allowed to opt-out unilaterally from ex-ante cost information obligations?

As explained in our answer to question 34.1 below, we see that professional clients and eligible counterparties should be exempted from the ex-ante cost information obligations. Investment firm should also be allowed under certain conditions to provide ex-ante cost information to retail clients after the provision of the investment service. This should at the very least be allowed in the case of distance communication.

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

Professional clients and ECPs should be exempted without specific conditions. Especially the obligation to inform professional clients and eligible counterparties on the costs of the transaction causes high costs for distributors. Notably for banks or institutional clients there is no added value in the information since both client categories do not lack any information. Where professional clients and eligible counterparties are on the same level as financial institutions, they know the conditions and prices of various financial service providers. They either compare different prices of various service providers by using electronic trading platforms (e.g. Swift, Bloomberg, FIX, etc.) or they request offers from different financial service providers.

In this context, it is important to mention that the legislator allows investment firms to assume that professional clients have the necessary level of knowledge and experience (see Art. 54 (3) and 56 (1) Delegated Regulation (EU) 2017/565). This shows that also the legislator is of the view that professional clients generally have a sufficient level of knowledge and experience. Therefore, many information requirements only apply to retail clients (i.e. the PRIIPs regulation).

Furthermore transactions of professional clients and eligible counterparties are often subject to great time pressure (second trading) and are largely closed electronically or by telephone. Providing a transaction-based ex ante-information would significantly delay the transaction, which in many cases will lead to unintended price fluctuations.

Another "problem" with using electronic trading platforms is that platform providers are not under the scope of MiFID II. This means any changes cannot be done by users (which are subject of MiFID II). Hence the distributors would have to include the

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platform providers in their implementation plan since only the platform providers determine the technical and contractual conditions.

That is why most professional clients and eligible counterparties do not want to be provided with detailed cost information which can be time consuming and result in the order being delayed which would run counter their interests. According to the ESMA Technical Advice on costs and charges disclosures published 31 March 2020 disapplication was the option that was raised the most by respondents (p. 27, nr. 102).

In respect of retail clients investment firms should be allowed under certain conditions to provide ex-ante cost information after the provision of the investment service. At least they should be allowed to do so in case of distance communication (see question 53 below). A mere opt-out-option would neither be feasible nor sufficient.

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

5 – Support completely

35.1 Please explain your answer to question 35:

Traditionally co-operative banks have client relationships with sectors of society such as rural and agricultural communities that may not have the same digital communication means as other client groups. That said, the shift to digitalisation in financial services is sensible in that it facilitates easier and faster communication, is practical for environmental reasons and generates cost savings for investment service providers and their clients. In addition, it may resolve some of the concerns related to information overload which are currently holding back the positive impact of transparency requirements, as well as, helping to foster the use of digital channels for the distribution of financial instruments in Europe.

Therefore, we would greatly support that digital-based disclosure of information is put on an equal footing with all other durable medium and allowed to be used by investment firms as a possible means of transmission to clients. In particular, we propose to drop the reference in Article 3(1) of the Delegated Regulation which allows the provision of information in a durable medium other than paper, only under specific circumstances or agreement with the client. Banks should be free to decide in which durable medium they transmit information to clients Such an adjustment of the Level II requirements would take account of two main objectives: digitalisation and sustainability. Sustainability aspects, in particular, should be taken into account in this context. However, still many of our clients do not use e-mail or online banking. Therefore, we will produce paper based information for some time. The ongoing use of paper information should not be burdened by (new) regulatory constraints. Clients often criticise the flood of information, providing which uses up an enormous amount of resources (energy and, in many cases, even paper). This additional information on costs is perceived by many clients as “disinformation” and by no means delivers the intended benefit for clients in every case. The amount of information provided should therefore be reviewed.

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

	Yes	No	N/A
General phase-out within the next 5 years	X		
General phase-out within the next 10 years		X	
For retail clients an explicit opt-out of the client shall be required		X	
For retail clients, a general phase out shall apply only if the retail client did not expressively require paper based information		X	
Other	X		

36 Please specify in which other way could a phase-out of paper-based information be implemented?

We support a phase-out of 5 years or less, and only after amendment to the regulation as advised in our answer to questions 35.1.

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

The EACB believes that such phase-out can be achieved in a relatively short period of time, much shorter than five years. Of course, there will always remain many clients in society that do not have the essential means to access an email address or electronic mailbox, and for such clients paper options should still be allowed. Cost-savings may vary across Member States and firms. However, even in the case of Member States where digitalisation in financial services is advanced the cost savings could be significant. Our Finnish member, for example, has already experienced an increase in total printing costs of €1.5 million in 2017 and the same figure was already reached by August 2018, just because of implementation of MiFID II. Therefore, the environmental benefits and cost savings prove to be significant for the Finnish co-operative banking group.

However, the ongoing use of paper information should not be burdened by (new) regulatory constraints. Particularly with regard to the transition period (for the change from paper based to digital solutions) and where the use of electronic information would lead to practical problems it should be allowed to provide paper based information.

The last sentence of Art. 63 (2) Delegated Regulation 2017/565 should also be amended: The provision that the firm has to have evidence that the client has accessed this statement at least once during the relevant quarter has proved to be an obstacle for the implementation of electronic information instead of paper information.

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

1 – Do not support

37.1 Please explain your answer to question 37

Our members do not support such database for the following reasons:-

(i) The costs of setting up and maintaining such a database may not necessarily outweigh the benefits. Indeed a lesson could be learned from the comparison website for the fees charged by payment service providers (Directive 2014/92/EU);

(ii) From a retail client viewpoint investment still very much remains domestic and this is not necessarily due to lack of data comparability, but other reasons such as language barriers and differences in product markets which make comparison difficult in any case. The retail client would also be overwhelmed with the flood of data;

(iii) In terms of professional clients and eligible counterparties, these already have capability of knowing the markets and being able to compare products even on a cross-border basis. Best example in this case is provided in the Top 5 trading venue reporting (please refer to questions 55-56); and

(iv) For some members, the use of data exchange templates is already sufficient (e.g. the EMT V3)

(v) The implementation of MiFID II requirements has led to bilateral agreements between manufacturers and distributors or the establishment of big data bases where manufacturers can provide information on the costs of their products. The IT systems of both, manufacturers and distributors, have been adapted to these solutions which was very expensive. Since these solutions have been established long ago, there is no need for an EU-wide database. Such a data base would have only been useful if it had been developed before distributors have introduced the solutions mentioned above. Once, these solutions are in place, there would be no added value.

