COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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TECHNICAL ADVICE

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

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Executive summary

This paper sets out CESR's response to Question 19 (on client categorisation) of the European Commission request for additional information in relation to the review of MiFID.

CESR considers, and the vast majority of respondents to the consultation paper (Ref. CESR/10-831) agree, that the (now established) client categorisation regime has worked well since the implementation of MiFID. In particular, the current MiFID rules on the categories of clients, and the obligations attaching to each, are generally appropriate and do not need changing – certainly not on a major scale.

CESR believes that the current tiered approach to client categorisation provides adequate and appropriate levels of investor protection to the three categories, and anecdotal evidence suggests that it is working well: that is, there has been no significant increase since MiFID implementation in customer complaints about mis-classification; there are very few issues on this subject that have been posted on the Q&A section of the Commission's website - which possibly reflects the fact that the current regime is well understood by market participants; and there are no widespread practical problems in the day-to-day business of industry players that would make significant change necessary. As MiFID already allows clients to opt down at any time (for example, eligible counterparties can always opt down to professional client status where they manage money on behalf of others eg: pension funds), those clients that do not feel comfortable with their classification can request additional regulatory protection. This is an important safety feature already built into the process and should not be overlooked by the Commission in proposing any changes to the regime.

While agreeing that per se professional clients (MiFID Annex II.I) and eligible counterparties (MiFID Article 24) include entities presenting differences in their nature, their size and the complexity of their businesses, a few respondents specifically pointed out, and CESR agrees, that these differences do not necessarily suggest differences in their respective capabilities to properly assess the risks of the financial markets in which they participate or in asking for more protection where they have doubts. In setting any criteria, there is a risk that those that should be included have been left out, and vice versa. But the current flexible regime strikes the right balance on this front. Also, there is little evidence that the current criteria are perceived by clients as being set too low as there are not significant numbers of clients requesting greater levels of regulatory protection.

In spite of the general majority opposition (by respondents) to major amendments to the regime, most respondents supported clarifications to the relevant definitions and terms in MiFID where there may be some ambiguity; and CESR does not rule out the possibility of future work at Level 3 to provide guidance or explanations as to what some terms mean in this context.

In the same vein, CESR (and most respondents) considers that it would be helpful to clarify that local authorities do not fall within the scope of "public bodies that manage public debt"; and that, when dealing with ECPs, investment firms have to (i) act honestly, fairly and professionally, and (ii) communicate with ECPs in a way that is fair, clear and not misleading (especially as these standards are consistent with the way in which firms already seek to act in the marketplace).

CESR notes (and many respondents stated) that the current client categorisation regime was implemented at great cost to the industry. In the absence of market failure and against the background of a principle-based regime that already allows for a customised treatment of different advice or selling situations and the accumulated experience with this regime so far, and without any persuasive evidence to the contrary, many respondents considered, and CESR agrees, that there are no grounds that may justify a revision of client categorisation rules. Categorisation is part of a larger system of investor protection, consisting also of suitability and appropriateness tests for certain services, information rules and fitness and propriety tests for prospective directors. Any evidence of mis-selling of certain products to certain per se professional investors is limited to specific sectors

and products and should be measured against the background of all transactions. Therefore, any change in the categorisation rules should be seen in this context and in the context of the present system that, generally speaking, works well. CESR asks the Commission to note that any attempt to address any perceived problem by altering the current regime is likely to have another large, and perhaps disproportionate, cost impact on firms (eg: as a result of changes to client take-on procedures, business practices and record-keeping systems).

I. Introduction

1. On 2 March 2010, the European Commission (EC) posed a series of questions to CESR in the context of its review of the Markets in Financial Instruments Directive 2004/39/EC (MiFID). Several of those questions related to the conduct of business rules in MiFID, including questions on the client categorisation regime.

2. CESR provided most of its responses to the EC's questions and request for additional information in relation to the conduct of business rules in July 2010. However, in a letter to the EC dated 19 March 2010, CESR indicated that its response to Question 19, on client categorisation issues, might be delayed because of the need to consult.

