

**MIFID2 REFIT**  
**European Commission Consultation**  
-----  
**French AFPDB Reply**

On the occasion of the European Commission Consultation on the review of MiFID II and MiFIR, the French association of retail structured product manufacturers, would like to share its views with the Commission on its experience with these current regulations and on the possible improvements that could be brought to the existing regulatory framework.

The AFPDB's contribution to the consultation focuses on investor protection topics which get specific importance to the structured products industry:

- General questions (questions 1 to 6)
- Product governance and investor protection (questions 31 to 34),
- Priority changes to be made, paper phase-out (questions 35 to 36)
- Creation of a pan-European product information database managed by ESMA (questions 37 to 39)
- Creation of a new category of semi-professional clients (questions 40 to 45),
- Modification of the product governance regime (questions 46 to 48),
- Abolition or recalibration of the inducement regime (questions 49 and 50),
- Delayed delivery of information (question 53)
- Opportunity of record-keeping tools in order to avoid mis-selling products (question 54)
- Opportunity of adapting the distribution regulations in order to suit digital and online offers (question 90)

## AFPDB Reply

### I.- General questions

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

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

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

With respect to structured products, **MIFID2 works well and fully achieves its goals: the product governance (target market and product approval process) and the cost and charges disclosure work well** thanks to the work performed on the Findatex EMT template in which AFPBD participated actively. The inducement regime was also well-calibrated and does not need further changes.

AFPBD recommends that the MIFID **retail investor protection framework remain stable for several years** to come because too frequent changes to the regime would cause a competitive disadvantage for the EU markets versus other non-EU countries such as Switzerland, Hong Kong or Singapore, where the investor protection rules have been a lot more stable over the years.

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

	1 Disagree	2 Rather not agree	3 Neutral	4 Rather agree	5 Fully agree	NA
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 problems in EU financial markets.			X			

The MiFID II/MiFIR has provided EU added value.			X			
---	--	--	---	--	--	--

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

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

In respect of the distribution of structured investment products to non-professional clients, several NCAs (at least 3 in the EU) have specific rules in addition to local interpretation of the MiFID II/MiFIR regulatory framework. We think the ESMA should review these rules, and where possible remove them because they often overlap or contradict with the MIFID product governance regime.

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

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

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

**II.- Investor Protection**

**Q 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					X	

progressing towards more investor protection						
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		

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

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

**Q 32 .1 Please explain your answer to question 32**

AFPBD deems that the MIFID2 product governance rules for structured investment products are robust enough, have achieved their objectives and do not need further changes.

Indeed, within the Findatex forum, formerly known as the European Working Group, the AFPBD took part in the industry efforts in setting up the target market sections of the EMT (European MIFID Template). These EMT standards and product governance rules more generally are now quite harmonized for funds and securities distributed in the EU and do not require further changes.

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

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

**Question 33.1 Please explain your answer to question 33**

The notion of complex products should be understood as defined in the ESMA Guidelines on complex debt instruments and structured deposits for the purposes of article 25.4 MIFID II.

**AFPDB considers that the information and disclosures provided to retail clients are very appropriate for complex products.** Thanks to the combined effects of the industry standardisation initiatives within Findatex and of the renovated regulatory framework resulting from the joint implementation of MIFID2, PR3 and PRIIPS, retail investors benefit from benefit from a wide range of information covering:

1. Prospectuses and prospectus summaries that more clearly highlight material risks;
2. Marketing brochures with balanced presentations of the product payoff and of its advantages and potential drawbacks;
3. PRIIPs KID (including prospective investors, cost table, risk indicator; scenario analysis);
4. Costs and charges full transparency under MIFID EMT format (ex ante and ex post);
5. Disclosure of the existence of inducement and their amounts (ex ante and ex post)

**Also, at the distributor level, suitability and/or appropriateness tests are performed.**

In addition the AFPDB would like to recall that:

- Any changes to the MIFID2 investor protection requirement would come at the expense of investors, who are already over-loaded with information.
- Requirements regarding complex products have some drawbacks: the compliance and IT cost burden associated with these products increases the cost for firms associated with these products and, as a consequence, limits their supply and ultimately reduces the product offering for retail clients, even where those products are otherwise appropriate or suitable for them;
- The rules are not harmonized at EU level. Several NCAs have decided to maintain their own local rules/policies resulting in a fragmentation of the rules applicable to complex products. As a result, a regulatory arbitrage may take place as non-professional clients in one country can access products that would not be accessible if they were in another country.

