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DES MARCHÉS
FINANCIERS

FINANCIAL MARKET PROFESSIONALS

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MiFID II REFIT
Investor Protection
-
Costs and charges

AMAFI's Proposals

PRIORITIZATION OF POINTS AND SUMMARY OF CHANGES PROPOSED AT LEVEL 1

(1) Reintroduce more proportionality according to investor categorization (in particular, reliefs for wholesale) and the typology of financial instruments
- See amendments of Recitals 103 and 104 of the Level 1 Directive
- See amendments of Articles 24.4 and 30.1 of the Level 1 Directive

(2) Simplify and clarify the current regime
- See amendments of Article 24.4 of the Level 1 Directive

MiFID II (and in particular Articles 24.4 of MiFID II and 50 of RD MiFID II 2017/565) ("DR MiFID II") requires investment firms to inform all investors, in a timely manner, of the costs and charges associated with the services provided and, where applicable, with the products marketed or recommended. An estimate of these expected costs must be provided to the investor prior to the transaction or service provision (*ex-ante* information), this estimate must be supplemented by information on the costs actually incurred by the client and provided, at a minimum, annually as soon as certain conditions are met (*ex-post* information).

AMAFI fully supports this obligation to inform investors, and in particular retail ones, of the costs and charges incurred. Disclosure of costs is indeed absolutely essential for investor protection purposes. However, this obligation is difficult to implement given the complexity caused by the number of parameters to be taken into account in identifying the obligation applicable to each situation. It does not take sufficient account of the principle of proportionality and the very heterogeneous degrees of knowledge between eligible counterparties, professional clients and retail investors.

This obligation, which has been complicated to implement for investment firms and which has not yet been stabilised, as evidenced by numerous ESMA question-and-answer publications, is, in AMAFI view, one of the priority topics for review MiFID II investor protection rules.

Proportionality

The current costs and charges disclosure requirements are applicable to all types of clients (with a very limited flexibility for professional clients and eligible counterparties: "limited application") without differentiation according to the service provided or the underlying product.

However, in order to guarantee an effective protection for the different categories of clients without imposing requirements on investment firms with no added value, it seems appropriate to introduce greater proportionality in the implementation of these *ex-ante* and *ex-post* disclosure on costs and charges.

As regards the *ex-ante* disclosure, as practice shows, it is not relevant for eligible counterparties that have the expertise and the necessary resources to make informed and responsible investment decisions (like putting several investment firms into competition when placing an order in order to obtain the best possible price).

For professional and retail investors, it seems appropriate to introduce greater proportionality in the implementation of the obligation according to the complexity of the product and the type of customer. Indeed, information communicated transaction per transaction seems relevant when the product is complex and the investor is retail but is disproportionate when the product is very simple (the costs being essentially the same from one transaction to another) and/or when the client is professional.

In the latter situation, information provided through a tariff grid, and not on a transaction-by-transaction basis, would allow to meet this logic of proportionate transparency.

As regards the *ex-post* disclosure, such requirement is not relevant for eligible counterparties who have knowledge to estimate themselves the costs and charges charged to them by their various investment firms. Thus, the *ex-post* disclosure requirement should be limited to professional and retail clients who are in "ongoing relationship" with the firm.

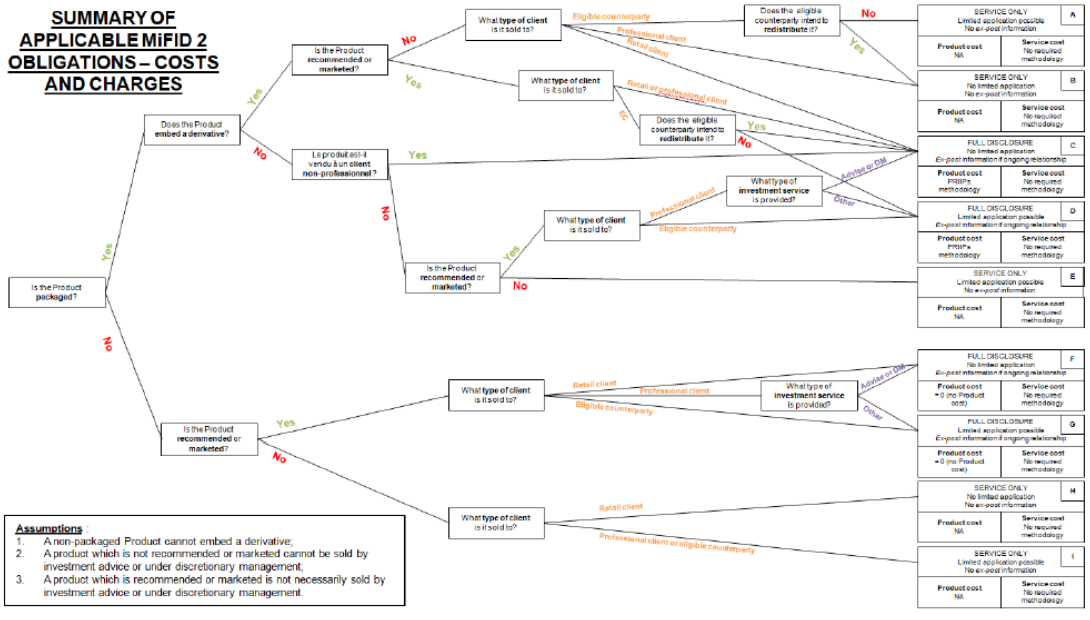
Taking into account the feedback on this topic, it also seems important to clarify the scope of the "ongoing relationship" to limit it to the provision of truly "ongoing" investment services : the safekeeping service (Section B(1) of Annex I of MiFID II), the portfolio management service (Section A(4) 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.