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

5 – Fully agree

40.1 Please explain your answer to question 40:

There are certain private retail clients that possess substantial assets and experience which may be suitably able to invest in products outside their scope under MiFID II and MiFIR. The current client classification prevents such retail clients from diversifying their portfolio further with certain derivatives, structured products, private equity, private debt, bond issuances, etc. The number of transactions is not an adequate criterion for retail clients who if opting in to make a private equity transaction would find it extremely difficult to perform 10 transactions of this kind in 1 year. Limited transactions and the requirements about working in the financial sector also restrict clients. These retail clients may have the flexibility of opting-up but are still bound to an overload of information which is also encountered by professional client categories (and which is of no added value).

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

5 – Fully agree

41.1 Please explain your answer to question 41

We agree with lowering the threshold for professional clients as this would allow certain retail clients with sufficient assets and experience to fall within the requirements of professional clients. This could help overcome certain information overload issues and would avoid the introduction of a new client category of 'semi-professional client'. We do not think that the addition of a fourth level of investors i.e. 'experienced' or 'semi-professional' clients would be appropriate as many EACB members do not distinguish between different levels of retail clients and doing so would also mean undergoing a huge change in their legal and IT systems, as well as paperwork. Besides this, it would be very difficult to provide the appropriate criteria for the distinction, and the regulatory changes required would constitute a review of the suitability assessment and product governance rules (target market) which could end up leading to a major overhaul of MiFID II/ MiFIR – contrary to a REFIT-type review.

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We fully agree with ESMA that based on the current state of the discussion on this point, the creation of a new sub-category of retail clients is not required or desirable as it would make the current regime more complex (ESMA´s Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II of 31 March 2020, ESMA35-43-2126, no. 118).

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

1 – Disagree

42.1 Please explain your answer to question 42

Our members do not support the addition of a new client category and the rationale behind this decision can be found in our reply to question 32.1 and 41.1.

We also reiterate that a deregulation of certain investor protection regulation for professional clients (and retail clients in some cases) could be an ideal solution to mitigate the current barriers in achieving the objectives of MiFID II and MiFIR in the context of the CMU.

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

4 – Rather agree

46.1 Please explain your answer to question 46:

Currently there is a restriction in the products that can be offered to retail clients (particularly private equity products) due to product governance rules such as the target market definition (particularly the negative target market definition). This together with the PRIIPS KID obligation frustrates retail clients who would otherwise be able in principle to invest in certain products after passing the appropriateness and suitability assessments.

Regarding the target market, we propose an exemption to be granted from the related requirements at least for simple products.

Please also refer to our answers to question 6 and question 41.1.

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

	Yes	No	N/A
It should only apply to products to which retail clients can have access (i.e. not for non-equities securities that are only eligible for qualified investors or that have a minimum denomination of EUR 100,000)	X		
It should apply only to complex products			X
Other changes should be envisaged – please specify below	X		
Simplification means that MiFID II/ MiFIR product governance rules should be extended to other products		X	
Overall the measures are appropriately calibrated, the main problems lie in the actual implementation		X	
The regime is adequately calibrated and overall, correctly applied		X	

47.1 Please explain your answer to question 47

Some members noted that distributors are reluctant to sell products to clients outside the target market in accordance with ESMA guidance that states this is possible in so far as this can "be justified by the individual facts of the case". Therefore, one option is to simplify the product governance rules to allow for this and adapt the methdology by product type. In this regard, we would recommend to exempt all "non complex" as well as in practice "simple" products from target market requirements, as long this is not raising any concern in terms of competitiveness between similar products from an economical perspective and complexity but belonging to different asset classes, . In this context, the EACB proposes that a more cohesive, material definition of such a "simple investment product" is clarified, which may allow for certain instruments to be included in the definition. Furthermore, proportionality should be applied as this is not being done as expected. For example with regard to products which are suitable for mass retail, regulators ask very specific requirements and categorization of mass retail in specific categories. Therefore,the product governance requirements should only apply to transactions with retail clients as regarding professional clients and eligible counterparties there is no risk of mis-selling.

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

- Yes, but in that case the firm should provide a written explanation that the client was duly informed but wished to acquire the product nevertheless

48.1 Please explain your answer to question 48

Although many EACB members avoid sales to the negative target market in any case, they still support that the regulation should allow such sales at least in exceptional cases and on the client's explicit request. Clients should be able to sign a discharge.

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

4 - Rather agree

49.1 Please explain your answer to question 49

The product governance rules (in terms of target market assessment, for example) have a far greater impact in practice on the sale and distribution of products to clients. However, the inducements rules have also proven to act as a 'double safety mechanism' via (i) transparency in the costs and charges disclosures to clients on an ex-ante basis (Art. 50 para. 2 (3) Delegated Regulation (EU) 2017/565) which means clients would notice unusually high commission payments in advance and can decide to refrain from concluding a contract; and (ii) Art. 11-13 of the MiFID Delegated Directive (EU) 2017/593 provides detailed case groups in which the inducement is regarded as quality enhancing, thus ensuring that investment firms can only keep the inducements received if they use them to enhance the quality of the services provided to their clients. Therefore, there is no scope for investment firms to interpret this condition too widely or to bypass the condition of quality enhancement.

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

1 – Disagree

50.1 Please explain your answer to question 50:

The EACB has noted unanimous agreement against an outright ban on inducements from its members, whether or not they come from jurisdictions that have a history of providing independent investment advice.