3. The questions posed by the EC on client categorisation were as follows:

   - Q19: "Professional clients per se" (Annex II.I of MiFID) and eligible counterparties (Article 24 MiFID) include a number of entities presenting differences in their nature, their size and the complexity of their business (for instance, small and big financial entities providing different types of activities; different categories of "institutional investors", municipalities and other public bodies). In the perspective of further calibrating the treatment of clients:
   - Q19 (a): Please share your supervisory experience and data related to problems encountered in the provision of investment services to professional clients or eligible counterparties. This includes any alleged mis-selling which may have involved public local authorities (e.g. municipalities), small and medium undertakings, institutional investors (e.g. pension funds), or small credit institutions. We ask CESR to provide details about the kind of entities and products concerned;
   - Q19 (b): Please consider possible 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), (i) of MiFID), public bodies managing public debt (see Article 24(2) and Annex II.I(3) of MiFID).

4. CESR considered that it was necessary to consult with stakeholders on the responses to these questions before responding to the EC, as the questions raised significant policy issues, including those which go beyond the confines of the questions asked. In this regard, CESR published its Consultation Paper (CP) "CESR Technical Advice to the European Commission in the context of the MiFID Review – Client Categorisation" (Ref. CESR/10-831) on 12 July 2010. The consultation period closed on 9 August 2010.

5. The CP sought views on whether distinctions should be made between regulated entities for the purposes of determining which entities are to be treated as "per se" professional clients; asked whether it is necessary to clarify, for the purposes of the client categorisation regime, whether local authorities/municipalities can be treated as public debt bodies; and sought views on whether tests of knowledge and experience should be used more widely for client categorisation than is currently the case, whether for very complex products (such as asset-backed securities and non-standard over-the-counter 'OTC' derivatives) the scope of the eligible counterparty categorisation should be narrowed and what standards should apply to transactions done with ECPs.

6. CESR received 43 responses to the CP (9 of which were confidential). All non-confidential responses have been published on the CESR website and are available there for viewing. CESR is grateful to all respondents for taking the time to give CESR their views.

Status of this paper

7. This paper sets out CESR's response to the EC's questions on client categorisation (Question 19). It does not make specific drafting suggestions for revisions to MiFID, but provides a suggested policy approach to the EC in answer to its questions on client categorisation.

8. This paper has been prepared by CESR's Investor Protection and Intermediaries Standing Committee (IPISC), which is chaired by Mr Jean-Paul Servais, Chairman of the CBFA.

II. 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)]

CESR's advice

CESR considers, and nearly all respondents to the CP agreed, that the opening sentence of Annex II.I(1) sets the scope of that 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"; and are not meant to be taken as an exhaustive list.

Nevertheless, a few respondents said that given the similarity in terminology used for entity type (i) "other institutional investors" and the fourth type of entity eligible for treatment as a per se professional set out in Annex II.I(4) "other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions", further clarification of the interaction and linkage between these two entity categories would be beneficial. CESR agrees.

CESR, and most respondents, believes that there is no case for narrowing the range of entities that are deemed to be per se professional clients - not least because no evidence has been provided that the current definition is deficient, or that the entities in question have suffered detriment as a result of being per se professional clients, or that the Directive has failed, or that criteria set out in Annex II.I(1) have led to any serious cases of mis-selling or large-scale fraudulent activity when dealing with clients in the wholesale markets.

CESR does not believe, and the majority of respondents agree, that the language necessarily needs to be clarified, especially as the Directive appears to be achieving its objectives and the current wording provides sufficient guidance as to the classification of customers. Having said that, CESR believes that additional clarification within the range of entities could possibly benefit firms and their clients (for instance, by providing more examples within each entity type) - as long as it does not lead to any narrowing of the range of entities included in the category of per se professional clients. Additional definitional and explanatory text could help to clarify the language in points (h) and (i); and this would provide more certainty on the intended coverage and remove any doubt about entities included within the scope of the current terms. In this regard, the Commission could consider the suggestions made in paragraph 19 of the CP.[1]

Alternatively, CESR suggests that in order to encourage a consistent understanding of the coverage of Annex II.I in the market, it may be more appropriate (in terms of clarifying language), and would certainly be helpful, to set out some typical examples and their appropriate treatment on the Q&A section of the Commission's website or through CESR's own Q&A. For example, the fourth type of entity eligible for treatment as a per se professional set out in Annex II.I(4) states that this category is intended to include entities dedicated to the securitisation of assets or other financing transactions. Illustrative examples of the types of entities which would be appropriate as being considered to be dedicated to such transactions would promote additional consistency across the markets.

