

POSITION PAPER



ESBG response to CESR consultation on MiFID appropriateness/ complex and non-complex instruments

CESR/09-295

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European Savings Banks Group (ESBG) welcomes the opportunity to comment on the issue of MiFID appropriateness/ complex and non complex instruments in preparation of Level 3 guidance. As an introductory remark, ESBG notes that although the consultation focuses on complexity, this characteristic is not always correlated with high risk.

As regards shares:

Answer to question 1: ESBG agrees to CESR's interpretation of Art. 19(6) according to which shares in companies which are traded on a regulated market would be automatically non-complex. ESBG furthermore considers that other types of equity securities negotiable in the capital markets need to be assessed against the criteria of Article 38 of the Level 2 Directive to determine whether they need to be treated as non-complex or complex.

Answer to question 2: ESBG agrees to CESR's approach to different interpretations of the category of "shares".

Answer to question 3: No further comment.

Answer to question 4: ESBG agrees that the range of equity securities listed by CESR (i.e. shares that are not admitted to trading on the regulated markets, depositary receipts for shares, stapled securities that comprise different types of security) should be assessed against the criteria in Art. 38 of the Level 2 Directive. ESBG notes that the list provided by CESR has to be seen as a list of examples as other equity securities may in the future be of relevance in this context.

Answer to question 5: ESBG agrees that convertible shares will always be complex in the described context.

Answer to question 6: ESBG does not consider that subscription rights/ nil-paid rights for shares are complex under the MiFID appropriateness requirement. ESBG rather sees them as a component of the share itself that is separated of the share with the single aim to facilitate taking up and trading of the rights. ESBG concludes that these rights should be treated in the same way as shares themselves.

Answer to question 7: No further comments.

Answer to question 8: ESBG does not judge that other specific types of such instruments should at the current point in time be explicitly mentioned in the list.

As regards money market instruments, bonds and other forms of securitized debt:

Answer to question 9 and 10: ESBG has no comments on CESR's view on the treatment of money market instruments.

Answer to question 11: ESBG agrees that complexity for the purpose of MiFID is determined by the way that an instrument is structured. However, in this case, the instrument that is finally sold to the investors is normally just a bond (with no derivative included) that may fit in the category

included by the legislator in Art. 19 (6). The structure that is behind may have derivatives included, but just with the purpose of safekeeping it from specific risks.

In this context, ESBG considers that asset backed securities could be regarded as non-complex instruments. Just in cases in which the bond itself includes a derivative it should be regarded as complex.

Answer to question 12: ESBG in principle agrees that MiFID could be usefully clarified.

Answer to question 14: No further comments.

Answer to question 15: ESBG agrees to CESR's analysis of instruments that embed a derivative. However, ESBG clarifies that in its view the classification does not include structured term deposits with the principal fully guaranteed. These products are pure banking deposits, which do not fall under MiFID's scope as confirmed in the European Commission's Questions and Answers tool (see questions and answers no. 118 and 203).

Answer to question 16: No comment.

Answer to question 17: ESBG agrees to CESR's view that traditional covered bonds can be described as non-complex, whereas structured covered bonds are complex.

Responding to CESR's specific question as regards Spanish "participaciones preferentes" ESBG is astonished that this question is dealt with in a section focusing on bonds. ESBG considers that participaciones preferentes should be treated as all preference shares. Preference shares do not fall in a specific category but they are other securities equivalent to shares and therefore need to be assessed according to Art. 38 of the Level 2 Directive. They fulfill this test under Art. 38 and should therefore be regarded as non-complex; furthermore there are products between shares and bonds and their structure is similar to subordinated debt; all these three product categories are non-complex. Finally, ESBG would like to mention that participaciones preferentes are subject to the Prospectus Directive, with the prospectus checked by the regulators.

Answer to question 18: ESBG considers that debt instruments are clearly treated in MiFID for the purposes of the appropriateness requirements and thus sees no need for a review in this field.

Answer to question 19: No further comments.

Answer to question 20: ESBG identifies no other specific types of such instruments that should at the current point in time be explicitly mentioned in a list of complex/ non-complex financial instruments for the purposes of CESR's exercise.

As regards UCITS and other collective investment undertakings:

Answer to question 21: ESBG considers that non-UCITS, which is a term capturing a whole range on non-harmonized products, can be categorized as non-complex instruments, subject to fulfilling the criteria in Art. 38 of the Level 2 Directive. It is necessary to evaluate the situation country by country by analyzing the types of funds included without taking into account the portfolio composition.

Answer to question 22: ESBG agrees to CESR's analysis of the treatment of units in collective investment undertakings for the purposes of the appropriateness requirements.

Answer to question 23: No further comments.

Answer to question 24: ESBG identifies no other specific types of such instruments that should at the current point in time be explicitly mentioned in such a list.

As regards other non-complex financial instruments:

Answer to question 25: ESBG agrees to CESR's view on the purpose of Article 38.

Answer to question 26: ESBG agrees to CESR's interpretation of what constitutes frequent opportunities.

Answer to question 27: ESBG agrees with CESR's point of view on how prices should be determined.

Answer to question 28: ESBG thinks that the lack of liquidity could eventually undermine the compliance with Article 38(b). ESBG's Members are particularly diligent when considering securities trading on a market where liquidity is thin.

Answer to question 29: ESBG agrees with CESR's view as regards the existence of an actual or potential liability.

Answer to question 30: ESBG agrees with CESR's view on what constitutes comprehensive and publicly available information.

As regards other products:

Answer to question 31: ESBG agrees with CESR's analysis of the position of Exchange Traded Commodities.

Answer to question 32: At the current state of play ESBG identifies no other specific types of such instruments that should be explicitly mentioned in a list for the purposes of CESR's exercise.

General question:

Answer to question 33: A summary list as presented in Annex I of the CESR consultation paper could constitute a helpful element for the classification of complex and non-complex products. Similar lists already exist in a number of Member States. However, it is important to clarify that such a list just gives examples and is not exhaustive, in order to guarantee that new products can be classified and that such a list does not harm innovation.



About ESBG (European Savings Banks Group)

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of € 5967 billion (1 January 2008). It represents the interest of its members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG Members are typically savings and retail banks or associations thereof. They are often organised in decentralised networks and offer their services throughout their region. ESBG Member banks have reinvested responsibly in their region for many decades and are one distinct benchmark for corporate social responsibility activities throughout Europe and the world.



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