Simplify the regime as a whole

Article 50 is difficult to understand because it requires the articulation of several regimes:

- (1) *ex-ante* information: total (meaning both service and product costs) or only service costs;
- (2) *ex-post* information; and
- (3) limited application.

As illustrated in the diagram below, this means having to differentiate between 9 situations, which seems difficult to implement and disproportionate given the objectives pursued.



Therefore, it seems appropriate to drastically simplify this system for both *ex-ante* and *ex-post* information.

For ex-ante information, AMAFI proposes to distinguish only **two regimes**:

- "**Full regime**": disclosure on both product costs and service costs on a trade-by-trade basis;

- "**Proportionate regime**": disclosure only on service costs through tariff grid. This tariff grid should be declined by asset class, the amounts indicated in may be fixed amounts or, where applicable, ranges or maximum amounts (provided that the latter reflect as closely as possible the economic reality of the costs). This grid, which is sufficiently granular according to the activities of the investment firm, must be communicated at the time of entering a relationship or at the first operation. It is updated at least annually and made available all times to clients.

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

- Eligible counterparties: possibility to switch off completely the costs and charges disclosure requirement (meaning 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 tariff grids);

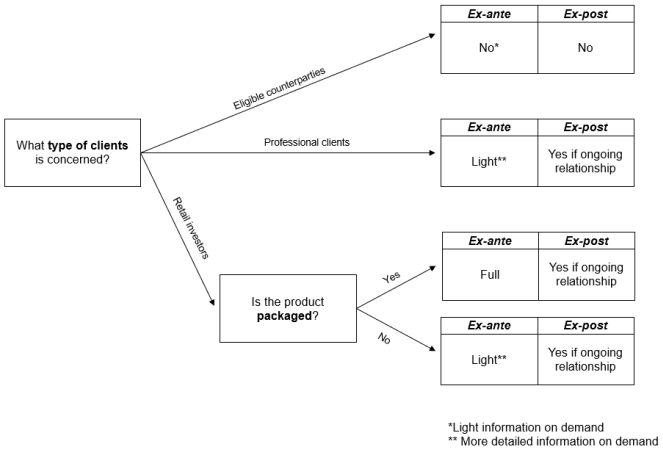
- Professional clients: application of the "Proportionate" regime; e.g. communication of costs and charges in *ex-ante* using tariff grids. When requested by the professional client, more detailed information will be communicated to this client.

- Retail clients: application of either the

    - "Full regime": when the product is a packaged product within the meaning of the PRIIPs Regulation, whatever the service provided;
    - "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.

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.

This simplification proposal, which would make a distinction between 4 situations, is illustrated in the diagram below.



The confusion brought by the "impact of costs on return"

The current Article 50.2 of the DR MiFID II 2017/565 required investment firms to provide to their clients an illustration of the impact of costs on return. Practice shows that the notion of impact of costs on return is difficult for investors to understand, especially for retail investors who understand more easily costs expressed in absolute value or in percentage as required by Article 50.2.

In line with the current European-wide discussions on questioning this cumulative effect on the yield of PRIIP KIDs, **it seems appropriate to remove this MiFID II requirement**, as it provides more confusion than transparency for retail investors.

