

29 July 2004

By email to CESR at www.cesr-eu.org

Dear Sirs,

London Office
112 Middlesex Street
London E1 7HY
Tel: +44 (0) 20 7247 7080
Fax: +44 (0) 20 7377 0939
Email: info@apcims.co.uk

Re: Call for Evidence on possible implementing measures on the Directive on Markets in Financial Instruments

APCIMS is the Association of Private Client Investment Managers and Stockbrokers. We represent some 223 firms operating from over 400 sites in the UK and continental Europe and acting for the private investor (a list of members is attached). Our firms have some €430 billion funds under management and act in all areas of the professional financial industry for private clients. In April 2002, the European Association of Securities Dealers merged with APCIMS thus enhancing APCIMS' role in continental Europe.

We welcome the opportunity to provide the views of our members on this call for evidence. The Directive on Markets in Financial Instruments (MiFID) is one of the central pieces of financial legislation in the Financial Services Action Plan, and our members who are both market participants and agency brokers acting on behalf of private clients will be affected by almost all of the changes being introduced. We welcome the much improved processes for consultation adopted and now practised by CESR and we believe that they will ultimately result in a better outcome on the main regulatory issues.

In this response, we provide two general comments, first, on the questions of the timetables for technical advice and implementation, and secondly, on the consultation processes, and these comments are set out below. We also comment in more detail on the priorities for the APCIMS community in the attached pages.

APCIMS General Comments

1. Timetable

We are all aware of the tight timetable for the work to be completed by CESR, the European Commission, and also by market participants and firms themselves to implement this important piece of legislation. We also appreciate that the timetable has been set by the European Council and is largely outside CESR's responsibility. But we would remiss if we did not point out some of the concerns that we have over the short timescales available, for not only will it be a challenge for CESR to complete its work on possible implementing measures, it will also be a major project for individual regulators and firms to introduce the new regime and rules. We therefore urge CESR to focus its advice on what it believes are the fundamental new requirements from the level 1 legislation rather than trying to capture absolutely every single small detail that would simply be consequential rather than core.

The task ahead for firms and trade associations is a very large one indeed and we believe that the more detail that is contained in the implementing measures, the longer the time periods will be needed for firms to introduce the new rules into business practices. For example, we believe that the following are some of the new requirements that are likely to be introduced as a result of the MiFID and CESR's work, and which will represent major changes for our firms:

- the introduction of equipment to record telephone conversations of client orders;
- the introduction of a mandatory benchmark for assessing portfolio management;
- requirements to monitor different reporting mechanisms or execution venues for “best execution”
- client money calculations
- unit trust reconciliation arrangements.

Many of these changes will require firms to make systems changes, and will also involve changes to firms’ Terms and Conditions where firms’ marketing literature and other documentation must also be altered. Such changes will generally require a period of over six months to complete from the date on which the final rule change is announced. Firms cannot risk planning the detail of the changes until there is certainty from their home state regulator. In the case of having to make systems changes, it is simply unrealistic and unachievable for firms to do this in a period of under twelve months. As noted above, we recognise that the timetable is not CESR’s direct responsibility but we hope it will take note of the real likelihood that implementation will be flawed and accordingly encourage it to work with the Commission and the Council to introduce a more realistic approach.

We note that in several areas the European Commission has asked CESR to consider criteria for doing something rather than identifying the actual detailed steps eg on Article 19.4, CESR is asked for technical advice on implementing measures on “the criteria for assessing the minimum level of information that should be obtained from the client.....”. We ask that CESR should confine its advice to general criteria rather than providing more detailed advice which if adopted will be difficult if not impossible to implement in the given timescales.

Two other aspects of the timetable that are relevant are on transitional periods and the grandfathering of existing arrangements. The question of transitional periods was discussed at CESR’s open meeting held in Paris on 8 and 9 July 2004 to discuss the first set of CESR implementing measures. There was some uncertainty expressed by the CESR speakers about whether provision would be available for transitional periods. We believe that it is vital for both transitional periods and for grandfathering to be permitted and strongly recommend that authority is given to home state regulators to apply such arrangements.

