



CESR

Mr Fabrice DEMARIGNY
Secretary General
11-13 Avenue de Friedland
75 008 PARIS

Paris, January 18, 2005

Re : CESR/04-562 Technical Advice on Possible Implementing Measures
of the Directive 2004/39/EC on Markets in Financial Instruments

Dear Sir,

EACT which includes 10 associations of corporate treasurers of the European Union representing more than 2500 groups or companies wishes to comment the Consultation Paper you issued in October 2004.

EACT will focus on technical advices proposed related to Articles 19 (1), (4) and (5) of the MiFiD Directive which all deal with "Conduct of business obligations when providing investment services to clients". After their reading, our general feeling is that obligations related to professional clients are somehow reduced to nothing and EACT strongly disagrees with this likely outcome. As specified in Article 19 (3) of the Directive, "appropriate information, and especially guidance and warnings of the risks associated with investments proposed, shall be provided in a comprehensible form to clients or potential clients so that they are reasonably able to understand the nature and risks of the investment service and take decisions on an informed basis". And EACT categorically opposes the possibility for a professional client to be considered as an "eligible counterparty".

You will find below our more detailed comments separated in three annexes:

- Technical advices on Article 19(1)
- Technical advices on Article 19(4)
- Technical advices on Article 19(5)

Hoping that you will give due consideration to our comments, we remain to your disposal for any question you may raise.

Yours sincerely

Pierre Poncet
Chairman

Copies for information

- M. Michel PRADA, Chairman of CESR Expert Group on Cooperation and Enforcement
- Mrs Pervenche Bérès, Chairwoman of the Economic and Monetary Affairs Commission, European Parliament

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Annex 1

Article 19(1)

General obligation to act fairly, honestly and professionally and in accordance with the best interest of the client

The mandate from the Commission is for CESR to provide technical advices on possible implementing measures on obligation for the investment firm to act fairly, honestly and professionally when providing investment or ancillary services other than the service of execution of orders on behalf of clients.

CESR advices only focus on portfolio management services for retail clients and EACT has no specific comments on your proposals.

But the rationale for this focus is that information owed or addressed to clients, as well as the client agreement and “know your customer” requirements are dealt through paragraphs 2 to 8 of article 19. Nevertheless, in the advices linked to those paragraphs, EACT sees nothing related to professional clients while most companies will be “*a priori*” classified as such.

So EACT stresses that the general obligation of article 19 should be implemented through at least a defined set of minimum information for any financial instrument and investment strategy and for any client, whether professional or retail. While EACT agrees that informations must be much more detailed for a retail client, informations for a professional client should at least include:

- the investment firm opinion on how the financial instrument or investment strategy fits to the client's objectives,
- the overall working of the financial instrument or investment strategy especially if it is a complex one,
- potential risks associated to the financial instrument or investment strategy.
- the accounting treatment under IFRS/US GAAP accounting norms of the proposed financial instrument or investment strategy.

Annex 2

Article 19(4)

Necessary information regarding the client's knowledge and experience in the investment field , his financial situation and his investment objectives

The mandates from the Commission are for CESR to:

- define the criteria for assessing the minimum level of information regarding the client's knowledge and experience, his financial situation and his investment objectives,
- determine the criteria for assessing the suitability of the investment service or financial instrument proposed.

The technical advices you propose for the first mandate clearly state that, once a client is classified as professional (procedure Annex II of the MiFiD Directive), then the investment firm is not required to get information from the client on his knowledge and experience. Moreover, it is the professional client's responsibility to inform the investment firm about his financial situation and his investment objectives. To say it more bluntly, once a client is supposed to be professional and unless he declares to be treated as retail, the investment firm has no responsibility in getting any information on the client and for the possible unfavourable consequences of any financial instrument or investment service provided.

Coming to the technical advices proposed for the second mandate, and because professional clients are somehow excluded from the first set, they are "de facto" excluded from the second one.

EACT strongly disagrees with these proposals which consider that any professional client is professional for all products and strategies from the simplest to the most complex ones. This view is clearly unrealistic; if not modified, these measures will very likely lead to serious conflicts between corporates and investment firms in the use of complex financial instruments or investment services. For instance a treasurer of a medium size company, classified as "professional client", will be knowledgeable only in forward products and plain vanilla options but not complex options such as barrier options.

So, for any professional client, EACT proposes:

1/ before the first transaction

- The investment firm writes to the client CFO stating that, as a professional client, he is supposed to understand the advantages and constraints of any financial instrument or investment strategy which the investment firm may propose. The CFO must acknowledge the letter and has the possibility to opt out for the retail client regime.
- The investment firm requires, if available, the financial risk policy document as well as its financial documents and reports. It must also get the necessary documents to conduct the transaction with the relevant persons.
- The minimum information for the proposed transaction as proposed in Annex 1 must be provided by the investment firm. If it is an investment strategy, the Finance head must provide a document explaining the financial objectives of the company

2/ after the initial transaction is completed, it is the responsibility of the investment firm to get the financial documents updated and it has to be done at least once a year. The financial risk policy document should list the financial instruments authorised and their limits.

3/ when a new financial instrument or investment strategy or combination of financial instruments and/or investment strategies is proposed, then the investment firm must precisely detail it and especially explain its advantages and risks.

Annex 3
Article 19(5)

It deals roughly with the same items as in article 19(4) for investment services not covered by article 19(4).

So EACT comments on the technical advices proposed are identical to the ones of Annex 2.

EACT insists on the fact that, on any investment service proposed by an investment firm to any professional client, a minimum set of information on the service has to be provided while, at the same time, the investment firm should get a minimum set of updated data on the client (financial situation, financial risk management policy, dealing authorisations).

EACT stresses the fact that it categorically opposes the CESR proposal (CESR/04-562 Consultation Report on the 2nd Set of Mandates on possible implementing measures of the MiFiD Directive: pages 54 to 57) whereby professional clients might be considered as “eligible counterparties”. In no circumstances, a professional client could be considered as an “eligible counterparty” because, in this case, the MiFiD Directive excludes any duty of information. And the will of the European Legislator which, in the MiFiD Directive, imposes minimum set of information for clients (professional and retail) would not be respected. .