



Fédération Bancaire Européenne
European Banking Federation

A5007DES
BI/AB
21/02/05

RESPONSE TO

Ref.: CESR/04-689

CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments Professional Client Agreements

INTRODUCTION AND GENERAL REMARKS:

1. The European Banking Federation¹ (FBE) welcomes the opportunity to comment on the Consultation Paper (CP) issued by CESR for possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments (MiFID) with regard to the application of Article 19.7 to professional clients.
2. First of all, Article 19.7 merely requires that the firm establishes a record of document(s) or terms of the agreement with the client *if they exist*, but does not establish any specific requirement for banks to conclude such documents with their professional clients. Client agreements are intricately linked to national law in each Member State, which means that any changes to such a regime would involve a significant level of costs, which should be justified on the grounds of key policy objectives, such as investor protection. Moreover, such changes would inevitably lead to unnecessary complications and burdensome new procedures not desired by investors, and thus have a negative impact on the global attractiveness of the EU market place if they were imposed on clients who do not require this protection.
3. We believe that in the case of professional clients, such agreements would not be necessary. As the principle is well established in the Level 1 text, MiFID Level 2 measures must take into account the fact that the nature of the professional client relationship is fundamentally different from retail clients (please see our response to Q1 below). Professional clients are capable of making their own risk assessments and understanding the legal and contractual basis for the products and services they are using. Therefore we do not believe that CESR should regulate how investment firms contract with their professional clients. This should be left to commercial practice.
4. We also do not believe that it is necessary to establish rules as to the contents of contracts. We therefore welcome CESR's rejection of *"any requirement relating to the mode of the acceptance of the agreement or to the content of the agreement"*.
5. In the CP, CESR gives three options as to whether to provide any advice on the professional client agreements. Of these three options, we support Option 1, namely:
"Not to provide any advice on the client agreement, recognizing that this should entirely be a matter for Member State discretion or for commercial practice."

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than EUR 20,000 billion and over 2.3 million employees.

6. For the reasons described above, we believe that the professional client agreement should be a matter for commercial practice. It should be a question of practice and commercial assessment, rather than Level 2 legislation, whether or not investment firms wish to enter into formal client agreements with professional clients. For instance, some individualised transactions may not require any agreements and requiring a written (and in particular *prior* agreement) would be unduly onerous and would in fact potentially disrupt the normal course of business. However, in other cases, firms may wish to ensure that appropriate written agreements are in place. It would not be appropriate to prescribe a single formula.
7. Having said this, we believe that the two sub-options given in Option 1 are worth commenting on. We strongly believe that there is a danger of Member States taking different approaches to this important question. It would damage the level playing field and the chances of cross-border transactions if some Member States required such agreements. We therefore believe that CESR should explicitly indicate in its advice to the Commission that whether an agreement is needed or not should be up to commercial practice, and not Member State discretion.
8. Meanwhile, we note CESR's statement on page 5 that "Paragraph 12 of CESR's June draft advice (Ref. CESR/04-261b) under Articles 13.7 and 13.8 included certain proposals for a client agreement in relation to the holding of client assets that would apply to both retail and professional clients." We would agree that the high-level regulatory obligation of protecting client assets applies to all clients, whether retail or professional. However, in line with our answers above, we believe that such a principle should not trigger any regulatory obligation to conclude an agreement with professional clients. We would welcome clarification that CESR's statement above relating to Article 13.7 and 13.8 is not intended to lead to a situation where such agreements are required. The Level 2 measures based on CESR's advice on the above subjects would also have to reflect this fact.

ANSWERS TO CESR'S QUESTIONS:

<i>Q.1: Should a written client agreement be necessary for professional clients of an investment firm?</i>

Answer:

9. As argued above, we believe that a written client agreement should not be necessary for professional clients of an investment firm. We do not see any added value for professional clients in introducing such a requirement. On the contrary, it would 1) complicate investment firms' dealing with professionals and 2) hinder professional clients' access to investment services. Put simply, with such a requirement, we would not be able to act in the best interests of our professional clients.
10. Retail and professional clients require a completely different level of protection as expressed in the Recital 31 of the Level 1 text, according to which "measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparts)". The same approach is also visible in Article 19.10 (c), which states that "[i]n order to ensure the necessary protection of investors, the Commission shall adopt implementing measures. Those implementing measures shall take into account the retail or professional nature of the client or potential client."

11. If CESR required any such agreements, the classification of clients between retail and professional would lose its sense, as both segments would be treated in the same way.

Q2. If 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?

Answer:

12. Not applicable.

Q.3: If such a requirement is introduced, do you think that this would create additional costs? Please provide details of the nature and likely amount of these costs.

Answer:

13. Yes, we believe that it would create an undue burden on the firm's business with such clients. Specifically, it would lead to costs of design of systems, costs of retrieval, documentation and storage. We believe that while such costs are well justified for retail clients, they are not in the case of professional clients.

Q.4: If you consider that no such requirements should be introduced, please specify the reasons why.

Answer:

14. As argued above, we believe that professional clients are capable of making their own risk assessments and understanding the legal and contractual basis for the products and services they are using. Furthermore, for many of the services such clients receive, a written agreement would not be practical.

CONCLUSION:

15. In conclusion, we believe that CESR should not recommend requiring any agreements with professional clients. Moreover, CESR should make it clear in its advice that whether an agreement is needed or not should be left up to commercial practice, and not Member State discretion.