EACB position paper on the technical advice of the Committee of European Securities Regulators (CESR) to the European Commission on client categorisation in the context of the review of the Markets in Financial Instruments Directive (MiFID)

09 August 2010

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.

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General remarks

The European Association of Co-operative Banks (EACB) would like to thank the Committee of European Securities Regulators (CESR) for the opportunity to comment on its proposals for a technical advice on the MiFID client categorisation regime.

For the co-operative banking sector in Europe the implementation of the MiFID in general and of its client categorization regime in particular was a very expensive undertaking. From our perspective the regime has proven to work well in the recent years. The rules and obligations currently in place ensure an appropriate level of investor protection and flexibility for clients and investment firms in respect of the different types of clients, different services and different financial instruments. We have no knowledge about any problems in this respect in the day-to-day business of our member institutions. For this reason we are against major changes in the MiFID obligations on client categorisation. In this light we are very sceptical about some of the CESR-proposals outlined in the consultation paper.

In the following outlines EACB would like to point out responses to selected questions raised by CESR in its consultation document:

Part 1: Technical criteria to further distinguish within the current broad categories of clients [("other authorised or regulated financial institutions", "locals", "other institutional investors" (Annex II.I (1) (c), (h), and (i) of MiFID)]

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 with CESR's view 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".

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 any reason for narrowing the range of entities covered by points (c), (h) and (i). We have no information about problems in this respect in the every day business of our member institutions.

We think that the opening sentence of Annex II.I (1) sets the scope of the provision. These entities are required to be authorised or regulated to operate in financial markets. For example the necessary size of the entity is investigated through authorisation or regulation. We do not see any difference in connection with client categorisation, whether the authorised or regulated entity is conducting the business on behalf of underlying clients or not.

A consequence of narrowing the range of entities covered by points (c), (h) and (i) would allege that an indefinite number of entities has not the necessary experience and knowledge required to be classified as professional per se. In the course of a recruitment process for members of the management of financial entities in-depth examinations take place in order to compare the manifold requirements with the personal skills of a candidate. There are usually fitness and properness assessments prior to the assignment of any decision making powers. In addition the competent authorities have the possibility

to prohibit the appointment of a candidate, in case she or he should not have the necessary level of professionalism.

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?

We are against a narrowing of the range of entities covered by points (c), (h) and (i).

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?

From our point of view the language used in points (c), (h) and (i) of Annex II.I (1) are clear enough and do not have to be modified. The range of clients covered by the obligations is described accurately and our member institutions have no information about any problems in their everyday business in this respect.

We welcome – in principle – the proposals for clarification of CESR outlined in paragraph 19 of the consultation paper. The third hyphen on "making clear that 'other financial institutional investors' in point (i) covers entities whose main activity is investing in financial instruments", however, might lead to interpretation problems, especially regarding the criterion of "main activity is investing in financial instruments".

Part 2: Public debt bodies

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?

There are diverging views on whether municipalities and regional public authorities are per se professional clients. We would welcome a clarification in this respect. Municipalities and regional public authorities should be explicitly included in the term "local authority" and should therefore be categorized as per se professional clients.

We would welcome a clarification of the term "local authorities". It would be very helpful to outline accurately what kind of existing public bodies can be considered as professional clients, especially for member states with a federal system.

Part 3: Other client categorisation issues

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 do not think it is appropriate that investment firms should assess the knowledge and experience of entities who are considered to be per se professionals under the MiFID. From our point of view the current regime of client categorisation works well as such without any knowledge and experience tests for professional clients. Professional clients can still opt for a treatment as retail client. With the existing regime of client categorisation "per se" professionals already have an adequate investor protection. In this light we are strictly against requirements obliging investment firms to assess knowledge and experience of professionals.

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 are strictly against obligations concerning any kind of knowledge and experience tests to 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. The every day business experience of our member institutions since the introduction of the MiFID clearly shows that the per se professionals are very well equipped with sufficient expertise and experience. Respective knowledge and experience tests should only apply to clients that cannot be classified as per se professional or eligible counterparties.

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

We firmly object any changes in the current client categorization rules. The set of obligations has proved to work well in practice, also with respect to OTC derivatives and other complex products. We would like to underline that investment firms have to provide their clients with comprehensive information on the respective financial instruments to be sold and have to check the suitability or appropriateness of an investment for different types of clients. Diverging criteria for the categorization of clients or products need be avoided in order to keep the current systems consistent. In addition we would like to mention that Annex II.I (4) of the MiFID enables the client to request a higher level of protection for certain types of products.

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?

As already mentioned we do not see the need for any changes in this respect.

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

We think it is not necessary to clarify the standards that apply when an investment firm undertakes a transaction with an eligible counterparty. The MiFID already requires that an investment firm should act honestly, fairly and professionally regardless of client categorisation (Art. 19 (1) MiFID).

In practice the first proposal by CESR in paragraph 35 of the consultation document ("ECP status is not available for transactions in highly complex products") would lead to a situation in which an ECP-status could not even be granted to banks that work on a daily basis with highly complex products or that issue such products themselves. In addition the term "highly complex products" leaves too much room for interpretation. This should be avoided as it would lead to uncertainty and differences when categorizing clients. The currently established client categories enable investment firms to properly categorize their clients on the basis of objective criteria. This system should not be weakened by using unclear legal terms.

Also the fourth proposal ("… know or have reason to know that an investor … is unable to properly assess the risks of a particular instrument") increases uncertainties because the complexity of a product is tied up to the subjective perception of a client and not to its basic characteristics.

In addition we would like to emphasize that already today the obligations concerning eligible counterparties are very strict. For this reason we do not consider the proposal 2 ("...'super-ECP' status...") as appropriate. These kinds of clients are well prepared to demand further information in case of open questions and doubts or to request a "downgrading" by themselves.

We do not see any reason for further specifying the duties of eligible counterparties with respect of having to act honestly, fairly and professionally. These principles are already today binding obligations for eligible counterparties.

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

We would like to refer to our answer to question 10.

Contact:

The EACB trusts that its comments will be taken into account. For further information or questions on this paper, please contact:

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