[1] Paragraph 19 of CP CESR/10-831: "... possible clarifications might include:
- making a link to the CRD definition of a financial institution in point (c);
- using wording from Article 2(1)(l) of MiFID to help define a "local" in point (h); and
- making clear that "other institutional investors" in point (i) covers entities whose main activity is investing in financial instruments".

Introduction and background

9. MiFID Annex II.I sets out clients that are considered to be professionals (termed "per se" professionals to distinguish them from clients that opt, or request, to be professionals under MiFID Annex II.II). This part I of the annex ("Categories of client who are considered to be professionals") is divided into four sections, the first of which deals with entities "authorised or regulated to operate in the financial markets".

10. The EC asked CESR to consider possible technical criteria to further distinguish within the broad categories of authorised or regulated entities listed in Annex II.I(1) of MiFID. CESR considered this issue and whether the language describing the entities covered by these points should be clarified.

Issues and feedback

Scope of Annex II.I(1)

11. CESR believes that the scope of Annex II.I(1) of MiFID is set by the opening sentence of its chapeau: "Entities which are required to be authorised or regulated to operate in financial markets." The second sentence and list that follow this opening sentence help in understanding the first sentence, but do not change the scope of the provision. The second sentence explains that the entities covered by the first sentence fall within one of three categories:

    - entities authorised by a Member State under a Directive;
    - entities regulated or authorised by a Member State without reference to a Directive; and
    - entities authorised or regulated by a non-Member State.

12. Therefore, the entities that fall under points (c), (h) and (i) of Annex II.I(1) of MiFID are sub-divisions of the entities that are within the scope of the opening sentence of the chapeau and fit into one of the three categories above. CESR believes that the wording of the points (a) to (i) does not change the scope of the entities that are considered to be professional clients by virtue of this limb of the definition of per se professional clients.

Interpretation of points (c), (h) and (i) of Annex II.I(1) of MiFID

13. MiFID does not define, or refer to a definition of, "financial institution" (point (c)); neither does it define the term "locals" (point (h)). However, CESR understands that the term "locals" covers the sorts of entities - where they are subject to authorisation or regulation - described in MiFID Article 2(1)(l): "firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets".[2]

14. CESR assumes that "other institutional investors" (point (i)) is intended to cover institutional investors not covered under points (d), (e) and (f). In contrast to the language used in Annex II.I(4), there is no specific reference to the investors investing in financial instruments as their main activity. However, one would expect the concept of institutional investors in a MiFID context to be mainly focused on investing in financial instruments.

[2] The same wording is used in Article 3(1)(p) of Directive 2006/49/EC which provides - for the purposes of the Capital Requirements Directive - a definition of a "local firm".

Possible changes to Annex II.I(1)

15. The motivation for revising Annex II.I(1) would be to strengthen investor protection by narrowing the range of regulated entities that can qualify to be treated as clients that are considered to be professionals. This implies that there are some regulated entities that, in some situations, do not have the knowledge and expertise to make their own investment decisions and properly assess the risks they incur.

16. To introduce criteria to distinguish between entities covered by points (c), (h) and (i) would require a revision to the text of Annex II.I(1) so that the points help to set the scope. In these circumstances possible criteria CESR considered for distinguishing between entities covered by these points included:

    - whether the entity was regulated or authorised in a jurisdiction with an equivalent regulatory regime to the EU;
    - whether the entity was conducting business on behalf of underlying clients or not; and
    - for points (c) and (i) the size of the entity.

17. CESR believes that there is no need to narrow the scope of Annex II.I(1) by distinguishing between entities authorised or regulated to act on financial markets. It agrees with CP respondents that there is insufficient evidence that the current breadth of the provision has caused significant detriment and that there are problems involved in saying that there are some regulated entities that are not capable of making their own investment decisions.