**AFPBD thinks that the regulatory protection given through MIFID2 to retail clients does not need to be further increased, as it is already at a high standard.**

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

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

The AFPDB considers that none of the above options would match our approach and our proposals concerning the necessary simplification and recalibration of the current cost disclosure rules in order to introduce more proportionality based on client category or product type.

**Our proposals in this field would support the views expressed by the French AMAFI.**

In short, we favor the following:

**For ex-ante information, two regimes should apply:**

- **“Full regime”**: disclosure on both product costs and service costs on a trade-by-trade basis.
- **“Proportionate regime”**: disclosure only on service costs through fee grids that would be specific to each asset class.

These regimes would be applicable according to the types of customers and products involved:

- **Eligible counterparties**: **“exemption” by default or proportionate regime if requested**: meaning switch off completely the costs and charges disclosure requirement (no requirement to provide information on costs and charges (neither in *ex-ante* nor in *ex-post*) unless the eligible counterparty so requests. In this latest case information would be provided under the “Proportionate regime” (through cost grids);
- **Professional clients**: **“Proportionate regime” by default or “more/full regime” if requested**, meaning application of the “Proportionate” regime; e.g. communication of costs and charges in *ex-ante* using cost grids. When requested by the professional client, more detailed information will be communicated to this client.
- **Retail clients**: application of either the
  - o **“Full regime”**: like today (i.e. no change of the current regime\*) when the product is a **packaged product** within the meaning of the PRIIPs Regulation, whatever the service provided.
  - o **“Proportionate regime”**: when the product is **not a packaged product** within the meaning of the PRIIPs Regulation, regardless of the service provided unless the client requested more detailed information.

**In that context, it should be added that Professional clients means here, equally, professional per se and professional on request (with *opt in* procedure amended like explained in our answers to Questions 40 to 45 meaning including sophisticated retail clients upgraded as professional clients).**

**Ex-post information** would be provided to professional and retail clients who have been in an "ongoing relationship" with the investment firm over the past year. Taking into account the feedback on this topic, it

also seems important to clarify the scope of the “ongoing relationship” to limit it to the provision of truly “ongoing” investment services : the safekeeping service (Section B(1) of Annex I of MiFID II), the portfolio management service (Section A(4) of Annex I of MiFID II) or a service that involves providing a periodic assessment of the suitability within the meaning of Article 24(4) of MiFID II and Article 52 of the DR.

**Question 34.1 Please explain your answer to question 34 and in particular the conditions that should apply: (5 000 characters maximum)**

The AFPDB supports the statement that Professional clients and ECPs should be exempted without specific conditions, even if we would consider that proposal should not apply to ECPs (unless requested).

**The AFPDB globally supports the statement Professional clients and ECPs should be able to opt-out if specific conditions are met but rather:**

- set up a proportionate regime by default for professional clients where disclosure is provided but in a simpler way (use of cost grids), like explained in our previous answer.
- exempt without specific conditions ECPs from costs and charges disclosure (unless if the counterparty requests to receive such disclosure).

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

- 1 – Do not support
- 2 – Rather not support
- 3 – Neutral
- 4 – Rather support
- 5 – Fully support
- Don't know / no opinion / not relevant

**Question 36 – How could a phase-out of paper-based information be implemented**

	Yes	No	N.A.
General phase-out within the next 5 years		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 expressly require paper-based information	X		
Other			X

**Question 36.1 – Please explain your answer to question 36 and indicate the timing for such phase-out, the cost savings potentially generated within your firm and whether operational conditions should be attached to it: (5 000 characters maximum)**

The AFPDB supports a paper phase-out. It is a positive contribution to an enhanced sustainability of product distribution. It is in line with both, industry efforts in this area and expectations of the general public.

However, the AFPDB considers that great care should be given in the implementation of this measure in order not to exacerbate further the electronic divide which affects some segments of the retail customer base - notably the elderly - that are less familiar with online services or who may be reluctant to move to a full-electronic documentation.

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

- 1 – Do not support
- 2 – Rather not support
- 3 – Neutral
- 4 – Rather support
- 5 – Fully support
- Don't know / no opinion / not relevant

**Question 37.1 – Please explain your answer to question 37 (5 000 characters maximum)**

The AFPDB does not support a database project of which it fails to see the need and the product scope.

Firstly, it should be noted that such freely and easily accessible product-information already exists online. Product comparison websites, also referred to as 'comparators' or 'aggregators', cover a very wide spectrum of products. These services have developed and have served investors successfully without being operated centrally by a supervisory authority.

