## **Conduct of Business Sourcebook**

Chapter 3

Client categorisation



#### 3.1 **Application**

- 3.1.1 The scope of this chapter is the same as that of the rules in the Handbook to which it relates.
- G 3.1.2 This chapter relates to parts of the *Handbook* whose application depends on whether a person is a client, a retail client, a professional client or an eligible counterparty. However, it does not apply to the extent that another part of the Handbook provides for a different approach to client categorisation. For example, a separate approach to *client* categorisation is set out in the definition of a retail client for a firm that gives basic advice.
- 3.1.2A R Subject to ■ COBS 3.1.3R and ■ COBS 3.6.4CR, in this chapter provisions marked "UK" apply to a firm's business other than MiFID business as if they were
- 3.1.3 The sections in this chapter on general notifications (■ COBS 3.3) and policies, procedures and records (■ COBS 3.8) do not apply in relation to a *firm* that is neither:
  - (1) conducting designated investment business; nor
  - (2) in the case of MiFID or equivalent third country business providing an ancillary service that does not constitute designated investment business.

#### Mixed business

- 3.1.4 If a *firm* conducts business for a *client* involving both:
  - (1) MiFID or equivalent third country business; and
  - (2) other regulated activities subject to this chapter;

it must categorise that *client* for such business in accordance with the provisions in this chapter that apply to MiFID or equivalent third country business, including those provisions applied to the equivalent business of a third country investment firm as a result of ■ COBS 3.1.2AR.

G 3.1.5 (1) For example, the requirement concerning mixed business will apply if a MiFID investment firm or third country investment firm advises a

- client on whether to invest in a scheme or a life policy. This is because the former is within the scope of MiFID and the latter is not. In such a case, the MiFID client categorisation requirements prevail.
- (2) The requirement does not apply where the MiFID or equivalent third country business is provided separately from the other regulated activities. Where this is the case, in accordance with Principle 7 (communications with clients) the basis on which the different activities will be performed, including any differences in the categorisations that apply, should be made clear to the client.



#### 3.2 **Clients**

#### General definition

- 3.2.1 R
- (1) A person to whom a firm provides, intends to provide or has provided:
  - (a) a service in the course of carrying on a regulated activity; or
  - (b) in the case of MiFID or equivalent third country business, an ancillary service,

is a "client" of that firm.

- (2) A "client" includes a potential client.
- (3) In relation to the financial promotion rules, a person to whom a financial promotion is or is likely to be communicated is a "client" of a firm that communicates or approves it.
- (4) A client of an appointed representative or, if applicable, a tied agent is a "client" of the firm for whom that appointed representative, or tied agent, acts or intends to act in the course of business for which that firm has accepted responsibility under the Act or MiFID (see sections 39 and 39A of the Act).

[Note: article 4(1)(9) of MiFID]

- G 3.2.2
- (1) A corporate finance contact or a venture capital contact is not a client under the first limb of the general definition. This is because a firm does not provide a service to such a contact. However, it will be a client under the third limb of the general definition for the purposes of the financial promotion rules if the firm communicates or approves a financial promotion that is or is likely to be communicated to such a contact.
- (2) Communicating or approving a financial promotion that is or is likely to be communicated to such a contact is not MiFID or equivalent third country business. In such circumstances, the "non-MiFID" client categorisations are relevant and, in categorising elective professional clients, the "quantitative test" will not need to be satisfied.

