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CESR
11-13 Avenue de
Friedland
75008 Paris

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

Assogestioni¹ welcomes the opportunity given by CESR to comment on the Consultation Paper concerning MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements; we deem very important to consult stakeholders on the definition of level 3 measures on such issue, given their relevance on the application of MiFID by the intermediaries.

1. Qualification of UCITS as non-complex financial instruments

With reference to the appropriateness requirements, art. 19, paragraph 6, of the Directive 2004/39/EC (hereinafter "MiFID") expressly qualifies units and shares of UCITS as non-complex financial instruments; as a consequence, investment firms, providing the investment services of execution and/or the reception and transmission of client orders, are allowed to provide such services in an "execution only" basis without undertaking the appropriateness test for such financial instruments, provided that the other conditions defined in the abovementioned article are satisfied.

In MiFID approach, the express definition of UCITS as a non-complex instrument by the above article gives relevance only to the qualification of the instrument itself without requiring an assessment of the elements that characterize it in concrete; hence, as underlined by CESR in paragraph 69 of the Consultation Paper, we deem

¹ Assogestioni is the Italian association of the investment fund and asset management industry and represents the interests of 162 members who currently manage assets whose value exceeds 800 billion euro.



correct that all investments in UCITS should be qualified as non-complex instruments by definition, given that the underlying financial instruments in which the UCITS invests are not relevant for the purpose of art. 19, paragraph 6, of MiFID.

2. Collective investment undertakings other than UCITS

As all the financial instruments not mentioned by art. 19, paragraph 6, of MiFID, shares or units of collective investment undertakings other than UCITS (hereinafter “non-UCITS”) should be subject to an assessment concerning the fulfilment of the criteria defined by art. 38 of the Directive 2006/73/EC (hereinafter “Implementing Directive”), in order to verify if they can be considered non-complex instruments. Consequently, we agree with CESR’s view concerning the fact that non-UCITS are not all non-complex instruments automatically (see paragraph 70 of the Consultation Paper). At the same time, however, we would like to underline that a particular non-UCITS should be qualified as complex, only after an evaluation of its specific characteristics and of its capacity to satisfy the conditions stated by the Implementing Directive. From this point of view, the financial instruments in which the non-UCITS invests are not necessarily relevant as long as they do not have an effect on the fulfilment of such requirements; therefore, in accordance with CESR’s opinion expressed in paragraph 78 of the Consultation Paper, we believe that if a non-UCITS invests in derivatives or other types of complex instruments, its units or shares should not be considered automatically complex.

Furthermore, the possible failure of a non-UCITS to satisfy the requirements established by the Implementing Directive should be verified taking into account the characteristics of the particular non-UCITS, without having regard to the category of undertaking to which it belongs to (for example, hedge fund or real estate fund); such failure should be assessed, only after having ascertained in concrete the inability of the specific non-UCITS to fulfil the abovementioned requirements. Consequently, even though CESR does not predetermine the categories of non-UCITS that should be considered complex financial instruments, we deem appropriate that level 3 measures should not mention any particular category of non-UCITS – like CESR does with hedge funds in paragraph 82 of the Consultation Paper – as an example of financial instrument that it is reasonable to consider complex because it may not readily satisfy the criteria in art. 38 of the Implementing Directive.

3. Policy issues concerning MiFID approach to UCITS and non-UCITS

Assogestioni does not share the position expressed in paragraph 83 of the Consultation Paper, where CESR seems to take into account the opportunity to review MiFID approach and the possibility that some non-UCITS should be considered automatically complex; the Association also disagrees with CESR when it states that not all UCITS should be regarded as automatically non-complex.



The regulation concerning complex and non-complex financial instruments for the purposes of the appropriateness requirements – defined by MiFID and by the Implementation Directive – is a well balanced set of rules which takes into account, with the due relevance, client's interests; consequently, there is not the need to review MiFID approach on this issue, because market developments of the last years have not revealed a failure of such regulation, especially with reference to UCITS and non-UCITS.

Therefore, we believe that such set of rules should not be amended, because there isn't the need to review the present approach, which lists some specific types of financial instruments considered always non-complex (art. 19, paragraph 6, of MiFID) and provides, at the same time, a set of criteria for the identification of other non-complex products not included in such list (art. 38 of the Implementing Directive); in fact, the aforementioned provisions guarantee an adequate flexibility without impairing client's protection, given that – as underlined even by CESR in paragraph 89 of the Consultation Paper – the purpose of art. 38 is to confine the scope of other non-complex instruments only to those products that are adequately transparent, liquid and capable of being understood by retail clients.

In light of the above, a review of MiFID approach which implies that some non-UCITS would be considered complex products automatically or that specific UCITS should not be regarded as non-complex, would be useless for investors and would harm the level playing field between such financial instruments and other products which are not characterized by a significant difference for the purpose of the appropriateness requirements.

The General Director