EUROPEAN ASSOCIATION OF CORPORATE TREASURERS

EUROPEAN COMMISSION
Directorate General Internal Market and Services
Financial Services Policy and Financial Markets
Securities markets

Comments in response to *Public Consultation – Review of the Markets in Financial Instruments Directive (MiFID)* *Issued by European Commission, 8th December 2010*

The European Association of Corporate Treasurers (EACT)
The EACT is a grouping of 20 national associations representing treasury and finance professionals in 19 European countries. We bring together in excess of 8,500 members representing approximately 5,000 companies located in Europe. We comment to the European authorities, national governments, regulators and standard-setters on issues faced by treasury and finance professionals across Europe. We seek to encourage the profession of treasury, corporate finance and risk management, promoting the value of treasury skills through best practice and education.

Question number	Questions and response
Developments in market structures	
8	**What is your opinion of the introduction of a requirement that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities satisfying the conditions above? Please explain the reasons for your views.**
8	Non financial end users have legitimate reasons to want to deal derivatives that are larger or smaller than the standard size, with or without collateral, or that need customising to match the underlying commercial risk and/or fulfill accounting criteria. Typically these bespoke deals have been accessed through a bilateral deal, negotiated over the phone. It is important that access to this functionality is not reduced by mandating a change to exclusively trade on regulated markets when possible. MTFs are able to handle standard transactions but will not be able to offer the same level of customisation currently available on a bilateral basis It is of paramount importance that the fact a deal is "clearing eligible" does not mandate that it must be cleared with the requisite requirement to post collateral. We hope that the European Commission will be mindful of the content of the proposed derivatives regulation, EMIR, currently being discussed in the co-decision process, and the approach proposed therein for non financial

	end users whose use of derivatives is for mitigating commercial risk.
Question number	**Questions and response**
84	**What is your opinion about limiting the optional exemptions under Article 3 of MiFID? What is your opinion about obliging Member States to apply to the exempted entities requirements analogous to the MiFID conduct of business rules for the provision of investment advice and fit and proper criteria?**
Investor protection and provision of investment services Certain of the proposals relate to additional protections around the arrangements for retail investors. The EACT is not able to comment on behalf of individual retail investors but since some companies may have opted to be classified as retail investors in order to benefit from additional protections, we do feel it appropriate for us to comment in respect of that type of corporate customer. Many companies will be within the professional or eligible categories so we also comment from that perspective.	
84	We agree to limit the optional exemptions under article 3 of MiFID (framework directive[1]) because we consider is it necessary to apply the same basis business rules in all Member States, notably information to clients and to act in the best interest of the client when transmitting orders received from them.
85	**What is your opinion on extending MiFID to cover the sale of structured deposits by credit institutions? Do you consider that other categories of products could be covered?**
85	We are in favor of extending MiFID to cover the sale of structured deposits by credit institutions because the sales of such products must comply with the same conduct of business rules than other financial instruments covered by the MiFID directives.
87 and 90	**(87) What is your opinion of the suggested modifications of certain categories of instruments (notably shares, money market instruments, bonds and securitised debt), in the context of so-called "execution only" services? Please explain the reasons for your views** **(90) Do you consider that, in the light of the intrinsic complexity of investment services, the "execution only" regime should be abolished? Please explain the reasons for your views.**
87 and 90	We are in favor of deleting article 19 (6) of the framework directive by applying the European Commission's proposed Option A rather than supplementing this article by applying Option B. We think the review of MiFID provides an excellent opportunity to clarify what instruments qualify as non-complex. We see no reason to prohibit the provision of "execution only" services, which would severely limit customer choice and the price at which customers can access the various instruments. However it may be worth considering if there need to be any additional warnings given to customers that no advice is being provided.

[1] *i.e.* Directive 2004/39/EC

89	**Do you consider that all or some UCITS could be excluded from the list of non-complex financial instruments? In the case of a partial exclusion of certain UCITS, what criteria could be adopted to identify more complex UCITS within the overall population of UCITS? Please explain the reasons for your views.**
89	We do not consider that all UCITS should be excluded systematically from the list of non-complex financial instruments, as some UCITS could be invested in complex financial instruments.