In this regard, we share ESMA's view in its Final Report (Final Report, ESMA's Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II, 31 March 2020, ESMA35-43-2126), according to which ESMA "...does not recommend to the Commission to ban inducements completely for all retail products across the Union" (No. 36). ESMA sees that "a ban may not have the desired consequences depending on the structure of the market." (No. 35). All inducements received or provided are already being disclosed to clients, so that complete cost transparency exists. A ban on inducements would thus be unfavourable because:

- It would lead to higher costs for investment advice for most clients: quite often investment advice does not result in a transaction, in the situation of independent investment advice, however, the fee becomes due anyway. In any case, clients should be given the choice between inducement and fee-based advice;

- Some EU member states, such as Germany and Austria, have regulated that wide local distribution networks are considered as a quality enhancement measure towards clients , even though Germany already in 2014 had introduced the model of fee-based investment advice as an alternative to inducement-based investment advice . In other EU Member States, such as in Finland, unfortunately this quality enhancement measure is not part of national legislation. Distribution networks are an important channel to distribute investment services and products to people especially in rural areas. Therefore, the outright ban on inducements may severely impact distribution models that do not follow independent investment advice. It may also lead to less distribution of certain financial instruments and less retail participation in EU capital markets – contrary to CMU goals. In our view, this is proven by the fact that neither in Germany nor in Finland has the provision of investment advice on an independent investment basis become a market standard, even after the introduction of MiFID II. The consequence is that instead of putting a ban on inducements in discussion, distribution networks should be fostered.

- A ban on inducements would undermine the economic viability of investment firms to provide their services to customers, and significantly reduce the widespread availability of investment advice, which, especially in rural areas, is offered by cooperative banks. Moreover, large sections of the population (particularly retail investors with small portfolios who need investment advice the most) would lose access to qualified investment advice. This is critical against the background of permanently low interest rates because clients with the need of investment advice (low income/ poor financial education) will not make use of fee-based investment advice. This would be an undesirable result for the very customers intended to be protected, would undermine their ability to participate in long-term investment in the European economy and ultimately undermine the economic growth which is dependent on the availability of long-term investment.

- It has also been noted that in countries were an outright ban was implemented, the results were not so positive and did not necessarily lead to quality enhancement. Rather, studies show that citizens were broadly excluded from investment advice, because they were not offered investment advice at all or they were redirected to other services (like execution only or portfolio

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management etc.) or they were just unable or unwilling to pay (Source: European Commission, Distribution systems of retail investment products across the European Union, Final Report, April 2018, p. 23). This can be seen in outcomes of mystery shopper trails in the Netherland and the UK. A UK study (Ignition House/Critical Research, The changing shape of the consumer market for advice: Interim consumer research to inform the Financial Advice Market Review (FAMR), August 2018, page 26) shows that the propensity to have advice increases significantly with wealth – for example, 5% of adults with less than £10,000 in investible assets have had advice in the relevant period of 12 months, compared to 22% of adults with £50,000 or more. It also shows that almost half (45%) of all adults who have had advice in the relevant period have investible assets of £50,000 or more.

In line with the above, the EACB strongly believes that besides its stance against an EU wide ban on inducements, the co-legislators should also ensure that Member States do not impose a full ban on inducements at national level.

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

1 – Disagree

51.1 Please explain your answer to question 51

The EACB believes that the guidelines by ESMA and NCAs for staff providing investment advice and other relevant information is already clear and provides for annual assessment of staff competence. MiFID II has actually significantly improved the level of knowledge, skills and experience of staff due to the increase in internal and external training based on changes to the regulations. If any certification requirement had to be introduced this would not be possible at European level because the educational systems differ per EU Member State. Each financial institution also prescribes tailor-made internal training for employees in order to fulfil the various regulatory requirements (AML, compliance, etc).

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

1 – Disagree

52.1 Please explain your answer to question 52

Please refer to our answer to question 51.1.

In addition, it should be noted that there is already some recognized uniform certification on the market (e.g. Certified Financial Planner CFP) but this may already

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not be suitable for everyone on the market due to costs and duration, and because it would make it difficult to take into account national specificities. Enforcing international certification may diminish the pool of advisors and smaller banks as they may not be able to afford such training.

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

5 – Fully agree

53.1 Please explain your answer to question 53:

The existing requirements for handling ex-ante cost disclosures in telephone trading continue to pose problems in practice. It should be noted that in telephone trading clients expect their orders to be accepted and executed without delay. Mandatory ex-ante-cost information in a durable medium lead to time lags and administrative burden. In some cases, information on costs in durable media cannot be provided promptly because of postal delivery times. Clients then usually cannot or do not want to use the internet but the telephone instead (e.g. when travelling (particularly by car) or where there is a poor internet connection). At the same time, such clients are predominantly experienced in securities transactions which make a large number of (recurring) transactions. Similar problems arise if orders are received by letter, fax, and other communication media, where provision of ex-ante information on costs is not possible. A clear, practice-oriented arrangement is therefore called for such as allowing ex-ante information on costs to be provided to clients following a telephone conversation or any other form of communication (web or non-web based). ESMA has acknowledged this problem and outlined a degree of flexibility in its Q&As on investor protection issues and intermediaries topics that helps to some extent. However, a legal provision is required corresponding to that, for example, or with regard to the suitability statement (Article 25(6) MiFID II) that allow for an exemption to provide cost information after the transaction in certain cases. We advocate for a similar legal provision to be added to MiFID II for ex-ante cost information, in order to address this regulatory gap. The existing gap in regulation continues to lead to practical problems and to annoyance on the part of clients. The German Federal Finance Ministry in its consumer study also advocated retrospective provision of information on costs in line with the provisions on the suitability report. Recently, ESMA has proposed in its Technical advice on inducements and costs and charges disclosure to introduce a provision that allows to provide the ex-ante cost information after the order is executed. The concrete wording shall be harmonised with the current provisions. We strongly support the recommendation of the German Ministry of Finance, that investments firms should be allowed to provide ex-ante cost information after the client is bound by an agreement under the same conditions set out in Article 25 (6) MiFID regarding the provision of a suitability statement. The adaption to Article 25 (6) MiFID would ensure a consistent approach within MiFID and an appropriate solution.

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The Austrian Financial Markets Authority has also used the Member State option in Article 24(5) of MiFID II allowing for cost information to be provided in a durable medium directly after the client has contractually bound himself provided that certain conditions are fulfilled.

For professional clients and eligible counterparties, the problems posed are even greater since the vast majority of transactions are executed via distance communication and a quick execution is essential for the parties involved. Transactions with professional clients and eligible counterparties should therefore be generally exempted so that these categories of client would not have to be provided with any ex-ante information on costs in telephone trading (see Question 34 above).