Calculating costs methodology

Importing into MiFID II, for the calculation of the costs of all financial instruments, the PRIIPs calculating costs methodology seems inadequate. Indeed, while it seems consistent to allow investment firm to use the costs information contained in the PRIIPs KIDs to communicate information on product costs due under MiFID II when it is within the scope of PRIIPs (packaged product made available to retail investors), it does not seem acceptable to require investment firms to use the calculation methodology defined in PRIIPs when the transaction does not fall within the scope of this regulation. Indeed, MiFID II must not bring into the scope of PRIIPs products and/or transactions that were not initially included in it.

Additionally, in order to bring closely PRIIPs and MiFID II wherever it is relevant to do so (meaning both texts apply), and have more possible synergies, AMAFI considers that the PRIIPs methodology should be amended to change the cost indicator of KID PRIIPs towards Total Expense Ratio (TER) that is the best consistent choice with MiFID II. Indeed, services costs could easily be added to a TER.

The current methodology of the KID PRIIPs, the impact on yield (RiY method - Reduction in Yield) does not currently allow the investor to communicate figures consistent with those of the KID PRIIPs and MiFID 2 (*see AMAFI /19-54 "AMAFI Position on PRIIPs KID revision"*)

Provision of the information

Communication of the information on a durable medium

The technical constraints relating to the provision of information on a durable medium in the context of dematerialized relationships create significant logistical difficulties. In addition, while the responsiveness of the investment firm is a key element for the client, the time required to provide detailed information before being able to execute/transmit his/her order can have a negative impact on the quality of execution. These negative consequences are not adequately addressed in the texts. In addition, it appears that the obligation to obtain the client's agreement under the conditions detailed in Article 3 of DR MiFID II to provide him with the information on a durable medium other than paper does not correspond to the objectives stated by the European authorities to promote a sustainable economy and the reduction in the use of paper, and should therefore be amended to encourage the use of dematerialised durable media.

Particular case of telephone trading

The combined reading of Articles 46.3 and 50 of RD MiFID 2 2017/565 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.

That is why, without prejudice to the changes that AMAFI would recommend of the current regime of costs disclosure, we think that **an exception to the obligation to provide information on a durable medium prior to the transaction should be granted, in all cases, for orders placed by telephone** when the investment firm cannot communicate a tariff grid to fulfil is *ex-ante* disclosure obligation. This could consist in providing information by telephone at the time of the transaction, followed by sending the information on a durable medium to the client[1].

For AMAFI, 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**. Moreover, legally speaking, it seems essential to have this exemption in Level 1 or Level 2 rather than in a Q&A.

TEXT AMENDMENTS PROPOSAL

- **Level 1**

Recitals of MiFID II

(103) For the purposes of this Directive eligible counterparties should be considered to be acting as clients **except where this would be manifestly disproportionate regarding their level of sophistication and all the more if they wish to waive the protection provided for them according to this Directive**.

(104) The financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments. While it should be confirmed that conduct of business rules should be enforced in respect of those investors most in need of protection, it is appropriate to better calibrate the requirements applicable to different categories of clients. To that extent, it is appropriate to extend some information and reporting requirements to the relationship with **first professional clients and, only where relevant,** eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and funds as well as information and reporting requirements concerning more complex financial instruments and transactions. **On the other hand, this extension is not appropriate for the simplest financial instruments.** In order to better define the classification of municipalities and local public authorities, it is appropriate to clearly exclude them from the list of eligible counterparties and of clients who are considered to be professionals while still allowing those clients to ask for treatment as professional clients on request.

Article 24 of MiFID II

4. Depending on the situations, t~~T~~he information about all costs and charges, including costs and charges in connection with the investment service and**, in some cases,** the financial instrument, which are not caused by the occurrence of underlying market risk, shall be aggregated to allow the client to understand the overall cost ~~as well as the cumulative effect on return of the investment~~, and where the client so requests, **a more granular information, for example** an itemised breakdown shall be provided **to it**. Where applicable, **when an ongoing investment service is provided to the client,** such information shall be provided to the client on a regular basis, at least annually, during the life of the investment.

[…]

[1] This exception has already been granted:
- for the submission of the MiFID II suitability statement when the order " is concluded using a means of distance communication which prevents the prior delivery of the suitability statement" (*MiFID II, art. 25.6*);
- for the delivery of PRIIPs KIDs when the investment service is provided by telephone and the KID cannot be communicated to the client before the service is provided (*PRIIPs, art. 13*).

