

**DRAFT**

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## **ELIGIBLE COUNTERPARTIES AND PROFESSIONALS UNDER THE MIFID<sup>1</sup>**

Recital 31 of the MiFID<sup>2</sup> provides that one of its objectives is to protect investors and that measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties).

### **Eligible counterparties**

Under the MiFID<sup>3</sup>, investment firms may bring about or enter into transactions with eligible counterparties without being obliged to comply with certain obligations such as conduct of business obligations (Article 19), best execution rules (Article 21) and client order handling rules (Article 22.1) in respect of such transactions or in respect of any ancillary service directly related to those transactions. Eligible counterparties include in particular all regulated institutions (including credit institutions)<sup>4</sup>. It should be noted however that classification as an eligible counterparty<sup>5</sup> is without prejudice to the right of these entities to request, either on a general form or on a trade-by-trade basis, treatment as clients whose business with the investment firm is subject to the above obligations<sup>6</sup>.

### **Professional clients**

Any 'downgrade' from eligible counterparties to clients occurs by categorisation as 'professional'.

A professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. Entities such as credit institutions which are 'required to be authorised or regulated to operate in the financial markets' are considered to be professionals<sup>7</sup>.

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<sup>1</sup> Prepared by Frank Tillian, BankAustria Creditanstalt.

<sup>2</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1–44).

<sup>3</sup> See Article 24.1 of the MiFID. Article 50 of the Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p.26) ('the Commission implementing Directive') elaborates on the notion of 'eligible counterparties'.

<sup>4</sup> Article 24.2, first subparagraph of the MiFID.

<sup>5</sup> Under the first subparagraph of Article 24.2 of the MiFID.

<sup>6</sup> Article 24.2, second subparagraph of the MiFID.

<sup>7</sup> Under Annex II. I (1) of the MiFID. According to this Annex, professionals must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is a regulated entity, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the firm, the client is deemed to be a professional client, and will be treated as such unless the firm and the client agree otherwise. The firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection. It is the responsibility of the client, considered to be a professional client, to ask for a higher level of protection when it deems it is unable to properly assess or manage

The status of professional requires a burdensome work for the credit institution offering financial instruments under the MIFID. For instance conduct of business rules require advice on risks associated with the financial instrument and the accomplishment of suitability and appropriateness tests<sup>8</sup>.

Banks/credit institutions provide their counterparts with letters specifying the relevant classification under the MIFID. A minority of banks categorise other banks as ‘professionals’ rather than eligible counterparties. In doing so these banks might expect, on a reciprocity basis, that their bank counterparts will also categorise itself as professionals. Since the inter-bank business is a business between eligible counterparties and with a view to ensuring legal certainty and a level playing field throughout Europe, it might be opportune to favour a harmonised approach in this field and to recommend, for instance, in a support letter to the European Credit Sector Associations (ECSAs), that all banks/credit institutions engage to treat themselves as eligible counterparties rather than professionals within the meaning of the MiFID. Notwithstanding this general recommendation every bank/credit institution, if once classified as eligible counterparty, cannot be deprived from its right for a possible change of classification as professional.

**The EFMLG is invited to discuss the above proposal for a recommendation.**

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the risks involved. This higher level of protection will be provided when a client who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime. Such agreement should specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction.

<sup>8</sup> See in particular Articles 31 and Articles 35 to 37 of the Commission implementing Directive.