18. In terms of the language of the points in circumstances where they set the scope of the Annex II.I(1), then possible clarifications CESR considered included:

    - making a link to the CRD definition of a "financial institution" in point (c);
    - using wording from Article 2(1)(l) of MiFID to help define a "local" in point (h); and
    - making clear that "other institutional investors" in point (i) covers entities whose main activity is investing in financial instruments.

19. Because the scope of the paragraph is not set by these points, CESR does not believe the language used causes a particular problem in relation to interpreting the provision as a whole. There is not therefore a strong case for change.

20. The use of "locals" (point (h)) might cause a casual reader of the directive some confusion given that it is a piece of financial services jargon and is not defined in MiFID. To make the directive more reader friendly there may be a case for using the words in Article 2(1)(l) to explain what constitutes a local. However, given that locals are exempted from MiFID, this might cause some confusion in a provision which only applies to entities that are authorised or regulated.

21. CESR does not believe it is sufficiently clear that the main purpose of "other institutional investors" (point (i)) is to invest in financial markets / instruments.

22. Rather than amending the legal text, another approach to clarifying language in Annex II.I(1) would be through Q&A from the Commission or CESR.

III. Part 2: Public debt bodies

CESR's advice

CESR notes, and several industry respondents to the CP made the same point, that there are substantial differences between Member States with regard to any local legislation in place for the financial market activity of their respective local authorities: the powers and competence of different local authorities, and the arrangements for managing public debt, vary extensively from State to State.

Having said that, CESR thinks there is a case for clarifying that it is not the intention under the definition of per se professional clients or per se ECPs that regional governments and public debt bodies include local authorities.

Introduction and background

23. There is no definition of what constitutes a public debt body in MiFID Article 4 ("Definitions"); and yet there are references to public debt bodies in MiFID Annex II.I(3) (in relation to clients that are considered to be professionals), and in MiFID Article 24(2) (in relation to undertakings that are considered to be eligible counterparties).[3]

24. The EC asked CESR whether there should be technical criteria to distinguish between public debt bodies. Based on the chapeau to the Commission's questions, CESR understands that the EC has particular concerns about how these terms might affect the categorisation of local authorities and municipalities (referred to below as "local authorities").

Issues and feedback

25. There is a difference in the wording of the references to public debt bodies in MiFID Annex II.I(3), and in MiFID Article 24(2). The reference in Article 24(2) is to "public bodies that deal with public debt", but is given in the context of the phrase "national governments and their corresponding offices". The reference in Annex II.I(3) is to "public bodies that manage public debt", and there is no qualification about such bodies being a corresponding office of national government.

26. This difference in language means that the words in Annex II.I(3) are potentially wider than those in Article 24(2). In some Member States local authorities have been classified as per se professional clients under this provision, whilst in most others they have not because it has been assumed that the reference is to standalone bodies managing public debt.

27. Response ID 249 on the Commission's MiFID Q&A database, regarding the classification of non-national layers of government, makes clear that "regional governments" in Annex II.I(3) should be interpreted narrowly. It then goes on to say that: "Public sector bodies which are not regional governments and do not manage public debt may be treated as professional clients on request if the conditions in Annex II, Part II are met."

28. CESR asks the Commission to take into account the fact that the ability of local authorities to engage in financial markets varies from Member State to Member State under laws and rules governing the activities of local authorities. In some Member States, local authorities are, for

[3] MiFID Article 24(2) sets out a list those entities that are automatically recognised as eligible counterparties (ie: an investment firm does not need to undertake any further steps); and MiFID Article 24(3) gives Member States the option to recognise as eligible counterparties entities other than the per se eligible counterparties as defined in Article 24(2), if those entities so request. Article 50 of the MiFID Implementing Directive specifies the requirements that such entities need to meet in order to request treatment as an eligible counterparty.

example, prohibited from entering into derivatives transactions and subject to codes and regulations governing their interaction with financial markets.

