



ASOCIACION ESPAÑOLA DE BANCA

**COMMENTS BY THE ASOCIACIÓN ESPAÑOLA DE BANCA (AEB) TO THE
CESR DOCUMENT CONCERNING POSSIBLE IMPLEMENTATION
MEASURES OF THE DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL
INSTRUMENTS
(Second set of mandates, CESR/04-562b)**

As well as we indicated with respect to document CESR/04-603b (first set of mandates), the general impression caused by the document that we are now dealing with is also positive, although in general it probably proposes a too detailed regulation of level 2.

Furthermore, we consider it important to insist on the need for a high degree of harmonisation in those areas that are particularly sensitive from the perspective of the desirable equality in the competition conditions amongst markets and investment services' providers (level playing field); in particular, in relation to the requirements of pre-trade transparency for systematic internalisers.

In relation to the various sections of the document, the following concerns are raised:

1. INVESTMENT ADVICE

On specifying in level 2 the scope of the concept of investment advice, the purpose for which it has to be clarified must be very much taken into consideration. Such purpose is to determine which type of advice must be reserved for investment firms (and credit institutions) and which must be able to be provided without the need for any administrative licence, and, furthermore, which advice must be considered investment service for the purpose of applying regulations like article 19.4 of the Directive (client's knowledge).

In any event, the focus of the document on this issue seems reasonable: not including the advice regarding which service providers are adequate and not including merely generic recommendations.

2. SUITABILITY

In relation to article 19.4 of the Directive, the document raises the question (Question 4.1) of whether, in the case of a client refusing to provide information, advising or management services can however be provided to them on the basis of the assumption that the client has no knowledge and experience, the assets provided by the client are his only liquid assets and/or the financial instruments envisaged have the lowest level of risk. In our opinion the answer is clearly yes.

Apart from that, the criteria contained in the document (Box 8) whilst useful and interesting in order to both assess the minimum level of information that must be obtained from each client as well as to assess suitability, they seem to be excessively detailed for the purpose of regulating level 2.

3. EXECUTION ONLY

There is a very substantial difference between services like advising or management and that of merely executing orders. For this reason, the scope of execution-only services should not be restricted in level 2:

- The criterion of considering all derivative instruments as always complex instruments seems too strict. The argument used (that the straight derivatives are not mentioned in article 19.6 of the Directive) is not convincing. And it has to be taken into account there could be merely complementary derivative transactions performed simply to reduce the risk.
- In relation to when a service is provided at the initiative of the client, we deem regulation at Level 2 to be unnecessary. The concept itself and Recital 30 of the Directive are more than enough.
- It also does not seem necessary to have regulation at Level 2 of the content of the related warnings.

4. TRANSACTIONS EXECUTED WITH ELIGIBLE COUNTERPARTIES

The document proposes that level 2 establishes the investment firm's obligation to communicate to the clients that are eligible counterparties "per se" (article 24.2 of the Directive), before providing any service, that they are going to be treated as such, as well as their right to ask to be treated as normal clients.

This proposal is alien to the system of the Directive and puts the eligible counterparties "per se" (financial institutions ...) on a level with the rest, which seems excessive. It would be reasonable to presume that the professionals know the regulation.

5. PRE-TRADING TRANSPARENCY FOR SYSTEMATIC INTERNALISERS

As we mentioned previously, this is one of the subjects in which the level of harmonisation should always be high.



3.

In relation to when a liquid market for securities should be considered, a determining issue for pre-trade transparency, we understand that for the purpose of simplicity and clarity a system should be followed which would take as a reference the most important indexes in each country or which would refer to lists established by each supervisory authority.

In any event, the condition of security negotiated on a liquid market should be recognised not only for the main securities but also for all of those which, officially quoted, enjoy the minimum liquidity necessary in order to consider that the market-formed prices are reliable.

13 January 2005