Also, it should be recalled that distributors already play a significant role in the communication of product information to the targeted customers. Within the MiFID 2 product governance framework and as a result of the cross-sectoral industry efforts concerning the standardisation of target-market information distributors can rely on very detailed target markets (for which the industry as a whole has been working very hard to implement and in a convergent way thanks to template developed within trade bodies and working groups).

Currently investors may compare information from several sources and the increasing availability of product comparison services tends to significantly reduce the usefulness of an ESMA-administered database.

The project also raises the following observations and questions:

- as most investment solutions remain mostly national or regional, there is a limited interest in the theoretical pan-European comparison. Despite the increasing European standardisation of disclosure format (e.g. PRIIPS Kids) local specificities persist. Those notably include tax regimes or local distribution rules enforced by NCAs. At the same time, public offerings often remain limited to a limited number of jurisdictions;
- the product scope is not specified: the number of products offered in the EU is extremely high, several millions of new ISIN codes are issued every year if one includes exchange-traded products. Also, for many products, disclosure documents (e.g. PRIIPS Kids) may be updated daily. The question of the operational feasibility and cost of such a centrally administered database should not be underestimated;



- the filing regime is not specified in the proposal. Will it involve a vetting mechanism? Will it introduce latency? Is there a risk that it could reduce the timely availability of hedging products? What data should be uploaded? Who shall be responsible for the filing and updating of the data? (the manufacturer, the distributor(s)? With what update frequency?
- How shall the service be funded? What would be the additional direct cost for the industry and indirect cost for investors? In light of the likely duplication of the envisaged database with other existing alternative lighter solutions, and in consideration of the huge amount of efforts, costs and work that was done by the industry in the area of disclosure due to MiFID 2 and PRIIPs KID, it should be asked whether such project, would be that be reasonable to add even more costs?

As a whole, we believe that this proposal raises serious issues notably in terms of costs without any real benefit.

Finally, one may point out that aggregating and providing data are services provided today by private companies whom experience, and technical expertise ensure a valuable service.

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

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

**Question 38.1 – Please explain your answer to question 38: (5 000 characters maximum)**

The AFPDB does not support the implementation of this database project, irrespective of the products.

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

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

**Question 39.1 – Please explain your answer to question 39: (5 000 characters maximum)**

As indicated above, the AFPDB is not supportive of the database project. We also fail to see how this plan which may compete with private sector initiatives and may indirectly weaken ongoing industry efforts in this field corresponds to the core mandate of ESMA.

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

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

**Question 40.1 – Please explain your answer to question 40: (5 000 characters maximum)**

The current retail client category covers a great diversity of situations. It ranges from individuals that have limited or no knowledge and experience of financial instruments to expert traders that have an extensive experience of wide spectrum of investment solutions and an acute understanding of the various payoffs and of market dynamics.

The retail category comprises both physical and legal persons. Among the latter a certain diversity also exists from corporate clients to associations and local authorities.

MIFID2 investor protection rules concerning retail are logically meant to protect the least sophisticated, most risk-adverse and least able to bear losses. It is therefore not surprising that this protective framework may seem less adequate when it is applied at this other side of the spectrum to the most sophisticated clients or the high-net worth bracket. For this upper category of the retail population, especially for individuals who repeatedly invest or trade in the same financial instruments, some regulatory requirements, notably some pertaining to cost disclosure may appear as superfluous or excessive, especially when they induce latency and may potentially affect the quality of order execution or when they contribute to an information overflow.

However, to tackle those issues, **AFPDB would not recommend the creation of a new category of “semi-professional”**. For the most advanced clients, we would rather support an easier opting-up process, as set-out in the Annex II of MiFID II regarding “*clients who may be treated as professionals on request*”.

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

- 1 – Disagree
- 2 – Rather not agree
- 3 – Neutral
- 4 – Rather agree
- 5 – Fully agree

Don't know / no opinion / not relevant

**Question 41.1 – Please explain your answer to question 41: (5 000 characters maximum)**

The present opting-up threshold based on portfolio size (currently set at 500K €), already allows a recategorisation of high net worth clients.

The AFPDB would not recommend to fundamentally alter this criterion.

We could consider however a slightly enlarged basis for the computation of the 500K € reference. This could notably involve an incorporation of other assets in the portfolio basis, such as life insurance schemes or retirement schemes.