#### Who is the client?

#### 3.2.3 R

- (1) If a *firm* provides services to a *person* that is acting as an agent, the identity of its client will be determined in accordance with the *rule* on agents as clients (see COBS 2.4.3 R).
- (2) In relation to a *firm* establishing, operating or winding up a *personal* pension scheme or a stakeholder pension scheme, a member or beneficiary of that scheme is a *client* of the *firm*.
- (3) If a *firm* that does not fall within (2) provides services to a *person* that is acting as the trustee of a trust, that *person* will be the *firm*'s *client* and the underlying beneficiaries of the trust will not.
- (4) In relation to business that is neither *MiFID* or equivalent third country business, if a firm provides services to a fund that does not have separate legal personality, that fund will be the firm's client.
- (5) If a firm provides services relating to a contribution to or interest in a CTF (except for a personal recommendation relating to a contribution to a CTF or in relation to the communication or approval of a financial promotion), the firm's only client is:
  - (a) the registered contact, if there is one;
  - (b) otherwise, the *person* to whom the statement must be sent in accordance with Regulation 10 of the *CTF Regulations*.

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#### 3.3 **General notifications**

3.3.1 [deleted]

UK 3.3.1A

Articles 45(1) and (2) of the MiFID Org Regulation require firms to provide clients with specified information concerning client categorisation.

45(1)Investment firms shall notify new clients, and existing clients that the investment firm has newly categorised as required by UK law on markets in financial instruments, of their categorisation as a retail client, a professional client or an eligible counterparty in accordance with that Directive.

(2)Investment firms shall inform clients in a durable medium about any right that client has to request a different categorisation and about any limitations to the level of client protection that a different categorisation would entail.

[Note: articles 45(1) and (2) of the MiFID Org Regulation]

3.3.1B

The information referred to in article 45(2) of the MiFID Org Regulation (as reproduced at ■ COBS 3.3.1AUK) must be provided to *clients* prior to any provision of services.

[Note: paragraph 2 of section I of annex II to MiFID]

3.3.2 G This chapter requires a firm to allow a client to request re-categorisation as a client that benefits from a higher degree of protection (see ■ COBS 3.7.1 R). A firm must therefore notify a client that is categorised as a professional client or an eligible counterparty of its right to request a different categorisation whether or not the firm will agree to such requests. However, a firm need only notify a *client* of a right to request a different categorisation involving a lower level of protection if it is prepared to consider such requests.



#### 3.4 Retail clients

A retail client is a client who is not a professional client or an eligible counterparty.

[Note: article 4(1)(11) of MiFID]

If a firm provides services relating to a CTF (except for a personal recommendation relating to a contribution to a CTF), the firm's client is a retail client even if it would otherwise be categorised as a professional client or an eligible counterparty under this chapter.

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#### 3.5 **Professional clients**

3.5.1 A professional client is a client that is either a per se professional client or an elective professional client.

[Note: article 4(1)(10) of MiFID]

### Per se professional clients

3.5.2 Each of the following is a per se professional client unless and to the extent it is an eligible counterparty or is given a different categorisation under this chapter:

- (1) an entity required to be authorised or regulated to operate in the financial markets. The following list includes all authorised entities carrying out the characteristic activities of the entities mentioned, whether authorised in the UK or a third country:
  - (a) a credit institution;
  - (b) an investment firm;
  - (c) any other authorised or regulated financial institution;
  - (d) an insurance company;
  - (e) a collective investment scheme or the management company of such a scheme;
  - (f) a pension fund or the management company of a pension fund;
  - (g) a commodity or commodity derivatives dealer;
  - (h) a local authority;
  - (i) any other institutional investor;
- (2) in relation to MiFID or equivalent third country business a large undertaking meeting two of the following size requirements on a company basis:
  - (a) balance sheet total of EUR 20,000,000;
  - (b) net turnover of EUR 40,000,000;
  - (c) own funds of EUR 2,000,000;
- (3) in relation to business that is not MiFID or equivalent third country business a large undertaking meeting anyof the following conditions:
  - (a) a body corporate (including a limited liability partnership) which has (or any of whose holding companies or subsidiaries has) (or