Question number	**Questions and response**
95	**What is your opinion about obliging intermediaries to provide clients, prior to the transaction, with a risk/gain and valuation profile of the instrument in different market conditions? Please explain the reasons for your views.**
95	We are in favour of making it compulsory for investment firms to inform clients, prior to the transaction, with a risk/gain and valuation profile for complex instruments in different market conditions. In fact, such an obligation is an important element used by the client to choose a suitable financial instrument to hedge its financial risks
104 to 106	**(104) What is your opinion about retaining the current client classification regime in its general approach involving three categories of clients (eligible counterparties, professional and retail clients)? Please explain the reasons for your views.** **(105) What are your suggestions for modification in the following areas: a) Introduce, for eligible counterparties, the high level principle to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading when informing the client; b) Introduce some limitations in the eligible counterparties regime. Limitations may refer to entities covered (such as non-financial undertakings and/or certain financial institutions) or financial instruments traded (such as asset backed securities and nonstandard OTC derivatives); and/or c) Clarify the list of eligible counterparties and professional clients per se in order to exclude local public authorities/municipalities? Please explain the reasons for your views.** **(106) Do you consider that the current presumption covering the professional clients' knowledge and experience, for the purpose of the appropriateness and suitability test, could be retained? Please explain the reasons for your views.**
104 to 106	We are in favor of retaining the current client classification regime as the initial difficulties met in 2007-2008 in implementing this regime are now solved; these rules are now working well and are correctly understood by corporate and account officers and salesmen in the investment firms. To illustrate this assertion, the most recent survey issued by one of the EACT's members (the French Association of Corporate Treasurers) mentions that near 90% of investment firms have notified to their customer their classification under MiFID; clients' awareness is also good as more than 80% have responded to the investment firms about the notification, either to accept it, or to request a modification (opt in or out) or to refuse the eligible counterparty regime.

	We are also in favour of introducing for eligible counterparty the high level principle to act honestly, fairly and professionally and the obligation to be fair clear, and not misleading when informing the client, on the basis that there are basic rules applicable to all participants in a financial market, irrespective of their MiFID status. Concerning the eligible counterparty regime, we see no reason to introduce limitations. This category is designed for those who are large enough and have sufficient knowledge and experience, so one would assume that they opt in to that category knowingly. It is interesting to note that, in the recent survey referred to above, no corporate had chosen the eligible counterparty regime. This figure of 0% can be easily explained because the financial activity of industrial and commercial companies is only an ancillary activity to hedge their financial risks; in comparison, for financial institutions this constitutes their core business. Even so we see no reason to prohibit the possibility of a non financial company being an eligible counterparty, subject to obtaining from the non financial company the express confirmation that it accepts this status, according the current MiFID regulation. Consequently, we consider that the current presumption covering the professional clients' knowledge and experience for the purpose of the appropriateness and suitability test should be abolished; the investment firm must apply a duty of information adapted to the categorisation of the client and the complexity of the financial instruments, and not presume the professional client has the knowledge and experience of the financial instruments and the risks they entail. The investment firm must indeed check by itself the correct knowledge and experience of all clients (retail and professional), according to the Know Your Client principle. One of the ways to comply with the investment firms' requirement is to send systematically to clients assessment *questionnaires* on the financial instruments used by the clients. Some improvements could be done in a more generalised application of assessment tests. The survey shows that only 62% of investment firms have sent to their clients assessment questionnaires.

Question number	Questions and response
Further convergence of the regulatory framework and of supervisory practices	

129 to 132	**(129) Do you consider that a common regulatory framework for telephone and electronic recording, which should comply with EU data protection legal provisions, could be introduced at EU level? Please explain the reasons for your views.** **(130) If it is introduced do you consider that it could cover at least the services of reception and transmission of orders, execution of orders and dealing on own account? Please explain the reasons for your views.** **(131) Do you consider that the obligation could apply to all forms of telephone conversation and electronic communications? Please explain the reasons for your views.** **(132) Do you consider that the relevant records could be kept at least for 3 years? Please explain the reasons for your views.**
129 to 132	We consider that a common regulatory framework for telephone and electronic recording, compliant with EU data protection legal provisions, must be introduced at EU level to strengthen a common implementation of such a requirement in all European countries, in line with best practice in the financial markets. The recording of telephone conversations or electronic communications would cover the services of reception and transmission of clients' orders, given that these means of communications have frequently been used where disputes arise between the client and the investment firm. The same requirement would also cover transactions concluded when dealing on own account in all financial instruments, to check that transactions have been dealt at current market conditions in order to avoid on OTC markets the concealment of a profit or loss, the perpetration of a fraud, tax evasion or the giving of an unauthorised extension of credit. on OTC markets the concealment of a profit or loss, the perpetration of a fraud, tax evasion or the giving of an unauthorised extension of credit. On the retention period, we would prefer a five year period but we understand it could be too difficult to manage for the investment firms. For this reason, we agree with the suggestion of the European Commission to have a mandatory retention period limited to three years with three exceptions in the following situations: – Disputes or litigation concerning transactions between a client and an investment firm – Disputes or litigation between two investment firms – Disputes or litigation between an investment firm and one of its traders involved in a transaction on own account. In these situations, the retention period must be extended so long as the disputes or litigation have not been definitively solved.

The European Association of Corporate Treasurers

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