

AFEP

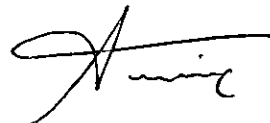
Paris, September 23, 2004

Dear Mr Secretary General,

In view to draw up its technical advice to the European Commission, CESR launched a consultation on implementing measures of the Directive on Markets in financial instruments in June 2004 (CESR/04-261 b).

You will please find enclosed the AFEP's comments, which are essentially linked to the scope of the difference made between retail and professional clients.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A. TESSIER', with a stylized flourish at the end.

Alexandre TESSIER
General Director

Mr Fabrice DEMARIGNY
Secretary General of CESR
11-13 Avenue de Friedland
75008 PARIS

AFEP RESPONSES (ref CESR/04-261 b)

Our references indicated in the titles refer to the consultation document.

Concept of best execution (§ 3.4.1 Question 3 in the consultation document)

Article 21 (1) of the Directive on markets in financial instruments deals with obligations to execute orders on terms most favourable to the client. Article 21.6 a) of the Directive stipulates in particular that the European Commission must establish criteria for determining the best possible result taking into account the size and nature of order and the retail or professional nature of the client.

Within this framework, CESR is requested to give advice on the criteria that make it possible to determine the relative importance of the factors to be taken into account, such as price, costs, order size and nature, speed and likelihood of execution and settlement. *CESR therefore wonders how the stated criteria could differ depending on the nature of the client.*

If, *in practice*, the execution conditions for an order ('execution service') requested by the client could vary depending on the nature of the client, there are also several cases where no difference exists between an order placed by a professional client and one placed by a retail client.

In practice, for the execution of an order, it is only the specific requests made by clients or the agreements that they have made with the investment firm which make it possible *in certain cases* to make a distinction between an order placed by a professional client and one placed by a retail client.

In many cases where orders are intrinsically identical or non-differentiated (no specific condition is applicable to the client, no request was made by the client, or the requests made by a professional client and by a retail client are identical), it would be illogical that the nature of the client would influence the relative importance of the factors to be taken into account to assess the principle of correct execution of orders, or in other words, that the obligation to ensure correct execution would vary according to the nature of the client rather than according to the order's characteristics.

A distinction between clients can be made in certain cases as part of decision-making and up to the issue of the order. The order is then executed by the investment firm in accordance with the defined conditions.

In a case where the characteristics of orders differ, to evaluate correct execution criteria and their relative importance, it would be appropriate to refer to specific requests for services or instructions formulated by clients, or to agreements concluded between the investment firm and the client. These requests instructions or agreements can differ according to the nature of the client.

The nature of the client (professional or retail) would thus be taken into account, in compliance with Article 21.6 a) of the directive.

Prior information to clients ('information to clients') (BOX 8 of the consultation document)

The directive on markets in financial instruments stipulates that the investment firm has general obligations to provide information to its clients, without making a distinction between professional and retail clients (Article 19).

For its part, CESR stipulates these obligations solely for retail clients (existing 'clients' or 'potential clients'- BOX 8), which may create the impression that no obligation of this nature exists relative to professional clients.

Annex II of the directive defines the 'professional client' as a person who 'possesses the experience, knowledge and competence needed to make its own investment decisions and properly assess the risks that it incurs'. It also stipulates that professional clients must be allowed to 'request non-professional treatment'.

To enable the professional client to request the benefit of this treatment, correctly assess the incurred risks or make informed decisions, *professional clients, like retail clients, should receive appropriate information from investment firms, as defined by Article 19.3 of the Directive for all clients: information on the investment firm and its services, on investment strategies' characteristics and risks, financial instruments, order execution systems ('trading venues'), etc.*

In practice, this may involve general conditions, information notes or presentation leaflets, which, moreover, are available to retail clients.

Client order handling rules (Article 22.1 – BOX 11 question 8 of the consultation document)

In its draft recommendation (SECTION 11), CESR states various provisions that guarantee the prompt and fair execution of client orders by investment firms. In this context, it notably refers to information on relevant risks to be communicated to retail clients only (§ 15) and wonders whether this risk information should apply only to retail clients.

For the reasons set out previously on prior information to clients, AFEP deems it essential for professional clients to have information on these risks as well.