BIPAR

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BIPAR, the European Federation of Insurance Intermediaries, is a non-profit European organisation grouping professional associations of insurance intermediaries in Europe.

It presently has a membership of 44 national associations, established in 28 countries, and represents some 80,000 insurance agents, brokers and independent financial advisers, employing in all about 250,000 people.

Founded in Paris in 1937, BIPAR has been established in Brussels since 1989. It is today the official and recognised voice of insurance intermediaries with the European Institutions.

4 October 2004

BIPAR response to CESR's advice on possible implementing measures of the Directive 2004/39/EC on markets in financial instruments (CESR/04-261b)

I. Introduction/ General comments

BIPAR is pleased to offer the following comments on CESR's advice on possible implementing measures of the Directive 2004/39/EC on markets in financial instruments which will affect many practitioners members of its national associations throughout the EU.

Independent financial advisers and insurance intermediaries which are predominantly small and medium-sized firms are brought within the MIFID because of its coverage of investment advice. We ask CESR to bear this in mind when it drafts its final advice on possible implementing measures of the MIFID. Its proposals will impact on such SMEs as well as on the larger institutions on which the MIFID is primarily focused. Imposing on such SMEs the same requirements as on larger institutions would go against the general policy of the European Commission which aims at promoting SMEs.

In the explanatory memorandum of its proposal adopted on 19 November 2002, the European Commission clearly explained that *"The proposal seeks to establish a situation in which inclusion in this regulatory framework should not impose unjustified or over-onerous regulatory demands on investment advisers."*
In Recital 3 of the same proposal, it added that *"Due to the increasing dependence of investors on personal recommendations, it is appropriate to include the provision of investment advice as an investment service requiring authorisation. Therefore **proportionate and relevant requirements** should be imposed on investment advisers to ensure that the content of **personal recommendations** is not influenced by factors other than the financial situation, investment objectives, knowledge, risk profile and expertise of the client."*

In many EU Member States the activity of investment advice is very often undertaken concurrently with the activity of insurance mediation as defined in the 202/92/EC Directive on insurance mediation (IMD). Therefore any inconsistencies between the two regulatory regimes set up by the IMD and the MIFID could lead to major difficulties for an insurance intermediary/financial adviser who would have to operate under the two regimes, advising on the two sets of products.
We ask CESR to allow a smooth undertaking of these two activities by the same legal or natural person and to advise the European Commission to avoid any contradictory or duplicative application of the Insurance Mediation Directive and the MIFID in its technical implementing measures of the MIFID.
Only in this way, the basic principles of the proportionality of requirements as laid down in the Directive proposed by the European Commission can be achieved for small and medium-sized operators.
In this respect BIPAR would suggest that CESR work in close collaboration with CEIOPS and its consultative panel on this issue.

II. Specific comments

- Question 1.1.
Compliance Function
It is important that the position of the small intermediary firm is properly appreciated and an over-bureaucratic reliance on process is avoided. Option d is by far the most realistic for the smaller business and we do not believe that any consumers will suffer as a consequence. Indeed, more consumers will be disadvantaged if they are deprived of access to good advice about investments because the costs of MIFID compliance have proved too high for businesses to continue to offer the service.

Code of Conduct
Any deferred implementation of requirements for independence of the compliance function should take account not just of the nature and scale of the investment firm but also of its complexity.
Most of the listed requirements are less applicable to intermediary businesses which offer advice but do not deal direct in the markets. The code may be too prescriptive for the smaller business and should be regarded as High Level principles, to be applied as appropriate to a business.

Reporting Requirements
The application of these should be proportionate to the size of the business.

Outsourcing
These provisions do not really apply to firms which do not hold client money and only offer investment advice.

- Question 4.1.
Record Keeping
It is difficult to demonstrate a negative; a provision with such wide-ranging a definition could lead to an excessively complex audit trail. Proportionality is very important.
Applying such a requirement for small to medium-sized independent financial advisors and insurance intermediaries would be disproportionate to the compliance risk such entities pose to competent authorities and consumers alike.

It would represent a significant compliance cost burden on such small investment firms as auditors to such firms might well require independent verification of the firm's confirmation to the competent authority that they (the firm) had not acted in breach of their obligations under the Directive, before signing off on the firm's audited accounts and reports. Effectively all of the firms activities and individual client recommendations during their financial reporting period would become subject to independent audit in order that the firm's statement of compliance can be held to be 'true and fair'. The cost of the firm's audit would be likely to increase significantly if this requirement was imposed on small to medium-sized independent financial advisors and insurance intermediaries.
Increased direct and indirect compliance costs eventually have to be borne by the consumer.

Many of the detailed requirements will not be relevant to firms only offering investment advice and not holding client money.
The same applies to requirements on **the holding of client assets**. A small investment firm must reasonably be able to assume that a depository authorised and regulated by a competent authority is a safe entity to hold clients assets, unless they are contrary indications available and visible to the firm at that time. Such small investment firms simply do not have the expertise or resources to 'second guess' the relevant competent authority as to the financial well being of a particular regulated depository. We would therefore feel that option (b) above is the most appropriate and practical approach to take.

The issue of **conflicts of interest** will not apply to advisory firms in the course of their business for their clients; but it may relate to the relationships between providers and distributors.

- Information to Clients
Information should not be so extensive that clients are overwhelmed by it and cease to take any interest in it. It will be important to distinguish between those requirements (especially in sub-groups 4 and 7) whose relevance is to traded securities as opposed to collective investments.

Questions about risk are important and will form part of the process of giving advice. These proposed requirements should not cut across that process and should not be unduly prescriptive about the means and format in which the information is communicated. For example, the requirements outlined in the Terms of business should be capable of being put in another document (such as the Menu of Services and charges) where they will have more impact.

- Recording of Advice
Clients should be given, usually in writing, a document setting out the investment advice, including any recommendations and the reasons for them. This should be received by the client whilst it is still possible for a decision to be changed and certainly before the end of any cooling-off period. The rules should not be so prescriptive that fail to take into account the many varieties of way in which client relationships may be conducted.