2. Consultation process

There are serious details to be decided under the principles adopted in the level 1 legislation. The consultations now underway will involve real effort from all concerned and we believe they must focus on those details. In other words, we ask CESR not to waste effort on re-opening issues already resolved.

The readings in the European Parliament and subsequent compromise final text adopted were the result of extensive and lengthy debate and deliberation – and were a genuine compromise to obtain a harmonised approach to regulation. It would clearly be counter-productive for debates to be re-opened and repeated in the course of CESR’s work on implementing measures, and we undertake to inform CESR and other appropriate institutions should we believe that this is happening.

We hope this response is helpful, and we would be pleased to provide clarification or further information on any point raised.

Yours sincerely,

Catriona Shaw
Head of European Affairs

Priorities for APCIMS firms

The main priorities for APCIMS firms in this second set of implementing measures are the following:

- a. Definition of investment advice – Article 4
- b. Conduct of business rules – Article 19
- c. Pre-trade transparency – Articles 4 and 27
- d. Retail size orders – Article 27.3

a. Definition of investment advice – Article 4

The issues surrounding the request to CESR to provide advice on criteria for differentiating a personal recommendation from either general recommendations, or marketing communications etc are closely aligned with those in Article 19, and our comments are relevant to both Articles. The CESR advice must take into account the different types of investment advisory services and therefore the different levels of advice that can be given. We have listed in our comments on Article 19 the different types of services that can be provided and which enable firms to offer a range of different services and likewise which enable consumers to have real choice.

As outlined in the existing CESR Conduct of Business Rules, a key component of investment advice which differs from general recommendations, marketing communications, information or simple offer, and activities by tied agents, is the knowledge that an investment advisor has of a client's personal and financial circumstances which enables financial advice to be given to suit a client's specific circumstances and needs.

b. Conduct of business rules – Article 19

The single most important criterion for considering advice in respect of requirements for conduct of business, is that they must be proportionate to the level of service being provided to the client. There are substantial costs attached to each and every conduct of business rule and these costs have to be paid for by clients. We therefore believe that an impact analysis should be undertaken for each and every additional requirement to be introduced, and this analysis should provide a detailed assessment of how and why additional requirements will add value to or enable additional client protection.

It is important to understand the different types and levels of investment services and advice offered in the private client financial sector ie including stockbroking parts of high street banks, independent stockbrokers, investment managers and private banks. The following are examples of the types of services offered by our members, but it should be noted both that there are variations on these services and that developments need to continue in this area in response to the needs of clients.

i. advisory services – there are broadly two types, limited and full

A limited advisory service is sometimes known as a non-managed advisory service and is a service whereby a firm will provide advice on request to clients. Clients pay commission (at a higher rate than for a execution-only service) and receive advice on a specific area of their own choosing. Typical examples are of clients wishing to raise a specific small sum (eg average €8000) to pay for school fees or to buy a new car, and asking what part of the savings in their portfolio they should sell, or, clients requesting advice on which particular product, usually a unit trust or ISA (individual savings account) they should buy. Each client has to complete a profile of his personal circumstances including financial situation, and sign an advisory agreement.

A full advisory service is where a firm acts as investment manager, and provides a comprehensive range of investment advice according to a client's profile. A firm charges a fee for this service, and each client completes a detailed profile of his personal circumstances. Responsibility for acting

upon the advice provided by the firm rests with the client who may or may not instruct the firm to carry out transactions in accordance with the advice given.

ii. Discretionary services are those where a client asks a firm to take full responsibility for all investment decisions, and a firm will carry out transactions on its own initiative without consulting a client, according to the best interests of the client's interests and balance of portfolio. Discretionary clients are often persons in senior political or professional positions who may specifically require firms not to consult them about investment decisions. This is to avoid any conflict of interest and to demonstrate that they have no detailed knowledge of investment decisions taken on their behalf.

iii. Execution only services are those where the service provided is limited to the reception and transmission of an order at the specific request of a client. The client has full responsibility of the choice of investment, and will pay either a percentage commission on the total value of the transaction, or will pay a flat rate fee. Execution only services require clients to go through an information gathering process with clients in order to satisfy anti money-laundering requirements, and to enable the firm to gather sufficient information on the client to determine that the level of service is appropriate for that client's needs.