- has had at any time during the previous two years) called up share capital or net assets of at least £5 million (or its equivalent in any other currency at the relevant time);
- (b) an undertaking that meets (or any of whose *holding companies* or *subsidiaries* meets) two of the following tests:
  - (i) a balance sheet total of EUR 12,500,000;
  - (ii) a net turnover of EUR 25,000,000;
  - (iii) an average number of employees during the year of 250;
- (c) a partnership or unincorporated association which has (or has had at any time during the previous two years) net assets of at least £5 million (or its equivalent in any other currency at the relevant time) and calculated in the case of a limited partnership without deducting loans owing to any of the partners;
- (d) a trustee of a trust (other than an occupational pension scheme, SSAS, personal pension scheme or stakeholder pension scheme) which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time) calculated by aggregating the value of the cash and designated investments forming part of the trust's assets, but before deducting its liabilities;
- (e) a trustee of an occupational pension scheme or SSAS, or a trustee or operator of a personal pension scheme or stakeholder pension scheme where the scheme has (or has had at any time during the previous two years):
  - (i) at least 50 members; and
  - (ii) assets under management of at least £10 million (or its equivalent in any other currency at the relevant time);
- (4) a national or regional government, including a public body that manages public debt at national or regional level, a central bank, an international or supranational institution (such as the World Bank, the IMF, the ECB, the EIB) or another similar international organisation;
- (5) another institutional investor whose main activity is to invest in financial instruments (in relation to the firm's MiFID or equivalent third country business) or designated investments (in relation to the firm's other business). This includes entities dedicated to the securitisation of assets or other financing transactions.

[Note: first paragraph of section I of annex II to MiFID]

- 3.5.2A R [deleted]
- A firm must categorise a local public authority or municipality which (in either case) does not manage public debt as a retail client, unless it is permitted to treat such a person as an elective professional client in accordance with COBS 3.5.3BR to COBS 3.5.3ER.

3.5.2C

As a result of ■ COBS 3.5.2BR, a local public authority or municipality which (in either case) does not manage public debt should not be treated as a per se professional client.

#### Elective professional clients

3.5.3

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A firm may treat a client other than a local public authority or municipality as an elective professional client if it complies with (1) and (3) and, where applicable, (2):

- (1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the *client* that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the *client* is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");
- (2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:
  - (a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
  - (b) the size of the *client*'s *financial instrument* portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500.000:
  - (c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;

(the "quantitative test"); and

- (3) the following procedure is followed:
  - (a) the *client* must state in writing to the *firm* that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;
  - (b) the firm must give the client a clear written warning of the protections and investor compensation rights the *client* may lose; and
  - (c) the *client* must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

[Note: first, second, third and fifth paragraphs of section II.1 and first paragraph of section II.2 of annex II to MiFID]

G 3.5.3A

(1) As a result of ■ COBS 3.5.3BR and ■ COBS 3.5.3ER a *firm* should always assess a local public authority or municipality against a "quantitative test" to treat it as an elective professional client, regardless of whether the firm intends to conduct business involving MiFID or equivalent third country business or other regulated activities subject to COBS 3.

(2) The "quantitative test" that a *firm* should use depends on the application of ■ COBS 3.5.3BR (which applies for *UK clients*) and ■ COBS 3.5.3ER (which applies for non-*UK clients*).

### 3.5.3B R

- (1) A firm may treat a UK local public authority or municipality as an elective professional client if it complies with COBS 3.5.3R(1) and COBS 3.5.3R(3) and, in addition, paragraph (2) of this rule.
- (2) In the course of the assessment under COBS 3.5.3R(1) the criterion in (a) below is satisfied as well as one of the criteria in (b) below (the "quantitative test"):
  - (a) the size of the *client's financial instrument* portfolio defined as including cash deposits and *financial instruments*, exceeds £10,000,000; and
  - (b) either:
    - (i) the *client* has carried out transactions, in significant size, on the relevant market at an average frequency of ten per quarter over the previous four quarters; or
    - (ii) the *person* authorised to carry out transactions on behalf of the *client* works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the provision of services envisaged; or
    - (iii) the *client* is an 'administering authority' of the Local Government Pension Scheme within the meaning of the version of Schedule 3 of The Local Government Pension Scheme Regulations 2013 or, (in relation to Scotland) within the meaning of the version of Schedule 3 of The Local Government Pension Scheme (Scotland) Regulations 2014 in force at 1 January 2018, and is acting in that capacity.

