
AFFAIRES JURIDIQUES GROUPE

**Group Legal Affairs
European Law**

Monsieur Fabrice DEMARIGNY
Secrétaire Général
Comité Européen des Régulateurs
de Valeurs Mobilières
11-13, avenue de Friedland
75008 PARIS

Paris, le 22 avril 2005

Monsieur le Secrétaire Général,

Vous voudrez bien trouver sous ce pli une nouvelle réponse du Groupe BNP PARIBAS à la consultation publique lancée par CESR en mars 2005 :

- CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments (CESR/05-164).

- Aspects of the definition of Investment Advice and of the General Obligation to Act Fairly, Honestly and Professionally in the Best Interests of Clients
- Best execution
- Market Transparency

Nous souhaitons vous soumettre une contribution additionnelle mettant en lumière les préoccupations de l'activité de « direct brokerage », compte tenu de l'importance des répercussions des mesures proposées par CESR sur cette activité.

Nous vous en souhaitons bonne réception et restons à votre entière disposition pour toute question que vous souhaiteriez nous poser.

Je vous prie de croire, Monsieur le Secrétaire Général, à l'assurance de notre considération distinguée.

Florence SIREL

European Law
Group Legal Affairs
BNP PARIBAS

Copie : M. Carlo COMPORTI

20 April 2005

**CESR's draft technical advice on possible implementing measures of the
Directive 2004/39 EC on Markets in Financial Instruments - [MiFID](#)
Consultation (ref: CESR/05-164)
2nd set of mandates**

Contribution by BNP Paribas

CESR's draft advice on lending to retail clients and "best execution"

□ **Presentation of BNP Paribas**

BNP Paribas (www.bnpparibas.com) is a European leader in banking and financial services, with leading positions in Asia and an active presence in the United States. It is the first bank in terms of net income and market capitalisation in the Euro zone. The group has one of the largest international banking networks with a presence in 85 countries and 90,000 employees world-wide. BNP Paribas enjoys key positions in Corporate and Investment Banking, Private Banking & Asset Management, Insurance, Securities Services and Retail Banking.

□ **1. Introductory remarks**

1.1. We appreciate the consultation by CESR of the financial industry as a positive initiative and welcome the opportunity to express our views on the important implementation measures of the Directive on Markets in Financial Instruments ("MIFID").

We fully concur in the views expressed by the French Banking Federation (FBF), AFEI (the French Association of Investment Enterprises) and the European Banking Federation (EBF) in their responses to the present consultation. However, in view of the important subject matters of CESR's consultation, we wish to submit herewith additional comments.

□ **1.1 *Timetable***

The consultation paper was published by CESR on March 3, 2005 and had to be evaluated within four weeks. Within this short period of time it was not possible to evaluate important

key issues such as “Lending to retail clients” (Chapter 1) and “Best execution” (Chapter 3) and other issues within BNP Paribas group as a whole. Therefore, we would like to submit hereunder a response, in addition to that submitted on 4 April 2005, as follows.

2. General comments

We are of the opinion that the above mentioned aspects of the consultation paper will have a significant impact on business models, organisation, financial and economic set-up of different subsidiaries of ours (e.g. such banks offering direct banking and execution only in the retail market). One of these subsidiaries is Cortal Consors.

Cortal Consors, a subsidiary of BNP Paribas, is one of the leading investment banks for private financial investments and online trading in Europe. Cortal Consors offers investors a complete range of investment products and services. Most of these services are offered via highly-developed and sophisticated technology systems. Cortal Consors has over 1.1 million customers and is located in 6 EU countries: Germany, France, Spain, Belgium, Luxembourg and Italy.

It would much appreciated, therefore, if the following aspects could be evaluated and taken into consideration by CESR.

From our point of view the proposal put forward by CESR does not take sufficiently into account characteristics of today’s retail markets. Nowadays a large and ever increasing number of customers are highly self-responsible, highly self-directed and knowledgeable investors with very good skills in trading. In Europe for over 10 years, customers have been doing their investment decisions on their own without the advice or recommendation of a bank or asset manager. Based on the clear need for a straight forward and inexpensive service, the business model of **online brokerage on the execution-only** principle was developed. This business model has changed the security trading market in more than one European market and has resulted in a lowering of costs and service charges for retail customers.

The consultation paper focuses on those retail clients that need and want advice and recommendations from their banks. It does not take into account that an ever growing number of customers are self-determined and wish to continue to do their investments on their own.

The “best execution” approach and the “suitability” test when a customer wishes to receive a loan or credit from a bank would lead to sizeable and consequential changes in the existing retail banking models for direct banking customers, which are not warranted given the customer’s need point of view.

Since today’s direct brokerage business is highly competitive and technically very sophisticated a technically highly developed hard- and software-equipment through the broker is necessary. A system which would lead to different automated information and suitability tests during the process of placing an order would be counterproductive and would ruin the competitiveness of the system. The pricing of direct brokerage is based on automation possible through IT systems. Non-European banks, especially in the USA and Switzerland, which have also specialised on direct brokerage business for retail clients would be favoured

– derive a competitive advantage – and the business model of European competitors may result into a huge setback for them compared to non European competitors as the latter would not be faced with the same regulatory constraints, while offering more or less the same services.