Perhaps the single most important element in the process is ensuring that both firms and their clients are absolutely clear about what type of service is being offered/delivered and that any suitability or appropriateness test is tailored to the service being offered.

We have commented extensively on the requirements surrounding execution only business, and the need for requirements in this area to be minimal and sensible. Of particular interest in this Call for Evidence is the advice under Article 19.6, i.e. the criteria for determining what is to be considered a non-complex instrument and, the criteria for determining when a service is provided at the initiative of the client.

On the first of these points, the criteria for a non-complex instrument, it is important that markets are as open as possible, and that firms can continue to develop new products and instruments to meet market and consumer demand. We therefore recommend that a flexible approach is taken so that consumers can continue to have choice in what services and products are available to them. We believe that the criteria should be general and should avoid being overly prescriptive. We also believe that any form of rigid or narrow definition of what might be complex or non-complex would effectively shut out new investors in the market and would hinder or completely stop the market and new financial products developing. Furthermore, what might be complex or non-complex in today's market place could differ over a period of time and it is important not to shut future consumers out of the financial market place as it develops. For all of these reasons, we suggest that a flexible and high level principles based approach is adopted.

In relation to the criteria for determining when a service is provided at the initiative of the client, we do strongly support the sensible wording in Recital 30, which we believe sets out what are very reasonable principles which would not benefit from further refinement. We hope that CESR will confine its work on defining criteria in a very broad way around these principles.

c. Pre-trade transparency – Articles 4 and 27

APCIMS member firms and their clients support choice and diversity in financial markets. In particular, they do not wish to be constrained in their ability to have access to any and all information that contributes to an open market place. We recommend that whatever measures are adopted in relation to pre-trade transparency, that they do not constrain the potential for future market developments and for both market participants and consumers to have proper choice of markets, types of trading platforms and methods of trading.

d. Standard Market Size (27.1 and 2) and Retail size orders – Article 27.3

We have previously commented on the difficulties of defining an “average retail sized order” and on what is a “standard market size”. In the light of the decision to go ahead with such definitions, we recommend that further work is done by CESR together with market operators on ‘standard market size’. On the definition of “retail size order” we believe that this should be set at a level to allow for market structures to operate in a flexible way, attracting sufficient liquidity to offer a healthy open marketplace for a wide range of investors and participants. We believe that it is probably unwise to set criteria around order type, service provider or type of market participant. Whatever criteria are chosen, it will be important that the average for a retail sized order can be reviewed regularly and adjusted in the light of both company and market circumstances and is kept at as low a level as possible.

Ordinary Members

Abbey National – City Deal
Aberdeen Private Investors Ltd
ADM Securities
American Express Financial Services Europe Ltd
Andrew Gwynne & Associates
S P Angel & Co Ltd
Ansbacher & Co Ltd
Arbuthnot Fund Managers
Arnold Stansby
Ashburton (Jersey) Ltd
Astaire & Partners
Attorneys at Law Borenienius & Kempinen
Barratt & Cooke
Berry Asset Management Plc
Blankstone Sington Ltd
Brewin Dolphin Securities Ltd
Brook Partners Ltd
Brown Brothers Harriman Ltd
Brown Shipley & Co Ltd
Cambridge Investments Ltd
Campbell O'Connor & Co
Capita Trust Company Ltd
Cardale Stockbrokers Ltd
Carr Sheppards Crosthwaite
Cave & Sons Ltd
Cazenove Fund Management
Charles Stanley & Co Ltd
Cheviot Capital Ltd
Chiswell Associates Ltd
C Hoare & Co
Christows Limited
City Asset Management Plc
Close Fund Management Ltd
Close Private Asset Management Ltd
Collins Stewart
Comdirect Ltd
Cripps Portfolio Ltd
Direct Sharedeal Ltd
Douglas Deakin Young Ltd
Dryden Wealth Management Ltd
Edward Jones
E*Trade Securities Ltd
Every's Solicitors
Farley & Thompson
Fiske Plc
Generali Portfolio Management Ltd
Gerrard Ltd
Gibraltar Asset Management Ltd
Goy Harris Cartwright & Co Ltd
Halifax Share Dealing Ltd
Hargreave Hale Ltd
Hargreaves Lansdown Stockbrokers Ltd
Harris Allday
Hedley & Co
Hichens Harrison & Co Plc
Hill Martin (Asset Management) Ltd
Hoodless Brennan & Partners Plc
HSBC Investment Management
Iain Nicholson Investment Mgmt Ltd
iimia Plc

