CESR draft technical advice on possible implementing measures of MiFID - Professional Client Agreements – Febelfin comments

Introduction

Febelfin is the Federation of six trade associations from the Belgian financial industry: the Belgian Bankers' and Stockbroking Firms'Association (BBA), the Professional Union of Credit Providers (PUCP), the Belgian Asset Management Association (BEAMA, which regroups as of 25/03/2004 the former Belgian Association of Investment Funds and Companies and the former Belgian Association of Asset Managers and Investment Advisers), the Belgian Leasing Association (BLA).

Febelfin again welcomes the opportunity to provide the views of our members on the consultation papers issued by CESR, especially as in this case for the draft advice on Professional client Agreements in the context of the possible impementing measures of the Markets in Financial Instruments Directive (MiFID).

We are pleased to send you our remarks as stated below.

1. General comment on the interpretation of article 19.7 of the Directive

Art. 19.7. MiFID requires an investment firm to establish a record that includes documents (e.g. client agreements) that set out the rights and obligations of the parties. It does not require keeping a record which sets out the rights and obligations nor does it prescribe what such rights and obligations should be. The firm should establish a record that includes client agreements, if they exist, and the other terms on which the firm provides services. We do not think that art. 19.7 offer a sufficient basis for the EC to regulate how firms should contract with professional clients and to determine the minimum content of such professional client agreements.

It is important that the level 1 text is not interpreted in different ways by the various Member States. CESR advice should make it clear that the matter of professional client agreements should be left for the commercial practice.

If this approach is not feasible, we consider that the requirement of a written agreement should be limited to discretionary portfolio management services. However, one should leave it to the contractual freedom of the parties to define the terms of such an agreement and there should be no requirement for a written agreement prior to the first transaction/service but in a reasonable time thereafter. Requiring a written agreement in all cases prior to the provision of a service may disrupt normal commercial business.

In relation to e.g. portfolio management and custody, it may very well be in the interest of both parties – firm and client – to have a written agreement in place but it would be

inappropriate to impose restrictions as to the terms of such agreements and the method of client consent in a professional relationship. There is sufficient evidence that market professionals do take care about contractual documentation. As evidence, one may refer to ISDA, ISMA, IPMA standard contract documentation. Finally, we want to point out the potentially significant cost related with new requirements as to content in relation to existing client relationships (review of client documentation, obtain client consent, etc.).

Comments on CESR specific questions

Question 1. Should a written agreement be necessary for professional clients?

The form and content of an agreement between a firm and a professional client should be agreed between the parties. We do not see the need for specific regulation but see our opinion above with respect to portfolio management.

Question 2. If so, should the agreement be limited to certain investment services (portfolio management and investment advice) of should it be requested for other investment and ancillary services?

If required, it should be limited to portofolio management. See also question 1 for more details.

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.

This would imply indeed imply additional costs (and loss of profit). For areas where standard master agreements exist, it is not usual to conclude such an agreement beforehand. This implies that the business can start later on with these activities. For areas for which it is actually not usual to conclude a written agreement, the formulation of the principles in a contract will take a lot of time and energy. It will generate law firm costs and the extra time necessary for the conclusion of such a contract will imply a loss of business. Transnational transactions will be hindered (parties will prefer to conclude an agreement with entities situated in the same country, having the same national law regime, in order to avoid long discussions related to other law systems).

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

See comments above