



*European Association of Co-operative Banks  
Groupement Européen des Banques Coopératives  
Europäische Vereinigung der Genossenschaftsbanken*

---

## EACB answer to the CESR consultation paper on MiFID complex and non-complex financial instruments for the purpose of the Directive's appropriateness requirements

17 July 2009

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%.

For further details, please visit [www.eurocoopbanks.coop](http://www.eurocoopbanks.coop)

---

### AN ASSOCIATION ON THE MOVE

**EACB AISBL** – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels  
Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149  
[www.eurocoopbanks.coop](http://www.eurocoopbanks.coop) • e-mail : [secretariat@eurocoopbanks.coop](mailto:secretariat@eurocoopbanks.coop)



## General remarks

1. The European Association of Co-Operative Banks (EACB) welcomes the opportunity to contribute to this very important consultation on MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements.
2. European co-operative banks are very much involved in the retail segment of the banking industry. We therefore welcome as much clarification as possible concerning the categorization of different products under the MiFID (labeled as "complex" or "non-complex") in order to minimize legal uncertainties currently in place.
3. We overall believe that most of CESR's outlines are very reasonable under the current legal provisions (MiFID level 1 and level 2 directives). However we would like to raise some comments on selected questions outlined by CESR:

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

4. EACB considers subscription rights and nil-paid rights for shares to be non-complex financial instruments.
5. In this respect EACB fully agrees with the CESR statements made in paragraph 37 of its consultation paper that refer to practical difficulties of a categorization of subscription rights and nil-paid rights as complex.
6. In those statements CESR highlights that it may not be in the interests of the shareholder to risk slowing down or obstructing the shareholder's response, and it may be disproportionate to require an appropriateness test in circumstances where the shareholder has received the rights free of charge.

### **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.**

7. We fully agree on the categorization of covered bonds made by CESR with respect to the distinction of traditional covered bonds and structured covered bonds. We would like to highlight that traditional covered bonds should be categorized as non-complex.

### **Question 21: Do you agree with CESR's view that non-UCITS undertakings should not automatically be categorized as complex instruments simply due to the fact that they invest in complex instruments?**

8. We agree with CESR's opinion that non-UCITS undertakings should not automatically be categorised as complex instruments. Many non-UCITS undertakings have the same level of complexity if compared with a UCITS undertaking. In our view, non-UCITS undertakings that qualify as suitable investments for UCITS undertakings under Art. 19 (1)(e) of the UCITS Directive should qualify as non-complex financial instruments.

### **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?**



- 
9. To the extent UCITS are concerned we agree with CESR's analysis. However, with respect to non-UCITS further guidance should be provided to ensure convergence in the treatment of non-UCITS for purposes of Art. 19 (6) of the MiFID.

**Question 23: Do you have any further comments on CESR's consideration of the position of these instruments?**

10. EACB would like to point out that it clearly sees UCITS as non-complex financial instruments. The UCITS directive already provided a very detailed set of rules that ensures a satisfying level of investor protection, especially with respect to products disclosures.

**Question 24: Are there other specific types of such instruments that should be explicitly mentioned in a list for the purposes of CESR's exercise?**

11. As mentioned in paragraph 6, non-UCITS undertakings that qualifies as suitable investments for UCITS undertakings under Art. 19 (1) (e) of the UCITS Directive should qualify as non-complex financial instruments.

**Question 26: Do you agree with CESR's interpretation of what constitutes frequent opportunities dispose of, redeem, or otherwise realise that instrument?**

12. We propose that redemption on a daily, weekly, fortnightly or monthly basis should comply with Art. 38 (b) of the Level 2 Directive. Taking into account usual investor horizons for investing in investment funds, the aforementioned redemption dates can be considered as a frequent redemption opportunity.
13. Furthermore, the frequency of redemption alone does not seem to be appropriate to assess the complexity of a financial instrument. Secondary markets, market practice and general market conditions have to be taken into account.
14. In addition, rather than require a daily or weekly redemption, it would seem essential that the investor receives clear information on redemption dates and can therefore easily understand redemption mechanisms of the financial instrument in question.

**Question 27: Do you agree with CESR's point of view on how prices should be determined and when it is considered that those prices are publicly available?**

15. We suggest that CESR should specify that net asset values published by investment funds in line with relevant UCITS requirements are sufficient for purposes of Art. 38 (b) of the Level 2 Directive. Funds which calculate their redemption price under the supervision of or in cooperation with a custodian or other third parties should therefore be deemed to meet this requirement.

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

16. Art. 38 (b) MiFID Level 2 Directive requires (amongst other criteria) frequent opportunities to dispose of an instrument. In our view, liquidity should not be the decisive factor in relation to determining whether a financial instrument has to be considered as complex. According to CESR, the complexity of an instrument determines whether it can be easily understood by an investor. The lack of liquidity will not necessarily have an impact.



17. Furthermore, it should be set out that a lack of liquidity would have to be assessed first in view of the redemption dates and available markets. Secondly, a case-by-case analysis could be required in case of an investment firm is becoming aware of changing market conditions which might affect liquidity.
18. To ensure a uniform interpretation of references to "liquidity" in EU regulations, we also suggest resorting to Art. 2 (1) of Directive 2007/16/EC (eligible assets directive) as well as CESR's guidelines concerning eligible assets for investment by UCITS (Ref: CESR/07-044b) (as amended). Factors to be considered should be:
- The volume and turnover in the financial instrument;
  - An evaluation of the opportunity and timeframe to buy or sell.
19. For the assessment of the quality of a secondary market activity in a financial instrument factors should be:
- An analysis of the quality and number of intermediaries;
  - Market makers dealing in the financial instrument.
20. Financial instruments admitted for trading on a regulated market should be presumed to meet the liquidity requirement as well as financial instruments providing at least half-yearly redemption dates.

**Question 30: Do you agree with CESR's view on what constitutes comprehensive and publicly available information?**

21. We propose that information comparable to a UCITS-prospectus or a KID should be considered as comprehensive and publicly available information. It should also be clarified that the length of a prospectus has generally no impact on the assessment under section 38 (d) of the Level 2 Directive.

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

22. We share CESR's view that deposits should not be included in the list of MiFID financial instruments. We agree with the exception made for deposits that have an embedded derivative that has the potential of reducing the initial capital invested.

**Contact:**

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

Ms Marieke VAN BERKEL, Head of Consumer Affairs, Payments and Financial Markets  
([vanberkel@eurocoopbanks.coop](mailto:vanberkel@eurocoopbanks.coop))

Mr Alessandro SCHWARZ, Adviser Financial Markets ([a.schwarz@eurocoopbanks.coop](mailto:a.schwarz@eurocoopbanks.coop))