### 3.5.3C

- (1) This *rule* applies where a *firm* is subjecting a *UK* local public authority or municipality to the tests and is following the procedure required as a result of COBS 3.5.3BR in respect of the *firm*'s business carried on in relation to that *person*'s:
  - (a) business in the course of or connected to its administration of a *pension scheme*; and
  - (b) other business as a local public authority or municipality.
- (2) A firm must apply the qualitative and quantitative tests required as a result of COBS 3.5.3BR separately and independently in relation to the *client's* business under (1)(a) and (1)(b).
- (3) A firm must follow the procedure in COBS 3.5.3R(3) required as a result of COBS 3.5.3BR separately and independently in relation to the client's business under (1)(a) and (1)(b).

#### 3.5.3D G

As a result of ■ COBS 3.5.2BR and ■ COBS 3.5.3CR, and depending on the outcome of the qualitative and quantitative tests required as a result of ■ COBS 3.5.3BR, a *firm* may be required to categorise a *UK* local public authority or municipality differently in relation to the two sorts of business described at ■ COBS 3.5.3CR(1)(a) and (b).

- 3.5.3E R
- (1) A firm may treat a non-UK local public authority or municipality as an elective professional client if it complies with ■ COBS 3.5.3R(1) and ■ COBS 3.5.3R(3) and, in addition, applies the "quantitative test" that is applied in relation to MiFID or equivalent third country business under ■ COBS 3.5.3R(2).
- (2) [deleted]
- 3.5.4 If the *client* is an entity, the qualitative test should be performed in relation to the person authorised to carry out transactions on its behalf.

[Note: fourth paragraph of section II.1 of annex II to MiFID]

3.5.5 G The fitness test applied to managers and directors of relevant firms is an example of the assessment of expertise and knowledge involved in the qualitative test.

[Note: fourth paragraph of section II.1 of annex II to MiFID]

3.5.6 R Before deciding to accept a request for re-categorisation as an elective professional client a firm must take all reasonable steps to ensure that the client requesting to be treated as an elective professional client satisfies the qualitative test and, where applicable, the relevant quantitative test.

[Note: second paragraph of section II.2 of annex II to MiFID]

3.5.7 G An elective professional client should not be presumed to possess market knowledge and experience comparable to a per se professional client

[Note: second paragraph of section II.1 of annex II to MiFID]

G 3.5.8 Professional clients are responsible for keeping the firm informed about any change that could affect their current categorisation.

[Note: fourth paragraph of section II.2 of annex II to MiFID]

- 3.5.9 R
- (1) If a firm becomes aware that a client no longer fulfils the initial conditions that made it eligible for categorisation as an elective professional client, the firm must take the appropriate action.
- (2) Where the appropriate action involves re-categorising that client as a retail client, the firm must notify that client of its new categorisation.

[Note: fourth paragraph of section II.2 of annex II to MiFID]



### 3.6 Eligible counterparties

3.6.1 R

- (1) An eligible counterparty is a client that is either a per se eligible counterparty or an elective eligible counterparty.
- (2) A client can only be an eligible counterparty in relation to eligible counterparty business ( PRIN 1 Annex 1 R is an exception to this).

[Note: article 30(1) of MiFID]

# Per se eligible counterparties

3.6.2 R

Each of the following is a *per se eligible counterparty* (including an entity that is not from the *UK* that is equivalent to any of the following) unless and to the extent it is given a different categorisation under this chapter:

- (1) an investment firm;
- (2) a credit institution;
- (3) an insurance company;
- (4) a collective investment scheme authorised under the UK provisions which implemented the UCITS Directive or its management company;
- (5) a pension fund or its management company;
- (6) another financial institution authorised or regulated under the law of the *United Kingdom*;
- (7) [deleted]
- (8) a national government or its corresponding office, including a public body that deals with public debt at national level;
- (9) a central bank; and
- (10) a supranational organisation.