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

2 – Rather not agree

54.1 Please explain your answer to question 54

On the one hand, taping and record-keeping can be considered useful in handling client complaints and to protect employees' rights. On the other hand, they can raise data privacy concerns for clients, have the potential to impair the confidentiality of communication between investment firms and clients, increase the regulatory and civil law risks in the bank, and cause high costs for investment firms and clients.

These consequences have also meant that in some jurisdictions, for example Spain and Italy, banks have opted for a conservative approach by providing solely by remote means (telephone, internet) the so-called "executive services" (e.g. reception and transmission of orders) or the execution-only services, leaving investment advice available to retail clients only at bank branches. Many clients would still like to consult easily with their investment advisor by phone, but this is not possible in many occasions. These clients need and want help to participate actively in capital markets. But certain technical issues including such obligation to record telephone conversations and make records of any discussions, ends up hindering financial advisors' ability to help the client to make good investment decisions in their best interest.

Ultimately, the fact that records are kept and can be checked post-trade does not necessarily reduce risks to clients. Furthermore, ESMA published on 20 March 2020 a public statement regarding temporary derogation from the telephone recording requirement due to the COVID-19 pandemic. Some of our members noted that even though they could not record telephone orders due to teleworking, their NCAs positively responded to the alternative risk mitigation measures taken by our members.

Considering the above, the EACB thus favours the deletion of such a provision for all clients.

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

2 – Rather not agree

55.1 Please explain your answer to question 55:

Our members advised that the reports are of sufficient quality to provide relevant best execution information to investors but do not bring any added value in terms of transparency. This is first of all because investors do not read the excessive volume of information in these reports which has been seen from statistics received by members of webpage access and other data analytics. And in some cases, for example for OTC derivatives, the reports are requested by clients for specific needs and not in a standardised format and price comparisons are not meaningful due to product-specific client requirements and different counterparty profiles. Indeed, the information in the reports is not only excessive but also not granular enough (particularly making output in the interbank sector irrelevant) for client specifications. Furthermore, although the mandatory Top 5 reporting works well it is not designed for multi-tier institutions and would make sense if a report could be submitted once for an entire corporate group.

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

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

56 Please specify what else could be done to improve the quality of the best execution reports issued by investment firms:

One major step for usefulness and availability would be a centralized reporting platform, where all the best execution reports need to be uploaded.

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56.1 Please explain your answer to question 56:

- In article 27 of the MIFID II Draft RTS on the data to be published by execution venues on the quality of execution of transactions ('RTS 27'), a precise product scope wasn't provided, so some trades are reported without identifiers (ISIN code), only with a written description of the product. For investors analysis purposes it is more useful if there would be only one specified identifier for the product, making the reporting format unique and providing for exploitable data.

- Best execution reports should have a predefined reporting format, for example XML based reporting format. This further standardization of the format of the report should be accompanied with alignment of RTS 27 requirements with the rules on costs and charges transaprency.

- The product scope of RTS 27 best execution quality report should also be limited to only ToTV products (Traded on a Trading Venue), thus the only identification of the products would be an ISIN code. Article 28 of the same RTS ('RTS 28') reports do not provide useful data of investment firms that executes trades 100% on own account. This results in only one row claiming 100% in this product is executed on own account. Only the qualitative reports should be provided in those cases.

- The meaning of 'execution' of a transaction should be clarified. Investment firms which 'execute transaction' in financial instruments have to report transactions to the competent authority. Even if the concept of 'executing transactions' is detailed in the Delegated Regulation, this still provides room for interpretation and confusion as the concept of 'execution' is not per se defined. In practice, this raises several questions, especially within the context of Brexit, as it is not properly defined and might be interpreted in several different ways – Does it mean booking, trading, selling? This question is even more complex for e-business especially when the trades are executed via an algorithm;

- The requirement to publish firm quotes is totally inappropriate for non-equity instruments and is rather artificial. Most of the time the quotes are published but it is almost impossible to trade on those quotes as they are generally providing for one client with specific trade characteristic. Therefore, we support that the pre-trade requirements for 'non-equity instruments' should be reviewed and

- Several central banks such as in Asia are not exempted from the transaction reporting. This raises several commercial issues which are to the benefit of non-EU investment firms. We thus advocate to exempt transactions with central banks including non-EU central banks from the transaction reporting.

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

1 – Disagree

57.1 Please explain your answer to question 57:

The reports do not totally work for certain products (e.g. comparison can be achieved for cash and equity but not for structured products and derivatives) and in any case the data to determine best execution is always available to the client at their request since best execution is ensured via monitoring systems. That said, the best execution reports clearly make sense for trading venues. Therefore, we think that in order to balance the costs for investment firms, these reports should be only mandatory for systematic internalisers and trading venues.

III. Research unbundling rules and SME research coverage

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

Quantity: We have noted that research unbundling has decreased research available for investors. This is particularly true for research coverage of SMEs, which are significantly financed by co-operative banks (one third of market share in Europe), and thus exposing our members and their clients on a greater level to the negative repercussions of this regime.

As execution fees are being forced down, research coverage requires sufficient liquidity (i.e. demand for research) in order to be a profitable activity. Consequently, this has reduced the incentive to provide research coverage for less liquid instruments, and decreased liquidity for high yield bonds and small-/mid-cap equities as can be seen above. Research providers have also diverted their business towards large caps. This impacts the financing (both debt and equity financing) and efficiency of the economy, due to the increased information asymmetry in the market (highly favourable to large hedge fund managers and banks).

The effect of the regime in charging for what was previously provided as free has also restricted the dissemination of research.

Quality: Although there has been an increased role for issuer-sponsored research this may not provide the same role in markets from a buy-side point of view as per traditional research.

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Pricing: The distinction between research and corporate access in the research unbundling rules has led to substantial administrative costs without contributing to investor protection. Currently, two invoices are sent out to clients: one for research costs and the other for corporate access. This has increased the cost of invoicing to a significantly higher level than the fees charged. Major investments have been made to create a contractualization and invoicing chain whose cost is barely covered by the billings. Indeed, the administration of MiFID II has been monopolising most of the IT investment in research for the past two years. In addition, the separate invoices confuse investors who are now less reluctant to attend road-shows or accept bilateral meetings with corporates. This is not conducive to achieving the CMU objective of affiliating and incentivising access to capital markets.