Article 30 of MiFID II

1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Article 24, with the exception of paragraphs 4 **a) and b)** and 5, Article 25, with the exception of paragraph 6, Article 27 and Article 28(1) in respect of those transactions or in respect of any ancillary service directly relating to those transactions.

Investment firms shall comply with the obligations under paragraphs 4 c) and 5 of Article 24 if the eligible counterparty so request.

[…]

- **Level 2**

Article 2 of MiFID 2 Delegated Regulation

(7) packaged financial instrument means investment, including instruments issued by special purpose vehicles as defined in point (26) of Article 13 of Directive 2009/138/EC or securitisation special purpose entities as defined in point (an) of Article 4(1) of the Directive 2011/61/EU of the European Parliament and of the Council (2), where, regardless of the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor

[…]

Article 3 du RD MiFID 2 2017/565

[…]

2. Where, pursuant to Article 46, 47, 48, 49, 50 or 66(3) of this Regulation, an investment firm provides information to a client by means of a website and that information is not addressed personally to the client, investment firms shall ensure that the following conditions are satisfied:

   (a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on;

   (b) the client must specifically consent to the provision of that information in that form**, except for information to be provided pursuant to Article 50 of this Regulation after being informed of the possibility of receiving the information on paper, the customer will only receive it on paper if he formally requests it**;

   (c) the client must be notified electronically of the address of the website, and the place on the website where the information may be accessed;

   (d) the information must be up to date;

   (e) the information must be accessible continuously by means of that website for such period of time as the client may reasonably need to inspect it.

[…]

Article 50 of MiFID 2 Delegated Regulation

1. For the purposes of providing information to **retail and professional** clients on all costs and charges pursuant to Article 24(4) of Directive 2014/65/EU, investment firms shall comply with the detailed requirements in paragraphs 2 to 10.

~~Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to professional clients shall have the right to agree to a limited application of the detailed requirements set out in this Article with these clients. Investment firms shall not be allowed to agree such limitations when the services of investment advice or portfolio management are provided or when, irrespective of the investment service provided, the financial instruments concerned embed a derivative.~~

~~Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to eligible counterparties shall have the right to agree to a limited application of the detailed requirements set out in this Article, except when, irrespective of the investment service provided, the financial instruments concerned embed a derivative and the eligible counterparty intends to offer them to its clients.~~

When providing investment services to retail clients, investment firms shall comply with the requirements of paragraph 2, unless the financial instruments concerned are not packaged financial instruments. In the latter situation, investment firms shall comply with the requirements of paragraph 3 unless the retail client requests more detailed information.

When providing investment services to professional clients, investment firms shall comply with the requirements of paragraph 3, unless the professional client requests more detailed information.

Pursuant to Article 30.1 of Directive 2014/65/EU, when an eligible counterparty wishes to receive information on costs and charges, investment firms shall comply with the requirements of paragraph 3.

2. For ex-ante ~~and ex-post~~ disclosure of information on costs and charges to clients, investment firms shall aggregate the following:

(a) all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and

(b) all costs and associated charges associated with the manufacturing and managing of the financial instruments.

Costs referred to in points (a) and (b) are listed in Annex II to this Regulation. For the purposes of point (a), third party payments received by investment firms in connection with the investment service provided to a client shall be itemised separately and the aggregated costs and charges shall be totalled and expressed both as a cash amount and as a percentage.

Where any part of the total costs and charges is to be paid in or represents an amount of foreign currency, investment firms shall provide an indication of the currency involved and the applicable currency conversion rates and costs. Investments firms shall also inform about the arrangements for payment or other performance.

3. **In conditions developed in paragraph 1, i**~~I~~nvestment firms ~~that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation~~ shall inform their clients about all costs and charges **only** relating to the investment and/or ancillary service provided.

   This information may be communicated to clients, at the time of entering into the relationship or concluding the first transaction, through tariff grids by asset classes, sufficiently granular according to the investment firm's activities.

   These tariff grids must be updated regularly and, at least, annually. The figures in this grid correspond to the best possible cost estimates and may, in some situations, correspond to the maximum costs and charges incurred by the investor, provided that they are as close as possible to the actual costs to be incurred by the investor.

4. In relation to the disclosure of product costs and charges that are not included in the UCITS KIID, the investment firms shall calculate and disclose these costs, for example, by liaising with UCITS management companies to obtain the relevant information.

