



CESR
M. Fabrice Demarigny
Secretary General
11-13 avenue de Friedland

75 008 PARIS

Paris, February 16, 2005

Re: Consultative report on professional clients agreements (CESR /04 689)

Dear Sirs,

EACT wishes to present its comments on the Call for Opinions document published in December 2004 and related to professional clients agreements (Implementing measures for the Directive 2004/39/EC on Markets in Financial Instruments). EACT is particularly interested in this document as it roughly includes 2800 European groups or companies located in one of the countries of the European Union which will be, for most of them, considered as professional clients unless they declare to be treated as retail clients.

You will find attached our answers to the four questions you raised at the end of the document. But in this covering letter, we just want to express our general belief for professional client's agreements.

EACT notes that article 19.7 of the Directive specifies that *"the investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts."*

We believe that the Directive is not precise enough so we propose that it is an obligation to have such a record and that the record has to be kept in writing.



While it is true that the agreements with professional clients have to be less detailed as far as the products or investment services are concerned, the main service level components must be specified. More generally, it seems not possible and fully unreasonable to declare that the terms of an investment service or a portfolio management service do not need to be written in a document, which might be an electronic one, signed by both Parties, i.e. the investment service provider and the professional client. EACT cannot imagine a company whose financial policy would not include for its finance managers the obligation to have such contracts before dealing with investment service providers.

So EACT points out its request that an agreement between an investment firm and a professional client, setting out their rights and obligations, must be signed in good time before providing an investment service or a portfolio management service. More generally, any service provided by an investment service provider and a professional client must be acknowledged by a document signed manually or electronically by the two parties. But the content of the agreement is free and will depend on the service offered, the nature of the relations between the investment firm and the professional client.

We believe it is a necessity for the security and transparency of their relationship.

It is the reason why, among the three options listed at the end of your document, EACT is in favour of the third one versus the first one which is no more than article 19.7 of the Directive:

An investment firm that provides a portfolio management service or an investment advisory service to a professional client must enter into an agreement in writing setting out the rights and obligations of the parties in good time prior to providing such services. By derogation, the investment firm may provide the terms of the agreement in writing immediately after starting to provide the relevant service to the professional client if that service has been provided at the professional client's request using a means of communication which does not enable the provision of the agreement in writing.

EACT is strongly against option 1 which will lead to different rules in Member States. And option 2 is only related to portfolio management services.

Should you have any further questions, please do not hesitate to contact us.

We remain yours faithfully

Pierre Poncet

EACT Chairman



Question 1

Should a written client agreement be necessary for professional clients of an investment firm?

Yes, a written agreement is a necessity for a professional client of an investment firm. It is a necessity for the security and transparency of their relations and transactions as it is a document which, by detailing the respective rights and obligations, will decrease the number of complaints and facilitate their solutions.

It is also a necessity, given the financial policy requirements of most large and medium-size companies.

Question 2

Is so, should the agreement be limited to certain investment services (portfolio management and investment advice) or should it be requested for other investment and ancillary services?

The agreement between a professional client and an investment service provider should not be limited to certain investment services.

As for any service agreement, it should include the type of the service provided, the rights and obligations for both parties including the way in which the service is provided, the time period for its use, the costs associated for the professional client, the way disputes can be settled.

The type of service/product provided needs only to be named if it is a simple one as the client is a professional one. But if the service/product provided is a new one for the investment firm or if it is a complex one such as a combination of simpler services/products the implementation of which is contingent of specified conditions, then the agreement must specify how it works, its advantages and constraints and the maximum loss the professional client might incur.

Question 3

If such a requirement is introduced, do you think that this would create additional costs? Please provide details of the nature and likely amounts of these costs.

Yes, such a requirement creates additional costs in comparison with the situation where such requirement would not be imposed. Besides incremental costs such as post, paper, possibly external consultants, costs associated are mainly internal expenses in both the investment firm and the professional client (allocation of finance, and legal personal expenses).

But these additional costs which generally are marginal ones after the signature of the first sets of contracts must be balanced by the likely high dispute costs in case of the lack of such agreements.



Question 4

If you consider that no such requirements should be introduced, please specify the reasons why.

As EACT considers such requirements to be a necessity, EACT is not concerned by this question.