By way of example, a survey conducted by the Nordic Securities Association about the effects of research unbundling after MiFID II implementation. This survey, dated 13 June 2019, comprised of 43 respondents in the Nordics, including 34 sell-side and 19 buy-side:

- Main findings from the Nordic sell-side are that:
  - More than 50% of sell-side respondents have cut down on research of small-cap equites. At the same time, 30% have increased their coverage. The net effect is clearly on the negative side, particularly for Nordic small- and midcaps;
  - 85% of sell-side respondents report less liquidity in small and midcap equities. None reported increased liquidity;
  - High yield bond liquidity has deteriorated, but not as much as mid- and smallcap equities; and
  - The quality of consensus earnings estimates has deteriorated significantly.
- Main findings from the Nordic buy-side are:
  - Buy-side largely pays for research out of own account;
  - The 'full subscription at fixed price'-contract is adopted by nearly all fund managers participating in the survey;
  - The number of research providers used has declined sharply by about 30%;
  - Sell-side coverage of small-caps down, mid-caps also negatively affected;
  - No positive trend in buy-side research hiring, mostly unchanged;
  - Buy-side is cautious towards issuer-sponsored research, even when clearly marked; and
  - Clearly lower quality in consensus estimates.

One of our French members also recorded the following consequences:

- Severe pricing deflation over the last two years (magnitude of circa 50% price reduction);
- Significant reduction of the number of issuers covered (price discovery has unveiled that asset managers who were asking for this kind of research were not willing to pay for it);
- Switch from issuer coverage oriented research to thematic oriented research; and

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- Switch from independent research status to marketing documentation.

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

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N/A
Introduce a specific definition of research in MiFID II level 1			X			
Authorise bundling for SME research exclusively						X
Exclude independent research provider's research from Article 13 of delegated Directive 2017/593		X				
Prevent underpricing in research	X					
Amend rules on free trial period on research	X					
Other					X	

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

First of all we would like to explain that there was no consensus amongst our members on the benefits (or otherwise) of the proposal to authorise bundling for SME research exclusively. This is because members consider that the quality, quantity and pricing of research upheld in the previous bundling regime under MiFID I to have been the ideal scenario.

Free research subject to conditions: The MiFID II review should result in an explicit legal basis under which research can be received for free under the condition that there are no inducement issues, i.e. a specific exemption for trading functions where there is no direct link to underlying clients. Indeed, explicit exemption from inducement rules should be granted on research used for proprietary trading or other non-client related activities, or otherwise a sufficient clarification can be given if an exemption cannot be granted. Article 13 of the Delegated Directive describes the requirements with regard to inducements in relation to research. These requirements are related to investment services (to clients) which seems logical to us because these are investor protection rules. This would entail that these requirements are not applicable on investment activities like own account trading. Own account trading by investment firms takes place for example in the framework of treasury activities (hedging), market making and building stock to be prepared for further demand. This own account trading is not related to a client and therefore it makes sense to us that own account trading is not included in Article 13 of the Delegated Directive or that our understanding is clarified in this regard.

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

Exclude independent research providers' research from Article 13 of delegated Directive 2017/593: Both sell-side and buy-side note that these independent research providers should be placed under the same regulation and same procedures as other research providers. We see this as a competition issue and also an issue from the buy-side who is buying this research now from different kinds of parties. Therefore, we do not understand why the buy-side would act differently when buying from independent research providers.

Prevent underpricing in research: If the regulators were to demand more from research providers this would have a negative impact on research coverage. There are levels of pricing for research that come from market participants and these king of price floors would eventually have a similar negative impact to research as MiFID II. Those professional clients who have budgets to pay for research would not raise these budgets, they would just buy less research, and this would result in a decline of research coverage again. Furthermore, it might be a bit difficult to determine underpricing as the value of research might be different in the perception of investors.

Amend rules on free trial periods of research: Trial periods are just a starting point in the relationship between research houses and institutional investors. It does not solve the quality problem and the adequate payment of research. ESMA has also defined in its Q&As that this period cannot be more than 3 months which should appropriately determine if the service provided is efficient. Thus, there is no need to change or define free trail periods of research as it will have no effect on SME research coverage.

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

2 – Rather not agree

60.1 Please explain your answer to question 60:

It is unclear how funding for such program would work, whether it would be raised from public money or market operators, and who will decide this.

Furthermore, the missing part of SME research financing are the listed companies themselves. Creation of a "research fund" should not rely only on SMEs but on all listed companies. The cost of being listed should not become more prohibitive for SMEs than it is already. Therefore a research fund could only work if funded by all listed companies, proportionally to their market value in order to restore mutualization among market participants.

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

The best approach would be market-driven research without public funding subsidisation. That said, we do not really agree with such a funding program for SME research based on our answers to questions 60 and 60.1

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

3 – Neutral

62.1 Please explain your answer to question 62:

The value of SME research relies mainly on human material and on insight analysis (notably ESG). Unlike large listed companies, SMEs offer less data and comparable points. AI may be cautiously used for accounting analysis, but this represents a portion of a research coverage. Therefore, even if the technology could be developed it must still be checked by humans who have the relevant information, and can assert their market view and interpretations about the data, financial position and future financial projections of the SME.

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

2 – Rather not agree

63.1 Please explain your answer to question 63:

These kind of research databases already exist for listed companies but are not so popular because they may not be so affordable for certain smaller investors (even for a small fee). It would be useful to facilitate data access by centralizing all publications and accounts of SMEs but it is hard to see what would be the incentive for smaller investors to pay for such research and for smaller research providers to give away their data without a proper fee. Larger clients and research providers would find such a database more valuable but then creating such a database only for large clients is not

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suitable. Furthermore, please note our rationale for doubts on the success of such an EU-wide database for SME research within our answers to questions 60 to 61.

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

5 – Fully agree

65.1 Please explain your answer to question 65:

Article 12-3b explicitly describes sponsored research as an acceptable minor non-monetary benefit. In addition, Article 37 of Delegated Regulation (EU) 2017/565 provides rules on conflict of interests for investment research and marketing communication. Investment research is defined in Article 36 of delegated regulation 2017/565. However, issuers and providers of investment research consider that the definition of Article 36 would in most cases not apply to issuer-sponsored research which as a result, would not qualify as investment research. As a consequence, the rules on conflict of interests applicable to marketing documentation would apply to issuer-sponsored research.

