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Committee of European
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**CESR Technical Advice to the European Commission in the context of the MiFID
Review – Client Categorisation**

Dear Madam or Sir,

The Association of Foreign Banks in Germany appreciates the opportunity to respond to CESR's consultation paper on client categorisation.

We represent 225 foreign banks, investment management companies, financial services institutions and representative offices in Germany, among them several entities belonging to the leading institutions world-wide. The activities of our members involve to a large extent the provision of banking and financial services in Germany, but due to their international structure they are also facing the typical cross-border problems that arise when being integrated in the actions of a globally positioned group.

We believe, in general, that the current MiFID provisions governing client categorisation are a meaningful approach with regard to investor protection. Especially with regard to professional clients and eligible counterparties we are not aware of a significant number of clients to choose "opting down" to the retail client category and enhanced regulatory protection.

We hope that our comments set out below will be helpful in developing your recommendations to the Commission. We would be happy to discuss any aspects of our response with you.

Kind regards

Dr. Oliver Wagner

Wolfgang Vahldiek

Association of Foreign Banks in Germany · Verband der Auslandsbanken in Deutschland e.V.

Representation of interests of foreign banks, investment management companies, financial services institutions and representative offices
Interessenvertretung ausländischer Banken, Kapitalanlagegesellschaften, Finanzdienstleistungsinstitute und Repräsentanzen

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1. Do you agree that the opening sentence of Annex II.I(1) sets the scope of this provision and that points (a) to (i) are just examples of “Entities which are required to be authorised or regulated to operate in financial markets.”?

We agree that the sentence “Entities which are required to be authorised or regulated to operate in the financial markets” sets the scope of all the entities that follow in (a) to (i).

2. Do you think there is a case for narrowing the range of entities covered by points (c), (h) and (i) of Annex II.I(1)? Please give reasons for your response.

We do not think that there is a case for narrowing the range of entities covered by points (c), (h) and (i) of Annex II.I(1).

The entities included in points (c), (h) and (i) are all actively engaged in the capital markets and are either authorised or regulated in those activities. Therefore, they have to be competent with regard to financial instruments and markets, and other market participants should be entitled to assume that this is the case.

3. If you believe there is a case for narrowing the range of entities covered by points (c), (h) and (i) of Annex II.I(1) what criteria do you think should be used to distinguish between those entities that are covered and those that are not?

See our answer to Q2.

4. Do you believe there is a need to clarify the language in points (c), (h) and (i) of Annex II.I (1) and, if you do, how do you think the language should be clarified?

See our answer to Q2.

5. Do you think that Annex II.I (3) should be clarified to make clear that public bodies that manage public debt do not include local authorities?

We support the view that local authorities and municipalities should be specifically excluded from the definitions of entities in Annex II.I(3). They should only be treated as professionals according to the criteria and the process set out in Annex II part II.

6. Do you believe it is appropriate that investment firms should be required to assess the knowledge and experience of at least some entities who currently are considered to be per se professionals under MiFID?

We believe that it would be unnecessary to incorporate requirements for investment firms to assess the knowledge and experience of these entities where in the overwhelming majority of cases the result would be the same as if no such assessment been required. Authorised and regulated firms have to be competent to carry on investments within the scope of their authorisation. Furthermore, the knowledge and experience required for authorisation should be deemed sufficient to responsibly choose higher levels of protection, opting down to retail client status, when necessary. Bearing this in mind, additional knowledge and experience tests would be an overly bureaucratic and burdensome requirement.



7. Should a knowledge and experience test be applied to large undertakings before they can be considered to be per se professionals or to other categories of clients who are currently considered to be professionals?

We do not believe that knowledge and experience tests need to be expanded to cover any of the per se professional categories. In our experience, the entities which currently qualify as large undertakings are frequently engaged in the capital markets and, in any case, engage sophisticated counsel when engaging in investment business. In any case, they are competent enough to “opt down” to a retail customer status if they feel that they require additional regulatory protection.

8. Do you believe that the client categorisation rules need to be changed in relation to OTC derivatives and other complex products?

We do not believe that client categorisation rules need to be changed in relation to product types.

It seems unlikely, particularly in light of the current environment that a party which is professional within the definition of Annex II of MiFID and which believed that it did not have adequate experience, knowledge and expertise to make its own investment decisions relating to a derivative transaction or a complex security investment or to properly assess the risk that it would incur in taking such investment decisions would not either specifically request additional information or hire expert assistance to assist it in its decision making process. Further, as a professional client can always request that it be opted down to be treated as a non professional client (even for a single financial instrument), the protection that would result from changing the categorisation of the party as a result of the perceived complexity of a transaction can already be achieved by the party itself without changing the existing framework.

The proposal also raises a number of questions: Who is the buyer and who is the seller in a bilateral trade? How would “complex” or “highly complex” products be defined?

We do not believe that the complexity of a given financial instrument is an indication for the risk it implies. More frequently, complexity is the result of tailor-made product design taking a complex situation of the client into account (e.g. for a complex hedge). Complexity is often used deliberately in order to reduce (and not to increase) risk.

9. If you believe the rules should be changed: for what products should they be changed and which of the approaches to change set out in the paper would you favour?

See answer to Q8.

10. Do you believe it is necessary to clarify the standards that apply when an investment firm undertakes a transaction with an ECP?

We believe that the standards that apply when dealing with eligible counterparties are clearly set out in the directive and require no clarification.

11. If you believe a clarification of these standards is necessary, do you agree with the suggestions made in the paper?

See our response to Q10.