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FRANCE

Consultation on MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements

Dear Mr. Comporti,

BVI¹ gladly takes the opportunity to express its views on CESR's proposed approach to MiFID complex and non-complex financial instruments.

Our following comments are focused on Section 3 (UCITS and other collective investment undertakings) and Section 4 (other non-complex financial instruments – including consideration of the criteria set out in Art. 38 of the MiFID Level 2 Directive).

I. Preliminary remarks

According to Art. 19 (6) of MiFID level 1 Directive, all investments in UCITS are by definition non-complex instruments for the purposes of the appropriateness requirements, regardless of the underlying instruments in which the UCITS invest. We believe that also in the future all UCITS should be automatically regarded as non-complex and to this extent the MiFID approach should not be reviewed.

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In our opinion, it must be a mistake that under Section 3 (margin number 83) CESR believes that **not all UCITS** should be regarded as automatically non-complex. In our view, it is to be interpreted as **not all non-UCITS** should be regarded as automatically non-complex. UCITS coordinated at Community level are subject to specific rules directly adapted to their activities. Therefore, all UCITS should be non-complex instruments by definition.

According to Art. 19 (6) of MiFID level 1 Directive, some BVI members provide the service of reception and transmission of client orders in UCITS on “execution-only” basis, without having to apply the appropriateness test. That should be considered if CESR suggest that not all UCITS should be automatically regarded as non-complex.

Finally, to increase legal certainty and to promote greater convergence in interpretation with respect to the question whether or not a particular financial instrument qualifies as complex or non-complex, any approach that finally ends in a case-by-case assessment of the risk related to a particular financial instrument should be avoided. Instead, criteria should be developed that can be easily verified and applied by financial institutions and regulators.

As regards questions posed by CESR in Section 3 und 4 of the consultation paper, we would like to submit the following remarks:

II. Section 3 – UCITS and other collective investment undertakings

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

We agree with CESR's opinion that non-UCITS undertakings should not automatically be categorized as complex instruments. Many non-UCITS have similar level of complexity as investment schemes authorized under the UCITS Directive.



In our view, non-UCITS undertakings that qualify as suitable investments for UCITS under Art. 19 (1) (e) of the UCITS Directive should qualify as non-complex financial instruments.

This is because such non-UCITS must be authorized under laws which ensure that they are subject to supervision considered by the UCITS' competent authorities to be equivalent to that laid down in Community law. Thus, the level of protection for unit-holders in the other collective investment undertakings is equivalent to that provided for unitholders in a UCITS, in particular with regard to the rules on assets segregation, borrowing, lending, and uncovered sales of transferable securities and money market instruments as well as to the provision of financial reports to investors.

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?

To the extent UCITS are concerned, we agree with CESR's analysis. However, with respect to non-UCITS, further guidance should be provided to ensure convergence in the treatment of non-UCITS for the purpose of Art. 19 (6) of MiFID.

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

At the moment, we do not see further issues that might be of relevance to the analysis.

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?

As mentioned above, non-UCITS undertakings that qualify as suitable investments for UCITS undertakings under Art. 19 (1) (e) of the UCITS Directive should qualify as non-complex financial instruments.



III. Section 4 – “Other non-complex financial instruments” under Article 38 of the Level 2 Directive: Issues of general interpretation

Question 25: Do you agree with CESR's view on the purpose of the Article 38

Yes, we agree with CESR's view on the purpose of the Article 38.

Question 26: Do you agree with CESR's interpretation of what constitutes frequent opportunities dispose of, redeem, or otherwise realise that instrument?

We propose that redemption on a daily, weekly, fortnightly or monthly basis should comply with Art. 38 (b) of the Level 2 Directive. Taking into account usually long-term investor horizons for investing in investment funds, the aforementioned redemption dates can be considered frequent redemption opportunities.

Furthermore, the frequency of redemption by the product provider does not in itself appear an appropriate criterion to assess the complexity of a financial instrument. The existence of secondary markets, market practice and general market conditions have to be taken into account as well.

Furthermore, rather than requiring daily or weekly redemptions, it would seem essential that the investor receives clear information on redemption dates and therefore, can easily understand redemption mechanisms of the financial instrument in question.

Question 27: Do you agree with CESR's point of view on how prices should be determined and when it is considered that those prices are publicly available?

We suggest that CESR should specify that net asset values published by investment funds in line with the relevant UCITS requirements are sufficient for the purpose of Art. 38 (b) of the Level 2 Directive. Funds which calculate their redemption prices under the supervision of or in cooperation with a



depository or other independent third party should therefore be deemed to meet this requirement.

Question 28: Do you agree that the lack of liquidity could undermine the compliance with article 38 (b) of the Level 2 Directive?

Art. 38 (b) of MiFID Level 2 Directive requires (amongst other criteria) frequent opportunities to dispose of an instrument. In our view, liquidity should not be the decisive factor in relation to determining whether a financial instrument has to be considered as complex. According to CESR, the complexity of an instrument depends upon whether it can be easily understood by an investor. The lack of liquidity will not necessarily have an impact in this regard. Furthermore, it should be set out that lack of liquidity would have to be assessed both in view of the redemption dates and available secondary markets.

Secondly, a case-by-case analysis could be required if an investment firm becomes aware of changing market conditions which might affect liquidity of a product.

To ensure uniform interpretation of references to "liquidity" in EU regulations, we also suggest resorting to Art. 2 (1) of Directive 2007/16/EC (eligible assets directive) as well as CESR's guidelines concerning eligible assets for investment by UCITS (Ref: CESR/07-044b) (as amended). Factors to be considered should be the volume and turnover in the financial instrument; evaluation of the opportunity and timeframe to buy or sell; in assessing the quality of secondary market activity in a financial instrument, moreover, quality and number of intermediaries and market makers dealing in the financial instrument should be taken into account. Financial instruments admitted to trading on a regulated market should be accepted as meeting the liquidity requirement; the same should apply to financial instruments providing for at least half-yearly redemption opportunities.

Question 29: Do you agree with CESR's view? Do you think than any other clarification is required?



We generally agree with CESR's view. We would propose to clarify that if the potential loss which the investor may incur with respect to holding of financial instruments is limited to the amount paid for their acquisition, those instruments should meet the requirements of Art. 38 (c) of the Level 2 Directive.

Question 30: Do you agree with CESR's view on what constitutes comprehensive and publicly available information?

We propose that information comparable to a UCITS prospectus or a KID as well as product information in the client's language available at and provided in a durable medium by an information agent in the investor's jurisdiction should be considered comprehensive and publicly available information. It should also be clarified that the length of a prospectus has generally no impact on the assessment under section 38 (d) of the Level 2 Directive.

We hope that our suggestions will help CESR in refining its guidance on complex and non-complex financial instruments and remain at your disposal for any questions or further clarification.

Yours sincerely

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