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

3 – Neutral

66.1 Please explain your answer to question 66:

Issuer-sponsored research should be regulated the same way as other research as long as the research provider complies with the applicable obligations when researching and producing investment research and discloses the fact that a publication qualifies issuer sponsored research under Art 6 para 1 (c) (iv) Delegated Regulation (EU) 2016/958. Indeed, we note that issuer-sponsored research matches the definition given within Article 36, as the fact that it is being paid by the issuer requires a specific disclaimer but does not impair the independence of view of the analyst producing the research (as rating agencies independence is not impaired by the fact that their work is being paid by the issuers).

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

2 – Rather not agree

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67.1 Please explain your answer to question 67:

We do not think the rules should be amended but a clarification could be useful, stating that issuer-sponsored research does not carry any inducement and therefore can be received by all asset managers without any incremental payment.

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

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

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68.1 Please explain your answer to question 68:

Please see our answers to questions 59, 59.1, 62.1, 63.1, and 67.1.

IV. Commodity markets

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

	1 (disagree)	2 (rather not agree)	3 (neutral)	4 (rather agree)	5 (fully agree)	N/A
The EU intervention been successful in achieving or progressing towards improving the functioning and transparency of commodity markets and address excessive commodity price volatility	X					
The MiFID II/MiFIR costs and benefits with regard to commodity markets are balanced (in particular regarding the regulatory burden).	X					
The different components of the framework operate well together to achieve the improvement of the functioning and transparency of commodity markets and address excessive commodity price volatility.	X					
The improvement of the functioning and transparency of commodity markets and address excessive commodity price volatility correspond with the needs and problems in EU financial markets.	X					

The position limit framework and pretrade transparency regime for commodity markets has provided EU added value.	**X**					

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

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

Please specify what other scope you consider most appropriate for the position limit regime:

We prefer the US style designated list of critical contracts. It reflects better what is important in the market.

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

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

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

Open interest:
Open interest would be the preferred criteria for its simplicity/sense. For example, if open interest shows only 5 lots of interest, it is not critical – no need to worry about it further. If millions are involved then it is critical. This is the simpler approach to take. The type and variety of participants would be irrelevant.

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

	Yes	No	N.A.
A financial counterparty belonging to a predominantly commercial group that hedges positions held by a non-financial entity belonging to the same group			
A financial counterparty	X		
Other	X		

75.1 Please explain your answer to question 75:

The scope of the hedging exemption should be expanded to financial counterparties. This is the CFTC approach whereas the EU approach is to prohibit eligibility outright e.g. Banks are out of scope for the exemption without consideration of the activity/scenarios.

Currently, FCs such as investment banks and commodity trading houses - that are MiFID II authorised and are important in the access of small commercial players to commodity derivatives markets – are not exempted from the position limits regime when it comes to hedging activity. This is further complicated due to the definition of 'hedging' under RTS 21 MiFID II, which only addresses non-financial entities that can engage in such activity. Also financial counterparties have to hedge the positions resulting from their activities. A prudent risk management in this context shouldn't be hampered.

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

Don't know/ no opinion/ not relevant

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

76.1 Please explain your answer to question 76:

We do not consider this relevant as each party has to quote mid-price. Where customers ask different providers for their pricing quotes, and see variation in the pricing – there lies the opportunity for transparency. The pre-trade transparency regime does not add to this.

V. Derivatives Trading Obligation

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

5 - Fully agree

If you do believe that some adjustments to the DTO regime should be introduced, please explain which adjustments would be needed and with which degree of urgency:

<u>Alignment with EMIR REFIT</u>:
With utmost urgency, we support statements by ESMA that essentially calls for urgent alignment of the derivatives trading obligation in MiFIR with the clearing obligation amended in the EMIR REFIT, so as to exclude small FCs - smaller banks which are essentially end-clients rather than market participants from the scope. Please refer to our answer to question 80.1 in this regard.

<u>Benchmarks Regulation (BMR):</u>
In a statement of the ESAs (ESAs 2019 19) published on 5 December 2019 on the introduction of fallbacks in OTC derivative contracts and the requirement to exchange collateral, clarification was provided regarding the scope of legacy contracts under the BMR when it comes to the EMIR Refit clearing obligation. Similarly, clarification is required that the introduction of the benchmarks fallback clause under article 28(2) of the EU Benchmarks regulation (BMR) in legacy contracts shall not trigger application of the DTO. The EACB believes that the DTO should not apply to such amended legacy contracts insofar as the clearing obligation would then be likely to apply to it; and

<u>Competitiveness:</u>
Furthermore, there is a need to monitor the markets and ensure that competitiveness is maintained in the EU and prevention of any market distortions. This is particularly in light of the Brexit negotiations.

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

5 - Fully agree

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80.1 Please explain your answer to question 80:

The scope of the MiFIR derivatives trading obligation must be aligned with the revised scope of clearing obligation under EMIR Refit as it is in line with the explicit mandate under EMIR Refit recital 32 and new article 85, 3(b) which require the Commission to prepare a report 18 months after date of entry into force of EMIR Refit (i.e. 18 December 2020), assessing whether both regulations and the above-mentioned respective obligations should be aligned. Furthermore, ESMA has also supported this alignment in its final report to the European Commission dated 7 February 2020 (ESMA70-156-2076). We strongly argue on behalf of our members that this is given higher priority by the Commission and resolved with urgency.

VII. Double Volume Cap

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

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

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

Qualitative elements for question 82.1:
One of our members has reported that from a share execution point of view, their execution costs have decreased since the introduction of MiFID II. This is partly due to the fact that the DVC (especially in early 2018) lowered the amount of dark MTF trading simultaneously when the share of overall trading increased for other better-quality execution venues (FBAs, SIs, LIS venues). This has also resulted in better quality executions. That said, some doubt remains on both venue and stock specific DVC levels as well as the effectiveness of the temporary venue and stock specific bans. The objective for transparency has made it easier for one to understand the stock specific liquidity profile e.g. in both pre- and post-trade analysis.

VIII. Non-discriminatory access

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

Don't know / no opinion / not relevant

83.1 If you do see any particular operational or technical issues in applying open access requirements which should be addressed, please specify for which financial instrument(s) this would apply and explain your reasoning:

N/A

83.1 Please explain your answer to question 83:

Members have not encountered major technical or operational issues.