As is the case today, the use of this portfolio criterion should continue to be combined with the other criteria (applying the two-of-three rule). As presently, the other criteria should cover the trading experience and the knowledge and experience. For trading experience a lower threshold would be appropriate (10 trades per year). For knowledge and experience a better ability to opt-up sophisticated investors is desirable. More specifically, investors that correspond to the current "advanced" bracket of the EMT templates in the standardized Findatex classification should be eligible to such voluntary recategorisation.

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

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

**Question 42.1 – Please explain your answer to question 42: (5 000 characters maximum)**

The AFPDB does not support the creation of a new investor category of semi-professionals. While the AFPDB is aware of the limitations of the current regulatory framework that may restrict the offering of some investment solutions to the most advanced retail clients, the association does not believe that the creation of such category would be the appropriate solution.

The introduction of this new category could entail unintended consequences, such as:

- a deep impact on the existing distribution models and operational solutions together with important costs, IT, repapering, personnel training, communication...
- a negative impact on portfolio diversification options (cliff effect in product ranges whereby mass retail would risk facing a reduction of its alternatives as a consequence of a binary approach of target markets, lacking the appropriate granularity)

A better approach would be:

- introducing more proportionality in the disclosure regime that is currently applicable to professional clients and eligible counterparties;
- promoting the use of granular target markets – as developed by cross-sectoral initiatives such as the Findatex templates (EMT) - that already allow a fine identification of advanced clients;
- facilitating the opting-up of the most advanced clients in the professional category (e.g. those classified as "advanced" in the EMTs), notably by easing-up the admission criteria.

As concerns the opting-up, the AFPDB would support a review of the existing criteria. The objective is to better acknowledge the client trading experience -notably by lowering the current threshold from 10 trades

per quarter over the previous year to 10 over the previous year) and the client knowledge (advanced clients).

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

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

**Question 43.1 – Please explain your answer to question 43: (5 000 characters maximum)**

The AFPDB does not support the creation of a new investor category of semi-professionals. Therefore, it does not consider relevant to modify investor protection rules based on this approach. However, the AFPDB notes that the information overflow on costs and charges is often noted as a nuisance by the most advanced clients, especially those who trade on a very regular basis.

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

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

As expressed in the reply to question 42, the AFPDB does not support the introduction of this new category which would entail considerable implementation costs :

- IT systems would also need to be modified
- Legal documentation ( Final Terms, Programmes, Distribution Agreements, and client onboarding packs)
- Product governance's target markets would need to be fully changed, while these have already been modified significantly by MiFID II.

Considering those drawbacks AFPDB is totally against the creation of a new clients' categorisation and rather proposes to adapt the "opt-up" rules as developed in our previous answers.

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

	1 (irrelevant)	2	3 (neutral)	4 (rather relevant)	5 (fully relevant)	N.A.

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

Please specify what other criteria should be the one applicable to classify a client as a semi-professional client: (5 000 characters maximum)

Not applicable since AFPDB does not support the proposal of a new category of semi-professional clients.

**Question 45.1 – Please explain your answer to question 45 and in particular the minimum amount that a retail client should hold and any other applicable criteria you would find relevant to delineate between retail and semi-professional investors: (5 000 characters maximum)**

Not applicable since AFPDB does not support the proposal of a new category of semi-professional clients.

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

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

**Question 46.1 – Please explain your answer to question 46: (5 000 characters maximum)**

The implementation of the MIFID2 product governance has contributed to an enhanced investor protection regime and to a harmonisation of the product information that manufacturers and distributors exchange concerning target markets.

Today this product governance regime works well in the structured product distribution space. It does not prevent retail clients from accessing products that would be appropriate to them. AFPDB praises the need for regulatory stability.

However, it should be noted that despite the general harmonisation principle that should have governed the implementation of MIFID2, local regulatory specificities still persist, notably in the form of national product bans, moratoriums or other forms of selling restrictions. Depending on the situation and jurisdiction, these limitations may range from the full prohibition of some products or payoffs or to a limitation in the number of features that a product may comprise.

As observed in its reply to the ESMA consultation on the power of intervention, the AFPDB deeply regrets that these local restrictive measures which preexisted MIFID2 were not reviewed with the implementation of the directive. These persisting examples of regulatory gold plating contribute to a European disharmony in the product marketing and distribution rules.

