

CESR

Monsieur Carlo Comporti
11-13 avenue de Friedland

75 008 PARIS

Paris, September 13, 2004

Dear Sir

EACT wishes to present its comments on the second set of mandates from the European Commission to CESR for the implementation of the ISD Directive.

We are particularly concerned by the measures applicable to professional clients linked to:

- article 19(2) – fair, clear and not misleading information –
- article 19(3) – information to clients –
- article 19(7) –client agreement-

It seems that your proposals are mainly directed to retail clients even though you state that general principles should apply to all clients. This is for instance the case for article 19(2) when you write that “it is sufficient in the case of professional clients to rely on the general principle in Article 19(2) that information must be fair, clear and not misleading”.

As you know, the economic thresholds levels which determine on an “a priori” basis whether a company is professional or not are low and a lot of SMB will be considered as professional clients by investment service providers unless they declare not to be. In order to avoid likely disputes especially in the use of complex financial products, EACT believes necessary to be more precise than the ISD when dealing with information between professional clients and investment service providers; this is an important issue as financial products might be risky if unsuitably sold by Investment Service Providers and consequently badly implemented by clients as the ISD clearly points out.

You will find attached our proposals we are ready to discuss and present.

EACT which includes 10 treasurers associations of the euro area representing roughly 2800 companies or groups hopes that you will take consider our comments and keep us informed of the next discussions and proposals.

We remain yours faithfully

Pierre Poncet
EACT Chairman

Charles-Henri Taufflieb
Chairman of the EACT Committee
on ISD and Codes of Conduct

Article 19(2)

All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

When specifying the criteria for assessing the fairness, clearness and not misleading character of information, the following principles should apply for any client or potential client, whether retail or professional (we include those appearing in Box 7 of the CESR document and of real interest for professional clients)

- Investment firm must avoid accentuating the potential benefit of an investment service or financial instrument without also giving a fair indication of the risks
- When addressing any information, an investment firm must make sure that key items are given due prominence, the method of presentation does not disguise, diminish or obscure important warnings, no information is omitted for fairness and clarity.
- Information must include a balanced description of the main characteristics of the financial instrument and/or service provided, as well as the financial commitments and risks involved
- Performance informations must not state or imply they are guaranteed unless there is a legal enforceable arrangement
- If information on past performance is given, it must be expressed that it may not be a reliable guidance for the future; informations on past performances must be clear (reference period, benchmarks if any) and not misleading.
- If information is given on forecasts of future performance, they must be clearly expressed and state that they may not constitute reliable guidance for the future. Assumptions used must be précised and relevant such as not to mislead the client.

Article 19(3)

Appropriate information shall be provided in a comprehensible form to clients or potential clients about:

- *the investment firm and its services*
- *financial instruments and proposed strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies*
- *execution venues*
- *costs and associated charges so that they are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instruments that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.*

The information on the investment firm and its services provided to any professional client or potential professional client should especially include:

- identity and main businesses
- geographical address and contact details
- proof that the investment firm is authorised and/or registered and the name of the competent authority that has authorised and/or registered
- information on the existence of an out-of-court complain or redress mechanism as well as an outline of the investment firm's conflict's policy

For information on financial instruments see proposal above on article 19(2)

Article 19(7)

The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.

In good time prior to providing any investment service or, where appropriate, ancillary service to a professional client, an investment firm must:

- provide to the client the terms of the agreement in writing, setting out the rights and obligations of the parties and any other contractual terms, a description of the services provided and all other items of information necessary for the proper understanding and performance of the contract
- obtain the professional client's consent to the terms of the agreement as evidenced by signature or an equivalent alternate mechanism

A copy of the professional client agreement signed by the client, any related contractual documentation and any amendments to such agreement, must be kept by the investment firm for the duration of the client relationship and for at least five years after the end of the relationship. A copy must be provided to the professional client immediately after signing, and at any time subsequently on request.