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

1 – Disagree

84.1 If you do think that the open access regime will effectively introduce cost efficiencies or other benefits in the trading and clearing areas, please indicate the specific areas (such as type of specific financial instruments) where, in your opinion, open access could afford most cost efficiencies or other benefits when compared to the current situation:

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Our members have not experienced any cost efficiencies since the introduction of the open access regime and adoption of the derivatives trading obligation (DTO), the clearing obligation, MTFs and OTFs. For our members that are small regional banks, there has been low volumes in trading interest rate derivatives, and on occasion their clearing brokers have tried to raise their pricing in IRD clearing. For these members who are not able to roll the clearing cost to their clients in full, the broker had to be changed quite a few times (creating more costs). In FX, MiFID II/MiFIR also requires all multilateral systems in financial instruments to operate as a regulated trading venue. Since adoption of MiFID II, the biggest trading platforms have raised their brokerage pricing (due to being MTF) and now, by design their pricing follows multi-level tiering that favors bigger market participants (high volumes) and completely differs for all other asset classes. In this case, some of our members are also not able to roll higher brokerage cost to their clients, so our clients trade elsewhere. From these experiences it appears that the open access regime will never effectively introduce cost efficiencies or other benefits in the trading and clearing areas.

IX. Digitilisation and new technologies

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

EACB members have noted the introduction of new technology in existing business models of co-operative banks as a main development (e.g. robo-advice and use of distributed ledger technology). This can trigger new business models and/or cooperation, but technology will remain the underlying driver, as evidenced by the tech-driven investments of incumbents and focus of new entrants in the market.

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

Please explain your answer.

Please refer to our answers to questions 35.1 and 36.1 which address the transparency requirements that are inhibiting a phase-out of paper based information. The shift to digital-based communication (whilst still allowing paper based information if the only means available) is important in transitioning towards a sustainable economy.

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

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Please explain your answer

Issuance: The launch of new platforms, the introduction of workflow tools, and the introduction of technology (predominantly Distributed Ledger Technology) will reduce the complexity of current issuance processes especially for those asset classes that do not require extensive legal negotiations (such as ECP, MTNs).

Secondary trading: This part of the trading lifecycle will be influenced by data analytics (pricing, hedging etc) and DLT (streamlined settlement), but the impact is already visible in today's market.

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

4 - Rather agree

89.1 Please explain your answer to question 89

Ongoing digitalisation will further increase the dominance and coverage of trading venues in general, and enhance global competition between participants and platforms themselves.

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

5 - Fully agree

90.1 Please explain your answer to question 90:

The EACB perceives the necessity for the EU to provide regulatory guidance on differentiating between a customer friendly on-line presentation of financial instruments and investment services on the one hand and the provision of investment/robo-advice on the other hand.

Customers expect investment firms nowadays to present their portfolio of services/financial instruments online. Most market participants allow for generic filtering functions on their respective online sites so to enable for clients or potential clients to obtain a better overview of the products/services that may be of potential interest to them. It would be highly beneficial if there would be an EU wide guidance or harmonization setting out under which circumstances such filtering mechanisms or tools will be considered to constitute a personal recommendation by the respective investment firm and hence, constitute (robo) investment advice pursuant to the MiFID

II classification. The currently existing legal uncertainty hinders investment firms to present their products/services in a customer friendly way and to use modern technological means customers expect while gathering information on potential investment opportunities.

However, above all we would like to emphasise that for our members it is essential that there is the same level of investor protection regarding to digital distribution types as in the field of branch business.

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

3 - Neutral

91.1 Please explain your answer to question 91:

Data-driven, rapid, and automated insights will lead to a new way of (automated) decision-taking that should be facilitated appropriately. However, for our members it is essential there is the same level of investor protection between digital distribution types as in the field of branch business.

X. Foreign exchange (FX)

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

5 - Fully agree

92.1 Please explain your answer to question 92:

In our opinion, adding FX spot within scope of MiFID II / MiFIR would create a regulatory overlap with the FX Global Code leading to costly record-keeping and reporting burdens. There are over 1000 wholesale FX Market participants that have signed and adopted the FX Global Code, which was initiated by the Basel Committee and developed in a partnership between central banks and market participants from 16 jurisdictions around the globe. Whilst the Global Code is a voluntary standard, adherence to its principles is growing - major Central Banks have confirmed they will link their trading to adherence with the code. In addition, we consider the spot FX Market to be most liquid compared to any FX derivatives in a same currency pair.

On a separate note, we wished to use this section to address the lack of clarity about what is entailed by "means of payment" as mentioned in Article 10, paragraph 1b of

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Commission Delegated Regulation 2017/ 565. In the case that an FX product is used as means of payment, the FX product doesn't have to be seen as a financial instrument and the MIFID II requirements won't apply. There are market participants which determine FX products as a means of payment on the basis of a statement of the clients regardless of the trading day period. Therefore, it would be helpful to receive clarification as to whether this is sufficient or if the trading period should be taken into account.

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

Please explain your answer:
We do not think that NCAs should be granted any supervisory powers in this respect. The market functions well – via platforms – and is already very transparent and liquid.

Section 3. Additional comments

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

Please, where possible, include examples and evidence.

Reference is made to those EACB members who are SNCBs under the meaning of Article 4 (1) point 145, CRR II. Such banks have business models that are based only on deposit-taking and lending, with no provision of investment services to customers. However, they all need to undertake a limited level of activity in financial instruments (for own account) as part of their treasury function and issue their own instruments to manage their intrinsic interest rate risks. Normally derogations exist such as the 'own account exemption' for such scenarios. However, such exemption is no longer workable for SNCBs under MiFID II. Therefore, we believe the following four observations should be considered in relation to SNCBs that do not undertake client investment business with respect to the "own account" exemption (Article 2.1 (d) MiFID II):

(i) The development of electronic trading since the MiFID II proposal was published in 2011 has been extensive, to the point where it is becoming normative for some types of transactions. It is now more difficult even for an SNCB with a low volume of transactions in financial instruments to avoid an element of disadvantage if it has to refuse direct access to an electronic trading venue and either insist on traditional voice trades, or undertake electronic trades only through an intermediary. So this should no longer be an obstacle to use of the own account exemption at least for SNCBs.