MIFID2 tends to promote a fine identification of targets markets which, for example, implies a subdivision of the retail segment into several brackets, notably according to the level of knowledge and experience or the chosen distribution mode (e.g. appropriateness vs. suitability). These local goldplating rules on the other hand tend to apply their restrictions in a uniform manner to all retail clients without regard to their knowledge and experience and, for example, without reference to the distribution mode (e.g. advised or non-advised sale).

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

	Yes	No	N.A.
It should only apply to products to which retail clients can have access (i.e. not for non-equities securities that are only eligible for qualified investors or that have a minimum denomination of EUR 100.000).		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		

**Question 47.1 – Please explain your answer to question 47: (5 000 characters maximum)**

### **Product scope of the Product Governance**

All types of product “complex” or “non-complex” under MIFID2 should be subject to Product Governance obligation. An exemption of the PG for all non-complex products would have side effects of limiting the offering of product further, and complexifying the decision tree for manufacturers as to which products are in scope or not. Different legal requirements for a subset of products would cause issues.

Instead, we recommend to keep the existing proportionality principle to be applied to all products which since 1st Jan 2018 works generally well.

For avoidance of doubt, we would support an exemption of shares and bonds (vanilla products) of the product governance. However, we would not support an exemption of UCITS of the Product Governance. In our view, in order to maintain regulatory convergence, all financial instruments that are deemed packaged under PRIIPS should remain subject to the PG under MIFID2

### **Simplification of Distributors’ Feed-Back to Manufacturers**

Currently, distributors must report to manufacturers on their sales outside of target markets.

Up to now, industry experience from the manufacturer point of view has shown that such reporting remains very limited.

In light of this situation, the AFPDB would suggest to trim the reporting requirement and limit to those sales that are made in the negative target market, subject to a significant threshold test to be applied by the distributor.

This refocusing of distributor reporting would help ensure that only pertinent information would be reported to manufacturers.

Indeed, one should keep in mind that the ultimate objective of this feedback is to allow manufacturers to review their distribution strategy and/or other key components of their product offering as part of their product governance periodic review. An appropriate calibration of this reporting is a key element of success in the post-distribution reviews of product governance.

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

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

### **Question 48.1 – Please explain your answer to question 48: (5 000 characters maximum)**

That issue is already clarified in ESMA Product Governance Guidelines in § 71 and 72.

Investment firm should be allowed to sell a product to a negative target market if the client insists, but in that case the firm should provide a written explanation that the client was duly informed but wished to acquire the product nevertheless.

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

- 1 – Disagree

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

Question 49.1 – Please explain your answer to question 49: (5 000 characters maximum)

Under the current MIFID2 rules inducements are subject to the quality-enhancement test that contributes to restricting them to situations that effectively benefit customers.

This test is complemented by disclosure and conflict of interests' rules that help ensure that clients are duly informed and that their interests are put first when devising a product distribution strategy.

The current system strikes the appropriate balance between the crucial client protection need and the corresponding need to fund these quality enhancing services.

As concerns the UK RDR reform that led to an inducement ban in the investment advice the AFPDB notes that this regulation change contributed to an « advice gap » for an important share of the retail segment that did not wish to pay a separate fee for advice services. As a consequence, in addition to a reduction by a third of the number of physical persons that are active in the field of advice -irrespective of the number of financial intermediaries - another unintended negative effect of the reform is a sharp reduction of the number of products that are bought as a result of a suitability assessment.

This evolution unfortunately deprives investors of an opportunity to benefit from an expert view on the compatibility of their investments with their stated objectives and on a useful advice on their portfolio diversification. It also reduces their opportunity to benefit from an ongoing portfolio monitoring following their investment decision.

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

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

Question 50.1 – Please explain your answer to question 50: (5 000 characters maximum)

Independent investment advice is already in the current framework and precisely because it implies a total ban of inducements, many advisors did not or could not opt for it.

A total ban will reduce significantly the range of products available to advisors. Finally it would have negative consequences in the financial sectors with job losses anticipated.

Finally it is worth reminding that the US has no inducement ban, nor do other large economies outside the EU (Switzerland, Japan, China), while the retail investment products landscape available in these markets is very wide. An inducement ban in the EU would further fragilize revenues of the financial sector which are already under significant pressure.

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

- 1 – Disagree



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

**Question 51.1 – Please explain your answer to question 51: (5 000 characters maximum)**

The AFPDB supports the existence of a mandatory professional certification for investment advice.

Such a framework is already in force in France under the AMF certification scheme that ensures that all individuals providing investment services satisfy the minimum knowledge requirements, notably as regards investor protection rules.