29. In the light of the above, CESR believes there is a case for clarifying the scope of Annex II.I(3) to make clear that local authorities do not fall within the scope of "public bodies that manage public debt". There was general agreement amongst respondents to the CP that clarification is needed, and there was majority support for excluding local authorities from the scope of Annex II.I(3). It could also be worth clarifying that regional governments do not include local authorities.

IV. Part 3: Other client categorisation issues

CESR's advice

On cost-benefit grounds, CESR does not consider that it is appropriate to require investment firms to assess the knowledge and experience of some entities currently considered to be per se professional clients. All are likely to be actively engaged in capital markets, are conversant with the MiFID rules, and can avail themselves of the option to request additional regulatory protection should they so wish.

Neither does CESR believe that the client categorisation rules need to be changed in relation to OTC derivatives or complex products. In particular, CESR does not believe that new concepts of "super ECP" or "highly complex products" are appropriate, not least because these concepts are not only difficult to define, but also because any resultant definitions are likely to very quickly lose their relevance over time, and will therefore lead to legal uncertainty.

The relationship between intermediaries and clients asking for financial instruments suitable for their hedging needs will likely amount to investment advice since it will include the provision of personal recommendations from the intermediary. In this case, a suitability assessment is needed and the ECP status is not available under the current legal framework.

CESR believes that the standards that apply when dealing with ECPs are not set out clearly in the directive and that it should be made clear that when dealing with ECPs that firms have to: (i) act honestly, fairly and professionally; and (ii) communicate in a way that is fair, clear and not misleading.

Introduction and background

30. The purpose of the client categorisation regime is to tailor client protections in the light of clients' ability to make their own investment decisions and understand the risks involved. Inevitably it does this in a broad brush way. For entities that are considered to be per se professional clients or per se eligible counterparties there is no specific test of their ability to make their own investment decisions and understand the risks involved. The categorisation also does not look through to the specific transactions a client is undertaking, although a client can opt for a higher level of protection in relation to specific transactions.

31. The broad brush approach taken by the client categorisation regime could potentially mean that there are some clients considered to be professional clients or eligible counterparties that do not in fact have the knowledge and experience implied by their categorisation either generally or in relation to certain financial instruments. CESR has considered:

- whether there should be more use of tests of a potential client's knowledge and experience in the client categorisation regime;
- how the client categorisation regime works in relation to very complex products; and
- the standards that apply when business is done with ECPs.

Issues and feedback

Knowledge and experience

32. Under MiFID Annex II.I (clients that are considered to be per se professionals) there are no explicit tests of the knowledge and experience. By virtue of the sort of business they do or their

size, entities are deemed to possess the knowledge and experience to make their own investment decisions.

33. This broad brush approach to client categorisation might mean that some clients do not get the protections they need because they might not have the knowledge and experience to enable them to properly assess the risks of the transactions they undertake. One way of moving away from such a broad brush approach would be to require investment firms to assess the knowledge and experience of more clients before they could be considered to be professionals. This might be particularly important in relation to unregulated undertakings that currently qualify to be considered as professionals simply by virtue of their size.

34. CESR does not consider that it is appropriate that investment firms be required to assess the knowledge and experience of some per se professional clients, not least because this would not be a proportionate response to the Commission's concerns. This proposal is likely to affect only a small number of clients, so any costs are very likely to outweigh any benefits.

Complex products

35. In addition to the numerous weaknesses in the process of securitisation that have been highlighted by the crisis and from which many institutional investors worldwide (and their underlying retail clients) have suffered, a number of cases of alleged mis-selling of complex derivative products to local authorities in Europe have been brought to public attention by the press. Moreover, anecdotal evidence suggests that corporate clients have also fallen victim to similar practices in the marketing of complex derivatives. In the US, local authorities have lost considerable sums in purported "hedging" transactions. Several enquiries are underway into whether investment firms have misled institutional investors in complex securities (such as asset-backed securities), and one case of civil fraud has recently been brought by the SEC against a major investment bank involved in the structuring and sale of collateralised debt obligations (CDOs) to large institutions.