(ii) Article 4.1(5) illogically defines *"the conclusion of agreements to sell financial instruments issued by [an investment firm or] a credit institution at the moment of their issuance"* as an instance of execution of client orders and therefore as an investment service. The illogicality goes back to Recital 45, which states that investment firms and credit institutions distributing financial instruments that they issue themselves should be subject to MiFID II when they provide investment advice to their clients. However this statement is then contradicted with the requirement that in order to eliminate uncertainty and strengthen investor protection, it is appropriate to provide for the application of MiFID II when, in the primary market, investment firms and credit institutions distribute financial instruments issued by them without providing any advice. To that end, the definition of the service of execution of orders on behalf of clients should be extended. This anomaly is then given effect in Article 4.1(5). As a consequence, an SNCB such as a building society or small co-operative bank that issues certificates of deposit into the wholesale money market automatically loses – quite unnecessarily – the own account exemption. A proportionate remedy for both these problems would be to dis-apply both conditions as a minimum to SNCBs.

(iii) Furthermore, the exemption in Art. 2 (1) (d) (ii) MIFID II for undertakings engaged exclusively in own-account activities is currently only applicable to "non-financial entities". Apart from the associated conceptual vagueness, this differentiation is neither necessary nor appropriate. The decisive factor should be the activity profile of the undertaking with regard to transactions in financial instruments. In particular, the restriction to proprietary trading means that there is no client contact, which is the ratio for many of the obligations under MiFID II / MiFIR. We therefore propose to delete the word "non-financial" in Art. 2 (1) d) ii) MIFID II.

(iv) There is uncertainty as to whether the own account exemption from MiFID II carries across into the exemption from the trade reporting requirements of MiFIR. On a purposive construction, and especially in light of MiFID II Recital 7 and MiFIR Recital 3 (both of which declare that MiFID II and MIFIR should be read together), the intention should be clear that the exemption carries across. But these recitals are not legally binding, and the operative text in Article 26 of MiFIR does not mention that these exemptions carry across. The resulting uncertainty is unsatisfactory – at best, SNCBs may be fortunate that their NCA takes the purposive construction, but at worst, they will be loaded with completely unnecessary reporting. The problem appears to be one unintended result of separating the MiFID II package into the Directive and Regulation. Therefore, the read across of the own-account exemption to MiFIR reporting should be secured by a change in the Level 1 text.

ISIN issues: We also acknowledge concerns with the depiction of portfolio commissions on ISIN and on an individual securities account basis, due to there being no transaction

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reference. An inducement is involved here and must clearly be shown to the client, but we call for regulatory simplification. Clarification of the ISIN issue is also required for derivatives (comprehensible allocation algorithm).

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

Please explain your answer:

Scope of financial instruments: The review should also take into account the diversity of financial instruments covered by MiFID II. In particular, instruments used for hedging purposes (such as interest rate derivatives to hedge a bank loan) need to be treated differently from financial instruments held for investment purposes. For example, we would advocate for the loss reporting requirement on the basis of MiFID II (Article 62 of the Delegated Regulation) to not be applicable for such instruments. Loss reporting, in particular for leveraged financial instruments or contingent liability transactions, is very confusing for investors. Therefore, the EACB calls for the exclusion of the loss reporting obligation at least relating to leveraged products, warrants, derivatives and other similar products which exhibit frequent fluctuations. Retail clients could be provided with a one-time clarification about the possible price fluctuations of that product type, whereas professional clients and eligible counterparties do not need this kind of information.

Derivatives within the meaning of MiFID II: Taking into consideration MIFID II Annex 1, Section C under 7, and article 7 of the Commission Delegated Regulation 2017/565, we assume that in principle commodities derivatives with physical settlement which are not traded or equivalent to a traded contact, should not be seen as derivatives within the scope of MIFID II and EMIR. However we can’t find an exemption like this for other derivatives which are settled physically and with other underlying values like for example securities. We refer to MIFID, Annex 1, section C under 4. We wonder whether this causes applicability of MIFID II and EMIR in situations which are not intended. Some practical examples: In the M & A practice it often happens that when company/ entity X takes a participation in company/entity Y, a contractual clause is inserted in the documentation that company/ entity x has the right to buy a further participation (often majority participation) in company/ entity Y within a certain period/ at a certain date on the basis of a pre agreed price as stated in the documentation. We assume that we have to see such a contractual clause as an equity derivative with physical delivery under MiFID.

Secondly, in case of the financial restructuring of a company which has severe financial problems, lenders often agree to write off part of their loans to the company. As a compensation it is sometimes stipulated in the documentation that the lenders get an option to buy shares in the company at a certain price within a certain period/ at a certain date (equity kickers). This gives the lenders the opportunity to profit from the

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upside potential of the borrowing company after the financial restructuring. We assume that also such a contractual clause qualifies as an equity derivative with physical delivery.

The market practice as we notice is that these contractual clauses in M&A or lending contracts are deemed not to be financial instruments. Application of MIFID II and EMIR requirements (e.g. risk mitigation techniques, exchange of collateral, reporting, clearing and trading) would absolutely not be suitable for these kind of contractual clauses and would cause huge problems. However looking at the text of C4 of MIFID II, another conclusion could be drawn.

Therefore we would propose that for physically settled derivatives with underlying values other than commodities, the same approach should be taken as for physically settled commodity derivatives in Annex 1, Section C under 7.

Reporting under Art. 26 MiFIR: A review of the rules and practices regarding reporting to authorities (Art. 26 MiFIR) are of crucial importance. This applies both to the scope of transactions covered by the reporting obligation and to the practice that has to be followed when preparing reports. Besides that, the data quality of the FIRDS-database according to Art. 27 MiFIR is not sufficient. Therefore, it cannot be used as a "golden source" to fulfil the reporting obligation. However, this is a prerequisite of a fully integrated reporting system. Besides that, the short selling indicator should be cancelled within the reports as short-sellings are ear-marked according to the short-selling regulation. However, the calculations for determining reportable short sales differ between the short-selling regulations and MiFIR, which entails complicated additional calculation runs. This leads to costs for the market which are not matched by any added value for the supervisory authorities.

Contact:

The EACB trusts that its comments will be taken into account.

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