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

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

**Question 52.1 – Please explain your answer to question 52: (5 000 characters maximum)**

The AFPDB considers that the establishment of an EU-wide framework for a certification applying to investment advice could be a proper way of assessing the knowledge and competence of staff providing this investment service as set-out in article 25, paragraph 1 of MiFID II.

Such a framework is already in force in France under the AMF certification scheme that ensures that individuals providing investment services satisfy the minimum knowledge requirements, notably as regards investor protection rules.

As concerns the practical organisation and content of such a European framework, the AFPDB would recommend applying a subsidiarity principle.

Such an approach would take into account existing national standards and encourage mutual recognition of the existing national certifications. The set of key requirements prescribed in the framework would be strictly limited to the minimum that needs to be harmonised at the Community level. This dual organisation (EU minimum framework complementing existing national certification requirements) would facilitate European convergence while at the same time taking in account the national existing certifications facilitating mutual recognition among them.

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

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

**Question 53.1 – Please explain your answer to question 53: (5 000 characters maximum)**

The combined reading of Articles 46(3) and 50 of MiFID II DR requires investment firms to provide *ex-ante* information before the transaction and on a durable medium. However, in the context of providing an execution service by telephone, this *ex-ante* communication on a durable medium requires delaying the execution of the transaction, which is not compatible with best execution obligations.

For AFPDB, the answer provided by ESMA in its latest Q&A 28 is not satisfactory because it requires to provide to the client the durable medium simultaneously (and not “immediately after”) to the communication over the phone which is very difficult to implement and to comply with.

Also the AFPDB further observes that in a spirit of regulatory convergence with, it would make sense to apply to financial instruments under MIFID2, the ex-post exemption that currently exists under PRIIPS (Article 13.3) for the provision of a KID after a transaction. Considering that, in several instances, the provision of a KID is a valid way to comply with disclosure obligations under MIFID2, the alignment of the two regulations would be very opportune in this regard.

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

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

**Question 54.1 – Please explain your answer to question 54: (5 000 characters maximum)**

AFPDB neutral answer is justified by the fact that MiFID II texts already impose taping and record keeping requirements and particularly under Articles 16(6) and 16(7) of MiFID II, further specified in MiFID II DR, for investment firms which execute transactions in financial instruments.

Our perception is that the first finality of record keeping requirements is to guarantee a complete and integer record of the received orders and their details together with the time and conditions of their execution.

We do not however see these records as a relevant tool to reduce mis-selling risk as such. It should be kept in mind that in order to avoid such mis-selling practices, investment firms can already rely on quite a few tools, such as product governance processes and the appropriateness and suitability processes. We think that these tools which were either introduced or reinforced by MIFID 2 are the relevant ones to fight against miss-selling practices as such.

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

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

**Question 90.1 – Please explain your answer to question 90: (5 000 characters maximum)**

As a rule, the AFPDB wishes to preserve a strict technology-neutral approach of financial regulation. This should also apply to product governance and distribution.

### **About the AFPDB**

The AFPDB (French association of the structured and listed retail investment products) represents the interests of the main issuers of structured products that distributed in France. Their product range includes both exchange traded securitised derivative products, such as warrants, turbos and certificates, and structured products (e.g. EMTN) distributed through public offering or private placements.

The main goals of the association are:

- Promoting and contributing to the development of this industry on the French and European markets;
- Representing and advocating for the industry's interests, notably with the public authorities and regulators, the regulated markets and other trading venues and the other industry associations, as the AMAFI;
- Promoting the use of common industry standards, notably as regards product typology, in cooperation with other European associations;
- Collecting, producing and keeping up-to-date statistics and studies on the French structured product market.

The AFPDB members commit to comply with the AFPDB Code of conduct and to implement the product to polity as laid out by the EUSIPA (European Structured Investment Products Association) to which the AFPDB is affiliated.

The AFPDB Legal and Regulatory Committee actively contributes to the marketplace reflections on work-streams concerning the showing and distribution of structured products.

Industry workshops involving both manufacturers and distributors are periodically organized by the AFPDB. They contribute actively to industry proposals in areas such as the implementation of the main regulations, the investor education programs, the disclosure and communication of key product information to, respectively, distributors and final clients.

Information, news and publications: [www.afpdb.org](http://www.afpdb.org)

### **Contact**

Olivier Gentier

Secretary General

[olivier.gentier@afpdb.org](mailto:olivier.gentier@afpdb.org)