BREWIN DOLPHIN

MIFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements (CESR/09-295)

Brewin Dolphin Ltd response

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Section 1 – Shares
Question 1
Paragraph 28
The requirement for all shares that are not traded on a regulated market to be considered to be complex gives rise to the situation where shares traded on the Alternative Investment Market (AIM) in the UK are considered as complex. The AIM market is an 'exchange regulated market'. AIM trades shares which are also traded on markets such as Plus Markets plc, a Recognised Investment Exchange in the UK and Market Operator under MiFID. This gives rise to the situation where the same share can be considered non-complex if traded on Plus Markets but when traded on AIM the share becomes complex.

It is our view that the distinction on whether a share should be considered complex or non-complex is more to do with the nature of the share than the market it is traded on.

Paragraph 32
It is our view that a clear distinction must be made between ordinary preference shares and convertible preference shares. Ordinary preference shares are no more complicated to understand than ordinary shares. Convertible preference shares do contain a greater element of complexity and should therefore be considered as complex.

Paragraph 33
Regarding shares not admitted to trading on a regulated market, as we have already mentioned consideration must be given to the regulated nature of the AIM market.

It is our view that whether or not a depository receipt is considered complex or not rather depends on the nature of the underlying security. If the underlying security is non-complex then the depository receipt should be considered non-complex, and vice versa.

Paragraph 34
We agree with CESR's view that investments that are convertible contain an added layer of complexity and should be considered as complex instruments.

Paragraph 36
We disagree with CESR's view that subscription rights and nil-paid rights should be treated as complex. These are investments which are listed and traded on regulated markets. The issue of nil-paid rights to a retail client provides the client with an opportunity to exercise the right (pay the subscription amount and receive the fully-paid share), sell the right on a regulated market, or take no action and thereby allow the right to lapse (with the possibility of receiving any lapsed proceeds). Whichever decision the retail client makes, the actual receipt of a nil-paid right does not give rise to any obligation on behalf of the retail client i.e. the retail client cannot be required to make any payment. We believe that subscription rights and nil-paid rights should automatically be considered as non-complex. Additionally, due to the brief period of time for an investor to take a decision regarding such rights an appropriateness test would be considered disproportionate.

Section 2 – Money market instruments, bonds and other forms of securitised debt
We agree with the view of CESR that despite the fact that commercial paper may be quoted and readily tradable, it should not considered to be a retail investment product and consequently it should be treated as a complex product subject to the appropriateness test.

Section 3 – UCITS and other collective investment undertakings
Paragraph 69
We disagree with the viewpoint held in paragraph 69 that UCITS are non-complex instruments by definition regardless of the underlying instruments. We are concerned that a retail client may invest in a UCITS perceiving it to be non-complex despite the fact that the underlying instruments may complex. The UCITS category should reflect the nature of the investments contained within it. A UCITS containing predominantly structured products should be considered to be complex.

Paragraph 72
Investment companies do not fall within the UCITS legislation and therefore do not automatically fall within the non-complex classification. The vast majority of investment companies are listed and traded on EU regulated markets, comply with the Prospectus Directive, Transparency Directive, Market Abuse Directive and International Financial Reporting Standards. Consequently, it is our view that for the purposes of appropriateness testing they should be treated similarly to UCITS.

Section 4 – "Other non-complex financial instruments" under Article 38 of the Level 2 Directive: Issues of general interpretation
Paragraph 89
We agree with CESR's view on the purpose of Article 38.

Paragraph 92
On considering the nature of warrants and covered warrants we would ask that CESR recognise the distinction between warrants that a retail client actively chooses to invest in and those that the retail client acquires by default. It is our view that where a retail client purchases a warrant or covered warrant then under these circumstances the firm should perform an appropriateness test to ensure the client has understood the ramifications for his actions.

However, where a retail client has acquired a warrant by default and simply chooses to sell the asset and realise the holding then there is little to be gained by undertaking an appropriateness test. This would be disproportionate.

Contracts for differences should be considered to be complex products.

Regarding the matter of frequency of opportunities to dispose, redeem or otherwise realise the instrument, it is our view that any period of time in excess of one month should be considered to be infrequent.

Paragraph 98
We agree with CESR's view on this point.

Paragraph 102
We believe that it is fundamental for information on investments to be clear, fair and not misleading. In our opinion, if a retail client requested to buy an instrument about which information was not immediately available and required us to go to extraordinary lengths to find out about it, then we would consider that instrument to be complex.