[Note: first paragraph of article 30(2) and first paragraph of article 30(4) of MiFID]

3.6.3 G

For the purpose of COBS 3.6.2 R (6), a financial institution includes regulated institutions in the securities, banking and insurance sectors.

#### **Elective eligible counterparties**

3.6.4

A firm may treat a client as an elective eligible counterparty in relation to business other than MiFID or equivalent third country business if:

- (1) the client is an undertaking and:
  - (a) is a per se professional client (except for a client that is only a per se professional client because it is an institutional investor under ■ COBS 3.5.2 R (5)) and:
    - (i) is a body corporate (including a limited liability partnership) which has (or any of whose holding companies or subsidiaries has) called up share capital of at least £10 million (or its equivalent in any other currency at the relevant time); or
    - (ii) meets the criteria in the rule on meeting two quantitative tests (■ COBS 3.5.2 R (3)(b)); and
  - (b) requests such categorisation; and
- (2) the firm adheres to the procedure set out at COBS 3.6.4BUK.

3.6.4A

EU

Provided that it adheres to the procedure set out at ■ COBS 3.6.4BUK, a firm may treat a client as an elective eligible counterparty in relation to MiFID or equivalent third country business if the client:

- (1) is an undertaking;
- (2) is a per se professional client, except for a client that is only a per se professional client because it is an institutional investor under ■ COBS 3.5.2R(5); and
- (3) requests such categorisation.

[Note: first paragraph of article 30(3) of MiFID]

UK 3.6.4B

Article 71(5) of the MiFID Org Regulation sets out the procedure to be followed where a client requests to be treated as an eligible counterparty.

> 71(5)Where a client requests to be treated as an eligible counterparty, in accordance with [ COBS 3.6.4AR], the following procedure shall be followed:

(a)the investment firm shall provide the client with a clear written warning of the consequences for the client of such a request, including the protections they may lose;

(b) the client shall confirm in writing the request to be treated as an eligible counterparty either generally or in respect of one or more investment services or a transaction or type of transaction or product and that they are aware of the consequences of the protection they may have lost as a result of the request.

3.6.4C

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[deleted]

- The categories of *elective eligible counterparties* include an equivalent undertaking that is not from an the *United Kingdom* provided the above conditions and requirements are satisfied.
- A firm may obtain a prospective counterparty's confirmation that it agrees to be treated as an *eligible counterparty* either in the form of a general agreement or in respect of each individual transaction.

[Note: second paragraph of article 30(3) of MiFID]

# Client and firm located in different jurisdictions

3.6.7 R [deleted]



#### Providing clients with a higher level 3.7 of protection

3.7.1 A firm must allow a professional client or an eligible counterparty to request re-categorisation as a client that benefits from a higher degree of protection.

> [Note: second paragraph of article 30(2) of, and the second paragraph of section I of annex II to, MiFID]

G 3.7.2 It is the responsibility of a professional client or eligible counterparty to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.

> [Note: third paragraph of section I and fourth paragraph of section II.2 of annex II to MiFID]

3.7.3 R [deleted]

UK 3.7.3A Article 45(3) of the MiFID Org Regulation sets out provisions in respect of giving *clients* a higher level of protection.

> 45(3)Investment firms may, either on their own initiative or at the request of the client concerned treat a client in the following manner:

(a)as a professional or retail client where that client might otherwise be classified as an eligible counterparty pursuant to [■ COBS 3.6.2R];

(b)a retail client where that client that is considered a professional client pursuant to Part 2 of Schedule 1 to Regulation (EU) No 600/2014.

UK 3.7.3B Article 71(2) to (4) of the MiFID Org Regulation sets out provisions applying to eligible counterparties requesting a higher level of protection.