3. Detailed comments

3.1. Chapter 1 – Lending to retail clients (Article 19 (1))

Page 6 of CESR's Second Consultation Paper: a suitability requirement is not workable

The differentiation at Level 1 reflecting the special rules of Articles 19 (4) to 19 (6) is of major importance. The idea to do away with this differentiation between such customers wishing to receive advice and those who are trading as self-determined well experienced execution-only customers is not pertinent. If a customer is self-determined he will not need more or further advice, just because he would like to execute orders within a credit line which was granted to him by his bank. Such a credit line is only granted by the bank, where a customer is admitted to the direct brokerage services. When credit is granted by the bank to a customer, such customer will be informed concerning the legal and commercial risks of such credit. A further advice to the customer – especially whenever the client intends to use the credit or loan for transactions would be a restraint in the offered trading functionalities. As a result such a trade could not be accepted automatically. The customer would have to call for or otherwise receive advice entering orders. The basic offering to the customer of bringing orders fast to the market at affordable pricing would not be possible for trading financed by a credit even though the credit would be sufficiently backed by the customer's existing assets.

Today's direct brokerage business is mainly a business in which very large numbers of transactions have to be processed in a very short period of time for each single transaction. Suitability tests for both, credit/loan and the underlying transaction for a self-determined and experienced customer, is an absolute barrier for every usage of a credit or a loan for a transaction in the direct brokerage business.

Today's direct brokerage clients are used to freely make their investment decisions in the technical system of the bank. Every obstacle retarding or even preventing a trade would not only result in damaging effects on the daily business of a direct broker, it would also considerably disturb the customers and take away a trading option which they have explicitly chosen. Immediate order executions would be slowed down. Customers would fail to obtain the spread or the market price they targeted, as the execution could not be processed instantly. Order processing would have to be interrupted or at least held back by a consultation that is not necessary, not requested and not target-oriented. Suitability tests or advice in the preliminary stages of credit based transactions to self-determined customers would significantly harm such customers by reducing flexibility and speed of their trading possibilities.

We do appreciate that CESR expressed that there are valid reasons for investment firms to provide loan and credit facilities to their clients as well as the fact, that CESR wants to enable the client to take advantage of short term investment opportunities. In the mass transaction

business of modern direct brokerage suitability tests for direct brokerage customers would significantly reduce the above- mentioned valid reasons.

It should also be noted and stressed that Directive 2004/39/EC recognises the possibility of execution-only brokerage. It recognises the fact that self directed customers have the need for inexpensive and fast trading facilities. CESR consultation paper substantially introduces limitations to the possibility of execution-only business if suitability tests would be required for each credit grant.

Another question also remains open: Why would a credit backed by securities used for trading be different from a credit backed by securities used for personal needs (such as financing holidays, etc...). It is acknowledged that a credit backed by a securities account could be used freely for purposes other than trading. In such a case CESR would not require that a suitability test be applied despite the fact that the risk relating to the credit would be the same.

Page 7 of CESR's Second Consultation Paper Draft Level 2 advice, Box 1

Therefore, we answer NO to questions 1 and 2 at the bottom of page 7.

3.2. Chapter 3 – “Best execution” (Articles 19(1) and 21)

Since today's direct brokerage business has to handle very large quantities of customers' transactions entered by very large numbers of customers, customers can choose between a number of different execution venues (with all of their particular differences). This is the very best way to secure that the client's interests are protected. The implementation of general “best execution” venues and risk warnings in case the customer chooses an alternative venue would not only force the bank to caution against its own business model, it also may upset customers, especially very active ones.

Many direct brokerage customers wish to do their transactions on different execution venues on purpose and they have their own reasons for doing so. For example, customers who do transactions comparable to arbitrage trading monitor very closely the different relevant markets. In such cases every single second counts and the customer may lose opportunities if he has to answer and click away risk warnings. There is in our opinion no reason to assume that the customer's explicit choices and wishes are inherently bad for his interests and that he has to be warned against his own decisions as is suggested on page 14 and 15 of CESR's Second Consultation Paper. Therefore, it should be possible to maintain the existing practices under which clients will issue specific instructions. We wish to point out that this practice is well known to customers and has been accepted by the customers for many years.

Direct brokerage is a non face to face business. Last but not least we would like to mention that the requirement for “Best execution” and “risk warnings” would limit direct brokerage to very few channels in which the customer would be able to get into contact with the bank itself for placing orders. Besides the most important channel which is the internet, direct brokerage does also use other channels such as Fax or Phone-Computers. The latter channels are used by customers who do not have access (either the possibility or opportunity) to use the internet for an order (either occasionally or as a regular practice) and therefore are still of importance. While online a risk warning would be possible, due to the fact that such channels simply are not as interactive as the internet. On these alternative channels efficient risk warnings which

would fulfil the above mentioned requirements would virtually be impossible to put in place or they would result in the turn-off of such alternative channels. This would be detrimental to clients aiming at the highest possible flexibility in the way they enter their orders.

Should you have any questions regarding the above comments, please do not hesitate to contact either Ms. Anita SCHMIDT at Anita.Schmidt@CortalConsors.de , BNP PARIBAS GROUP at tel.: 0049 911 369 5103 or Ms. Carole POUCHIN BNP PARIBAS asset management and services at carole.pouchin@bnpparibas.com tel.: 0033(0)1 47 38 96 58, who will be happy to be of assistance in these matters.

Very Sincerely,

Carole POUCHIN
HEAD OF COMPLIANCE
CORTAL CONSORS
ASSET MANAGEMENT & SERVICES
BNP PARIBAS GROUP

Florence SIREL
GROUP LEGAL DEPARTMENT
EUROPEAN LAW
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