

INVERCO REPLY TO CESR CONSULTATION PAPER ON MiFID COMPLEX AND NON-COMPLEX FINANCIAL INSTRUMENTS FOR THE PURPOSES OF THE DIRECTIVE'S APPROPRIATENESS REQUIREMENTS

1.- INTRODUCTION

INVERCO is the Spanish Association of Collective Investment Schemes and Pension Funds and represents more than six thousands collective investment schemes and more than 1,300 pension funds, with assets under management exceeding EUR 298 billion.

INVERCO thanks CESR for its excellent work on MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements, as well as its close cooperation with the industry practitioners in order to identify those areas where additional clarification is needed to ensure the proper application of MiFID across Member States.

INVERCO's comments on this paper are included in the second part of this report, starting by some preliminary remarks which are followed by our answers to the questions asked by CESR. Insofar as the consultation paper covers a wide range of financial instruments, our comments will be focussed on those areas which are more directly involved on INVERCO's statutory activities, in particular on Section III, regarding UCITS and other collective investment undertakings.

2.- COMMENTS

- ***Preliminary remarks***

The MiFID Level 1 Directive (Article 19(6)) lists specific types of instruments/products that can always be treated as non-complex for its purposes, including UCITS amongst them. Therefore, ***UCITS are always non-complex instruments and must be excluded from the scope of the assessment.***

For the remaining financial instruments not directly mentioned in this Article 19(6), Level 2 Directive (Article 38) establishes a set of criteria to classify them as non-complex (if they fulfill all these requirements) or complex (if they don't).

As a consequence, it is clear that ***not all non-UCITS undertakings must be classified as complex instruments, but rather it must be assessed, on a case-by case basis, if those criteria set in Article 38 are fulfilled.***

Insofar as Collective Investment Schemes never fall within the categories established in Article 38.a), the relevant criteria to assess the complexity-non complexity for the MIFID purposes of non-UCITS undertakings are those set in paragraphs b), c) and d) of Article 38, namely:

- Existence of frequent opportunities to dispose of, redeem, or otherwise realize that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer.

For the purposes of determining if the valuation systems are independent of the issuer, a relevant element to take into account shall be, according to Recital 52 of the MIFID Level II Directive, their oversight by a depositary that is regulated as a provider of depositary services in a Member State.

- Lack of any actual or potential liability for the client that exceeds the cost of acquiring the instrument.
- Public availability of adequately comprehensive information on its characteristics, drafted in terms that make it likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

The problem arises when ***trying to identify whether these criteria are fulfilled by generic categories of non-UCITS undertakings*** (real state funds, non-UCITS ETF, non-UCITS hedge funds or non UCITS-funds of hedge funds, amongst others), ***because these categories may not be formally defined at a domestic level, and because, even if they are, such lack of European harmonization hinders to make general statements*** applicable in all Member States.

Therefore, INVERCO appreciates CESR's effort to attend the clarification requests received on what should be considered complex or non complex, and proposes ***this clarification to be tackled by providing objective elements to assess the fulfillment of the criteria set in Article 38*** (for example, the scope of "frequent opportunities to dispose" or "public availability of adequately comprehensive information"), ***instead of by drawing up a definitive or complete list of products***, which, according to paragraph 8, is not the MIFID's goal ("MiFID does not seek to provide definitive or complete lists of all

types of products and how they should be categorized, and since MiFID was agreed CESR and its members have received requests for clarification of how types of products might be categorized”).

Despite the preliminary remarks, we attach our answers to the questions included in Section III.

- **Answers to the questions**

Question 21: Do you agree with CESR's view that non-UCITS undertakings should not automatically be categorized as complex instruments simply due to the fact that they invest in complex instruments?

Yes, INVERCO strongly supports CESR's against automatic classification of non-UCITS undertakings as complex instruments. In addition, INVERCO considers that CESR's statement on paragraph 69 regarding UCITS -*“Nothing in MiFID Art.19(6) requires a person to look through to the underlying investments of the UCITS for these purposes” [to determine whether they are complex]-* is also applicable to non-UCITS, as far as criteria set in Article 38 do not deal with underlying assets.

Question 22: Do you agree with CESR's analysis of the treatment of units in collective investment undertakings for the purposes of the appropriateness requirements?

Yes, except for the case of ETF. In our opinion, as far as ETF are, by nature and definition, listed and traded on a stock exchange, they should be put on a level with shares admitted to trading on a regulated market, which, according to MiFID Level 1 Art. 19(6), are always non-complex instruments for the purposes of the appropriateness requirements.

Question 23: Do you have any further comments on CESR's consideration of the position of these instruments?

Please, see preliminary remarks above.

Question 24: Are there other specific types of such instruments that should be explicitly mentioned in a list for the purposes of CESR's exercise?

The consultation paper seems to put into the same basket both hedge funds and funds of hedge funds, which could led to inappropriate conclusions.

Hedge funds have become increasingly accessible to mass affluent and retail investors in diluted form, by the way of funds of hedge funds which, depending on the jurisdiction, may be subject to stringent requirements that allow them to fulfil those criteria set in Article 38, and therefore, to qualify as non-complex products. This is clearly the case in Spain.

As a consequence, it could be convenient to clarify this point, because the statement on paragraph 82 regarding hedge funds (*“it seems reasonable to consider that it may not readily satisfy the criteria in Art.38 of the Level 2 Directive”*) may not be applicable, in most of the cases, to funds of hedge funds.

Madrid, 17th July 2009