



Danish Securities Dealers Association



Danish Bankers Association

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

The Danish Bankers Association and the Danish Securities Dealers Association (hereafter the associations) welcome the opportunity to comment on the CESR consultation paper on "MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements".

Please find below the comments from the associations.

General remarks

The CESR consultation paper focuses on categorising specific financial instruments. However, with the ongoing development of instruments, there will always be new instruments for investment firms to assess. It is therefore important to have a clear and logic methodology for the assessment as well as it would be useful to supplement the paper with the underlying criteria leading to the proposed categorisation.

The associations can support CESR's view that complexity of a financial instrument is not necessarily synonymous with the risk associated to that instrument. On the other hand it is important to bear in mind that risk can be concealed in complexity - in other words there will be an interaction between complexity and risk.

In consequence hereof categorisation of instruments is not only related to the "execution only" regime but is also relevant to the appropriateness test, as the complexity of the instruments is of importance to the depth of the appropriateness test carried out by the firm in order for the firm to determine whether the client understands the risks - and complexity - involved. Therefore complexity will be of importance when the firm is transmitting orders to customers without investment advice or portfolio management and on the other hand not offering "execution only".

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Specific remarks

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Question 6: Do you agree with an interpretation that subscription rights/nil-paid rights for shares would be complex under the appropriateness requirements?

The associations find that it is important not to introduce obstacles and limits for shareholders' rights to participate in new issues of shares. It would be disproportionate to require an appropriateness test where the shareholder has received the rights free of charge. Furthermore, the associations can support the CESR view that the rights in general should be considered a component of the share itself that is separated from the share only to facilitate the trading of the rights. Consequently the rights should be categorised the same way as the share itself.

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Question 17: Do you agree with CESR's distinction between traditional covered bonds and structured covered bonds? Is there a need for further distinctions in this space? If so, please provide details in your answers

The associations fully support the CESR view in the consultation paper par. 61 saying that covered bonds and mortgage bonds issued by a credit institution should be considered non-complex.

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?

The associations fully support the CESR view that non-UCITS should not automatically be categorised as complex instruments if they invest in complex instruments. The categorisation of an investment in a non-UCITS should depend on the fulfilment or not of the criteria in art. 38 of the Level 2 Directive.

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?

CESR advances the view that it should be taken under consideration whether all UCITS should automatically be regarded non-complex.

When considering the categorisation of UCITS, it is important to place emphasis on the fact that UCITS are regulated by the UCITS directive which in itself contains substantial investor protection. To constitute a "look through" obligation for investment firms to assess the underlying instruments in a UCITS would involve a risk of very uneven assessments of UCITS. The associations find that instruments which are regulated by separate legislation that handles the investor protection should be categorised on the basis of the instrument itself and not by the underlying instruments. UCITS should therefore - as it appears from MIFID today - automatically be categorised as non-complex instruments.

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

CESR states in par. 98 that the fact that an instrument is admitted to trading on a regulated market not necessarily indicates that the requirement in art. 38 (b) of the Level 2 Directive of "frequent opportunities to dispose of, redeem, or otherwise realise the instrument" is fulfilled.

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The associations find that the requirement in art. 38(b) lies in the nature of a regulated market as regulated in MIFID. To constitute an obligation for investment firms to currently – on a day to day basis – assess the efficiency of a certain regulated market would be disproportionate and over a short period of time the assessment of the regulated market could differ significantly with the consequence that the categorisation of the instrument would differ similarly. The mere requirements in MiFID on transparency and efficiency should be ample to fulfil the requirement in article 38 (b).

Question 31: Do you agree with CESR's analysis of the position of these instruments?

It appears from par. 106 that the "Commission regards a deposit with an embedded derivative that has the potential of reducing the initial capital invested as a financial instrument under MiFID". As the associations find that deposits – including deposits embedding a derivative – basically are deposits and not securities, we would suggest CESR to elaborate on this statement.

In general the associations find that it should be taken into consideration that several deposits embedding derivatives do not have the characteristics of securities and the depositors would therefore not necessarily benefit from being embraced by the MiFID regime.

Yours sincerely

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