~~5. The obligation to provide in good time a full ex-ante disclosure of information about the aggregated costs and charges related to the financial instrument and to the investment or ancillary service provided shall apply to investment firms in the following situations:~~
~~(a) where the investment firm recommends or markets financial instruments to clients; or~~
~~(b) where the investment firm providing any investment services is required to provide clients with a UCITS KIID or PRIIPs KID in relation to the relevant financial instruments, in accordance with relevant Union legislation.~~

6. Investment firms that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation shall inform their clients about all costs and charges relating to the investment and/or ancillary service provided.

7. Where more than one investment firm provides investment or ancillary services to the client, each investment firm shall provide information about the costs of the investment or ancillary services it provides. An investment firm that recommends or markets to its clients the services provided by another firm, shall aggregate the cost and charges of its services together with the cost and charges of the services provided by the other firm. An investment firm shall take into account the costs and charges associated to the provision of other investment or ancillary services by other firms where it has directed the client to these other firms.

8. Where calculating costs and charges on an ex-ante basis, investment firms shall use actually incurred costs as a proxy for the expected costs and charges. Where actual costs are not available, the investment firm shall make reasonable estimations of these costs. Investment firms shall review ex-ante assumptions based on the ex-post experience and shall make adjustment to these assumptions, where necessary.

9. Investment firms shall provide **to retail and professional clients** annual ex-post information about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s) where ~~they have recommended or marketed the financial instrument(s) or where they have provided the client with the KID/KIID in relation to the financial instrument(s) and~~ they have or have had an ongoing relationship with the client during the year. Such information shall be based on costs incurred and shall be provided on a personalised basis.

   Investment firms may choose to provide such aggregated information on costs and charges of the investment services and the financial instruments together with any existing periodic reporting to clients.

An investment firm shall be considered to be in an ongoing relationship with its client when it provides the client with the safekeeping service referred to in Section B(1) of Annex I of Directive 2014/65/EU, the portfolio management service referred to in Section A(4) of Annex I of Directive 2014/65/EU or a service that involves providing a periodic assessment of the suitability within the meaning of Article 24(4) of Directive 2014/65/EU and Article 52 of this Regulation.

~~10. Investment firms shall provide their clients with an illustration showing the cumulative effect of costs on return when providing investment services. Such an illustration shall be provided both on an ex-ante and ex-post basis. Investment firms shall ensure that the illustration meets the following requirements:~~
~~(a) the illustration shows the effect of the overall costs and charges on the return of the investment;~~
~~(b) the illustration shows any anticipated spikes or fluctuations in the costs; and~~
~~(c) the illustration is accompanied by a description of the illustration.~~

11. **By way of derogation from paragraph 2, and subject to Articles 3(1), 3(3)(a) and 6 of Directive 2002/65/EC, an investment firm may provide information on costs and charges to the retail investor after the provision of the service, without undue delay, where all the following conditions are met:**

(a) the retail investor chooses, on his own initiative, to contact the investment firm and conclude the transaction using a means of distance communication;

(b) the investment firm has informed the retail investor that it is not possible to provide ex-ante information on costs and charges and has clearly stated that the retail investor may delay the provision of the service in order to receive and read this information before providing the service;

(c) the retail investor consents to receiving ex-ante information on costs and charges without undue delay after the provision of the service rather than delaying the provision of the service to receive such information in advance.

- **Level 3**

ESMA's Q&As on costs and charges

Q&A	Amendments to be achieved ?	Comments
1	NA	
2	To be deleted	Suppression of the requirement to communicate an illustration of the cumulative effect of costs on performance.
3	To be deleted	Suppression of the requirement to communicate an illustration of the cumulative effect of costs on performance.
4	To be kept	
5	To be kept	
6	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.

7	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
8	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
9	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
10	NA	
11	To be amended	Keeping of the answer except for the part importing the PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
12	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
13	To be amended	The scope of this question should be restricted to situations for which trade-by-trade information should be communicated to the client.
14	To be kept	
15	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
16	To be kept	
17	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
18	To be deleted	This question-answer will no longer be relevant if the two new regimes proposed by AMAFI are retained.
19	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.
20	To be amended	The scope of this question should be restricted to situations for which trade-by-trade information should be communicated to the client.
21	To be kept	
22	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.
23	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.
24	To be kept	
25	To be kept	
26	To be kept	
27	To be kept	
28	To be deleted	This question-answer will no longer be relevant if AMAFI's proposal on orders placed by telephone is retained.

29	NA	
30	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.

ESMA'Q&A Other issues

1	To be deleted	The term "ongoing relationship" would be clarified by an exact reference to the relevant investment services so this question-answer would be no longer relevant