36. These cases appear to show that clients presumed to be sophisticated and capable of looking after their own interests do not always understand the risks involved in complex instruments. They also appear to show that serious failings by investment firms (inadequate disclosures, unsuitable products) occur in the professional markets for some OTC derivatives and certain other complex products. This is not surprising given the considerable information asymmetries and conflicts of interest in these markets, not to mention the profitability of such complex products for investment firms.

37. However, CESR recognises that some clients need to use potentially complex OTC derivatives in order to hedge precisely the specific and bespoke financial risks they may otherwise face. The risk management practices of those clients may be robust and the hedging activity undertaken should bring benefits in overall risk reduction. Any change in client categorisation should neither discourage nor impede that risk management activity.

38. The relationship between intermediaries and clients asking for financial instruments suitable for their hedging needs will likely amount to investment advice[4] since it will include the provision of personal recommendations from the intermediary. In this case, a suitability assessment is needed and the ECP status is not available under the current legal framework. Nevertheless, in those cases where investment advice is not provided, it is necessary to consider whether it would be desirable and feasible to change the way MiFID's client categorisation rules work for a set of highly complex products (such as asset-backed securities and non-standard OTC derivatives).

[4] CESR's Q&A on investment advice (CESR/10-293) made clear that knowledge about an individual's desire for protection against certain risks was information about a person's circumstances. Consideration of a person's circumstances is one of the elements that determine whether a communication constitutes investment advice.

CESR considered several possible approaches to changing the client categorisation rules; inter alia:

- to say that ECP status is not available for transactions in highly complex products;
- to define a "super ECP" status subject to stricter requirements (for example, large financial institutions instead of all regulated financial institutions) for highly complex products;
- to require undertakings - either all or some, such as non financial undertakings - to request to be considered as ECPs and then requiring firms to consider whether they have the expertise, experience and knowledge to enter into transactions in highly complex products (when such transactions are contemplated) without relying on the investment firm to act on their behalf;
- to require firms that know or have reason to know that an investor classified as an ECP is unlikely to be able to properly assess the risks of a particular instrument or transaction, to treat that investor as a professional client for the relevant transaction; this would require firms to do a minimum amount of 'know your customer' (KYC) (experience, knowledge and expertise) when they envisage highly complex transactions with ECPs.

39. CESR does not believe that the client categorisation rules need to be changed in relation to OTC derivatives or complex products. In particular, CESR does not believe, and the overwhelming majority of respondents to the CP agreed, that new concepts of "super ECP" or "highly complex products" are appropriate, not least because these concepts are not only difficult to define, but also because any resultant definitions are likely to very quickly lose their relevance over time, and will therefore lead to legal uncertainty. CESR believes (and this was supported by many respondents) that client categorisation should not be based on products or their relative complexity.

40. Furthermore, in practice, the unavailability of the ECP categorisation for certain products could potentially lead to the untenable scenario where banks, for example, are not an ECP when trading some complex products, some of which they may originate.

Standards applying to business done with ECPs

41. As a result of Article 24(1), when a client does business as an ECP the protections in Article 19 do not apply, and an investment firm is not under a specific obligation to act "… in accordance with the best interests of the client."

42. It makes sense that investment firms are not under an obligation to act in accordance with the best interests of the client when dealing with ECPs. The conduct of business obligations are turned off for such transactions because the ECPs are deemed to be able to look after their own interests. However, the standards that do apply to business that investment firms conduct with ECPs are opaque.

43. It is clear that the conflicts of interest rules apply to such dealings (Article 24 of MiFID does not disapply these rules to dealings with ECPs). Moreover, for market transparency and integrity purposes, Article 25 of MiFID also says that competent authorities have to monitor the activities of investment firms "…to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market." This provision does not limit competent authorities' regulatory obligations, but is not matched by a specific obligation on firms in relation to dealings with ECPs.

44. Given that ECPs are deemed to be able to look after their own interests, there should be no need to have a long list of standards applying to business done with ECPs. However, CESR believes

that it would be helpful to clarify[5] that, irrespective of the kind of client they are dealing with, investment firms have to:

- act honestly, fairly and professionally; and
- communicate with ECPs in a way that is fair, clear and not misleading.

45. These standards are consistent with the way in which firms already seek to act in the marketplace.

[5] For example, through CESR/ESMA guidance.