Insinger Townsley
Irwin Mitchell Solicitors
James Brearley & Sons
James Sharp & Co
J & E Davy
JHC Securities LLP
J M Finn & Co
J O Hambro Investment Mgmt Ltd
John Scott & Partners Ltd
J P Jenkins Ltd
Kas Bank N.V.
KBC Peel Hunt
Killik & Co
Leopold Joseph & Sons
Lloyds TSB Stockbrokers
London York Group of Companies
M D Barnard & Co Ltd
Morgan Stanley Quilter
Murray Beith Murray
NatWest Stockbrokers
NCL Smith & Williamson
Noble Asset Managers Ltd
Norwich & Peterborough Building Society
ODL Securities Ltd
Pershing Limited
Philip J. Milton and Company Plc
Pilling & Co
Principal Investment Management Ltd
Pritchard Stockbrokers Ltd
Ramsey Crookall & Co Ltd
Rathbone Investment Management Ltd
Raymond James Investment Services Ltd
Redmayne Bentley
Rensburg Investment Management
Reyker Securities
Rothschild Private Management Ltd
Rowan Dartington & Co Ltd
Royal Bank of Canada Investment Mgmt (UK) Ltd
Ruffer LLP
Russell Wood Ltd
SAGA Investment Direct Ltd
Savoy Investment Mgmt Ltd
Seymour Pierce Ltd
The Share Centre
Shore Capital Stockbrokers
Speirs & Jeffrey Ltd
Standard Bank Jersey Ltd
Taylor Young Investment Mgmt Ltd
T D Waterhouse
Teather & Greenwood
Thesis Asset Management Plc
Thornhill Investment Management Ltd
Tilly Bailey & Irvine – Solicitors & Notaries
Tilman Asset Management
Tilney Investment Management
Travers Smith Braithwaite
Truro Stockbrokers
UBS Laing & Cruickshank
Vartan & Son
Walker, Crips Stockbrokers
W H Ireland Ltd

Williams de Broe Plc
Yorkshire Investment Group Asset Mgmt

Total: 123

Associate Members

ABC Clearing Limited
ADP Brokerage Services Group
Advent Europe Ltd
Aitken Campbell & Co Ltd
Archipelago Europe Ltd
Bank of Scotland
Barlow Lyde & Gilbert
Bristol & West Plc
BT Syntegra
Business Architects International
Cantor Index Ltd
City Consultants Ltd
City Index
ComPeer
CRESTCo Ltd
Deloitte & Touche
Depository Trust & Clearing Corporation
Dresdner Kleinwort Wasserstein
Exact Technical Services Ltd
Exchange Data International Ltd
HSBC Bank Plc
I G Markets Ltd
Instinet Europe Ltd
Investit
Investmaster Ltd
Investment Sciences Ltd
Knight Equity Markets International Ltd
Knowledge Technology Solutions Plc
KPMG LLP
Lawshare Ltd
London Stock Exchange
MBA Systems Ltd
Merrill Lynch International
Monument Securities
OFEX Plc
OM
Penson Worldwide Settlements Ltd
Performa
Peter Evans & Associates
Pulse Software Systems Ltd
Proquote Ltd
R A McLean & Co Ltd
Reuters Ltd
Rhyme Systems Ltd
Royal Bank of Scotland – Financial Institutions Group
SAM Systems Ltd
S J Berwin
Speechly Bircham
State Street Bank & Trust Co
Summerson Goodacre
SunGard Investment Systems

SWIFTsc
Talos Securities Ltd
Telekurs Financial
Thomson Financial Ltd
Virt-x Exchange Ltd
Verband unabhängiger
Vermögensverwatter
Winterflood Securities

Total 58