

EUROPEAN COMMISSION
Directorate General Internal Market and Services

Director General

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Mr Andrea Enria
Chairman
European Banking Authority (EBA)
Tower 42 (level 18)
25 Old Broad Street
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Subject: Request for EBA technical advice on possible delegated acts concerning the Directive on markets in financial instruments repealing Directive 2004/39/EC [MiFID] (the "Directive") and the Regulation on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories [MiFIR] (the "Regulation")

Dear Andrea,

On 14 January 2014 the European Parliament and the Council reached political agreement on a compromise text of the Commission's proposals for a Directive on markets in financial instruments repealing Directive 2004/39/EC and a Regulation on markets in financial instruments and amending Regulation on OTC derivatives, central counterparties and trade repositories. This compromise text was adopted by the European Parliament on 15 April 2014 and by the Council on 13 May 2014. Both the Directive and the Regulation are expected to enter into force in June 2014.

The Directive and the Regulation have the following main objectives:

- Improve the way capital markets function to the benefit of the real economy and deepen the single market in financial services;
- Establish a safer, more open and more responsible financial system, in particular by enhancing transparency;
- Enhance investor protection and restore investor confidence in the wake of the financial crisis;
- Ensure that legislation keeps pace with technological developments;
- Fulfil the Union's G-20 commitments, in particular in relation to derivatives and commodities trading;
- Strengthen the existing rules, harmonise sanctions and ensure effective cooperation between the relevant authorities.

Certain elements of the Directive and Regulation need to be further specified in delegated acts to be adopted by the Commission. In most cases these delegated acts should enter into application by 30 months after the entry into force of the Directive and Regulation. In this context, on 23 April 2014, a Mandate for technical advice on the delegated acts in the Directive and the Regulation was sent to ESMA (“the Mandate”)¹.

You will notice that the Mandate to ESMA (Section 3.26) includes a request for technical advice concerning product intervention by competent authorities. Pursuant to Article 40(8), 41(8) and 42(7) of the Regulation, the Commission is empowered to adopt delegated acts specifying criteria and factors to be taken into account by ESMA, EBA and competent authorities in determining when there is a significant investor protection concern and threat to the orderly functioning and integrity of financial markets or commodity markets and to the stability of the whole or part of the financial system of the Union. The Mandate notes that the Regulation already provides a strict framework for product intervention powers and sets criteria and factors to be taken into consideration: the degree of complexity of a financial instrument and the relation to the type of client to whom it is targeted and sold, the size or the notional value of an issuance of financial instruments, its degree of innovation. The Mandate further states that future criteria and factors should be consistent with the ones set out in the Regulation itself and should preserve the degree of legal clarity ensuring a harmonised application of these powers and the need to intervene and react towards exceptional situations or new and evolving market products or practices. Relevant Union case-law should be duly taken into consideration². ESMA is invited to provide technical advice on measures specifying the criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of the Union or of the financial system within at least one Member State.

Similarly to the opinion included in the Mandate addressed to ESMA, we stress that as the Regulation establishes an identical framework for EBA intervention powers in respect of structured deposits, factors and criteria to be taken into account for the exercise of product intervention powers for structured deposits should be similar to (if not identical to) those set for ESMA with respect to financial instruments. Accordingly, it is essential that the ESMA and EBA work together when providing technical advice to the Commission on product intervention powers.

Since the texts of the Directive and the Regulation have been stable in substance since beginning of this year and in light of the tight deadlines to develop the required delegated acts, the Commission services welcome the fact that ESMA has already begun its preparatory work on the necessary delegated measures and that ESMA has already contacted EBA with respect to the draft Consultation Paper on product intervention.

Taking account of the principles listed under Section 1.2 of the Mandate to ESMA, EBA is invited to closely liaise with and consult ESMA when providing technical advice to the Commission and proposing factors and criteria for intervention powers concerning structured deposits in accordance with Articles 41 and 42 of the Regulation.

¹ http://ec.europa.eu/internal_market/securities/docs/isd/mifid/140423-esma-request_en.pdf

² Judgment of the Court (Grand Chamber) of 22 January 2014, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union, Case C-270/12.

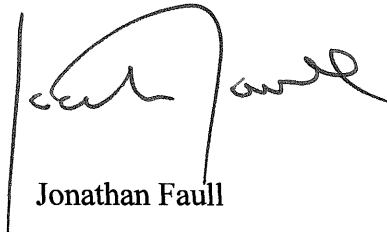
In terms of timing for the delivery of the technical advice requested, this request for advice and the Mandate take into consideration that ESMA and EBA need enough time to prepare the technical advice and that the Commission needs enough time to consider that advice in preparing, drafting and adopting the delegated acts. It also takes into account the right of the European Parliament and the Council to object to a delegated act within 3 months (which can be extended by 3 months). Delegated acts need to be adopted and published in the Official Journal in time for the entry into application of the Directive and the Regulation, which will be 30 months after the entry into force of the Directive and the Regulation.

The deadline for EBA to submit the technical advice is set at 6 months after the entry into force of the Directive and the Regulation which is expected to take place in June 2014. We trust that by setting the deadline in this way, and by sending you this request prior to the entry into force of the Directive and the Regulation, EBA will have sufficient time to coordinate with ESMA and provide a high-quality technical advice to the Commission.

This request for technical advice will be made available on DG Internal Market's website once it has been sent to EBA and the European Parliament and the Council will be duly informed about it.

As always, it will be essential for the Commission and EBA and ESMA to cooperate very closely and I am confident that this cooperation will enable a successful outcome in the preparation and adoption of these delegated acts.

Yours sincerely,



Jonathan Faull

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