> 71(2)Where, pursuant to [■ COBS 3.7.1R], an eligible counterparty requests treatment as a client whose business with an investment firm is subject to rules in the Conduct of Business; Market Conduct; Senior Management Arrangements, Systems and Controls and the Product Intervention and Product Governance sourcebooks which were relied on immediately before IP completion day to implement Articles 24, 25, 27 and 28 of Directive 2014/65/EU ("the relevant rules"), the request should be made in writing, and shall indicate

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whether the treatment as retail client or professional client refers to one or more investment services or transactions, or one or more types of transaction or product.

- (3) Where an eligible counterparty requests treatment as a client whose business with an investment firm is subject to the relevant rules, but does not expressly request treatment as a retail client, the firm shall treat that eligible counterparty as a professional client.
- (4) Where the eligible counterparty expressly requests treatment as a retail client, the investment firm shall treat the eligible counterparty as a retail client, applying the provisions in respect of requests of non-professional treatment specified in paragraph 4 of Schedule 1 to Regulation (EU) No 600/2014.
- 3.7.4 R [deleted]
- (1) If, in relation to MiFID or equivalent third country business a per se professional client requests treatment as a retail client, the client will be classified as a retail client if it enters into a written agreement with the firm to the effect that it will not be treated as a professional client or eligible counterparty for the purposes of the applicable conduct of business regime.
  - (2) This agreement must specify the scope of the re-categorisation, such as whether it applies to one or more particular services or transactions, to one or more types of product or transaction or to one or more *rules*.

[Note: fourth paragraph of section I of annex II to MiFID]

- 3.7.6 G
- (1) In accordance with *Principle* 7 (communications with *clients*) if a *firm* at its own initiative re-categorises a *client* in accordance with this section, it should notify that *client* of its new category under this section.
- (2) If the *firm* already has an agreement with the *client*, it should also consider any contractual requirements concerning the amendment of that agreement.
- The ways in which a *client* may be provided with additional protections under this section include re-categorisation:
  - (1) on a general basis; or
  - (2) on a trade by trade basis; or
  - (3) in respect of one or more specified rules; or
  - (4) in respect of one or more particular services or transactions; or
  - (5) in respect of one or more types of product or transaction.

[Note: second paragraph of article 30(2) of MiFID]

3.7.8 Re-categorising a client as a retail client under this section does not necessarily mean it will become an *eligible complainant* under *DISP*.



### 3.8 Policies, procedures and records

# Policies and procedures

3.8.1 R

A *firm* must implement appropriate written internal policies and procedures to categorise its *clients*.

[Note: fourth paragraph of section II.2 of annex II to MiFID]

#### Records

3.8.2 R

- (1) A *firm* must make a record of the form of each notice provided and each agreement entered into under this chapter. This record must be made at the time that standard form is first used and retained for the relevant period after the *firm* ceases to carry on business with *clients* who were provided with that form.
- (2) A firm must make a record in relation to each client of:
  - (a) the categorisation established for the *client* under this chapter, including sufficient information to support that categorisation;
  - (b) evidence of despatch to the *client* of any notice required under this chapter and if such notice differs from the relevant standard form, a copy of the actual notice provided; and
  - (c) a copy of any agreement entered into with the *client* under this chapter.

This record must be made at the time of categorisation and should be retained for the relevant period after the *firm* ceases to carry on business with or for that *client*.

- (3) The relevant periods are:
  - (a) indefinitely, in relation to a pension transfer, pension conversion, pension opt-out or FSAVC;
  - (b) at least five years, in relation to a life policy or pension contract;
  - (c) five years in relation to MiFID or equivalent third country business; and
  - (d) three years in any other case.

[Note: article 16(6) of MiFID]

3.8.3 G

If a *firm* provides the same form of notice to more than one *client*, it need not maintain a separate copy of it for each *client*, provided it keeps evidence of despatch of the notice to each *client*.