

BIPAR

Bureau International des Producteurs d'Assurances et de Réassurances
European Federation of Insurance Intermediaries

Avenue Albert Elisabeth 40, B-1200 Bruxelles

Tel: +32/2/735 60 48

Fax: +32/2/732 14 18

BIPAR@skynet.be

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.

21 January 2005

BIPAR response to CESR's draft technical advice on possible implementing measures of the Directive 2004/39/EC on markets in financial instruments (CESR/04-562)

I. Introduction/ General comments

BIPAR is pleased to offer the following comments on CESR's draft technical 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 again 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 2002/92/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.

BIPAR would like to underline that intermediaries need as much flexibility as possible in their compliance arrangements. It should be for the small firm to show that it has suitable arrangements, not have them imposed by a regulator.

II. Specific comments

- Definition of investment advice (Article 4(1) no.4)

CESR tries to differentiate personal recommendations from other forms of generic advice and information. BIPAR suggests that the complexity of the solution will cause problems for intermediaries. The key regulatory question is whether a consumer believes that advice has been given, not whether a particular process has been followed, in the course of which specified information has been gathered and communicated.

The question of whether a client feels that advice has been given depends on all circumstances to do with the relationship between adviser and consumer. Thus a client who receives a mail shot from a firm which previously has advised him/her is more likely to feel that the mail shot contains advice than if there had been no previous contact. BIPAR is of the opinion that CESR should refer to the “bilateral nature of relationships/contacts” between client and firm (second option of question 1.2). There has to be some subjective element in assessing whether advice has been given – given all relevant factors.

BIPAR suggests that firms which try to operate in a way which evades authorisation are unlikely to succeed; but they could set up subsidiaries to offer general marketing recommendations and then execute business through another part of the business.

- Suitability Test (Article 19(4))

BIPAR imagines that national regulators will produce the real detail of what goes into the process of assessing client suitability. In paragraph 1a), the text should not be taken to mean that no client can be advised on an instrument with which he/she has no familiarity. BIPAR thinks that the intention is reasonable; the words may be over-prescriptive and they down-play the role of the adviser in explaining what products do.

- Appropriateness Test (Article 19(5))

This applies where advice is not given; so it could cover direct offer mail shots. We do not like these but must acknowledge that many advisers use them. BIPAR thinks that the directive will mean that mail shots have to be targeted and that those sending them have to be able to justify their targeting, if they contain anything resembling advice (back to the definition of advice).

- Execution only (Article 19(6))

As only non-complex instruments may be offered in this way, BIPAR suggests that the definition of non-complex should follow the economic effect of the instrument and especially exclude any instrument with a derivative element. This would have stopped much of the problem the UK has had with derivative backed income products.

BIPAR also suggest that we agree that a firm must not exert undue influence for a deal to be deemed execution –only.

III. Conclusion

BIPAR asks CESR to bear in mind that its proposals will impact on independent financial advisers (IFAs) and insurance intermediaries as well as on the larger institutions on which the MIFID is primarily focused. IFAs and insurance intermediaries are **predominantly SMEs**. 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 this respect BIPAR fully agrees with **EU Commissioner Charlie McCreevy's** recent statements on the Financial Services Action Plan and therefore urges CESR to adopt requirements for IFAs and insurance intermediaries which will be ***“proportionate, precise, with the right level of detail and without duplication and justified where necessary by cost benefit analysis”***.