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CESR LEVEL 2 Directive on Markets in Financial Instruments Response to Call for Opinions on Professional Client Agreements
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I. INTRODUCTION

We welcome the opportunity to provide comments to CESR's Call for Opinions on Professional Client Agreements under the level 2 implementing measures of the Directive on Markets in Financial Instruments (MIFID). As a European firm with operations via branches or subsidiaries in almost all EU Member States, we provide various investment services to a number of our professional clients. Thus, we are highly concerned and directly affected by the outcome of CESR's final advice in this specific field.

As a preliminary remark, after having carefully examined CESR's proposals, the level 1 Directive as well as our current market practices, we have to underline that professional clients do absolutely not need the similar level of protection as retail clients. We do not agree with CESR's options two and three requiring the investment firms to provide professional clients with a written agreement prior to or within a reasonable time after the first provision of investment services.

We think that this would not only fundamentally change and negatively interfere with investment firms' current business with professional clients, but also diverge with the requirements of the level 1 text.

We provide further explanations below and invite CESR to take consideration of the following in the subsequent drafting of its advice to the European Commission:

II. 3 OPTIONS AND QUESTIONS 1, 2, 3, 4

In our view, no obligation should be imposed on investment firms to provide professional clients with framework written agreements prior to the provision of investment services (no matter which ones: investment advice, portfolio management, etc.).

In relation to the holding of clients' assets, while we completely agree that the high-level principle of safeguarding of clients' assets should apply to both retail and professional clients, we do not agree that the investment firms should be obliged to conclude a written agreement with professional clients in this specific case. We would therefore highly appreciate CESR's appropriate clarification of its statement in paragraph 12 of CESR's June draft advice under the articles 13.7 and 13.8.

First of all, CESR's option **two and three** (to impose on the investment firms the requirement to provide professional clients with written agreement prior to the provision of investment services to a new client even with some derogations envisaged in respect to the investment advice and portfolio management) would go **against currently accepted market practices**:

Professional clients are generally not provided with written agreement prior to (or after) the provision of investment services. Investment firms' current relationships with professional clients are self-regulated by markets in an efficient way and do not need CESR's, nor Member States' regulatory intervention. If Member States could require conclusion of such agreements, this would be dangerous in terms of the level-playing field and the efficiency of cross-border transactions. Investment firms are sufficiently self-disciplined and need flexibility in this field.

- We do not see **any added value for professional clients** by introducing such a requirement. On the contrary, it would complicate investment firms' way of dealing with professionals and block professional clients' access to investment services.

Therefore, on top of the question of high additional costs, which are evident as no such requirement currently exists, this would hinder us from acting in the best interests of our professional clients.

- In case of some **particularly complex transactions** involving high risks even for professional clients, agreements can be indeed provided. For example, in derivatives transactions, it is important to clarify before the transaction is concluded, which jurisdiction is competent and which law is applicable in case of conflict.

But even in situations involving high risks, agreements are result of sometimes complex negotiations between firms and their professional clients. Even in these situations, flexibility on when the agreement should be provided and its form is still particularly necessary.

Secondly, the result of applying CESR's option two and three would be the same or almost the same treatment of professional and retail clients, which is not in line with the level 1 text.

In fact, the lesser need for investors' protection in interprofessional business and a differentiated approach to regulation are needed.

CESR should ensure **coherency and consistence** of its advice with the following level 1 provisions of the Directive:

- **The article 19.10 (c)** stating that: *"In 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"*.

- **The recital 31** according to which: *"measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparts)"*.

With CESR's second and third option, the classification of clients between retail and professional would simply loose its sense, as both would be treated in the same way. We therefore invite CESR to not to ignore the classification between retail and professional clients.

Finally, CESR does not provide **any proof of the disfunctionning of professional market** or the need to ensure to professional clients the similar level of protection as to retail clients.

Therefore, we support CESR's statement upon to which any requirement relating to the mode of acceptance of the agreement or to the content of the agreement would be over-prescriptive and unjustified in a professional client relationship. **The option 1** with one important precision explained above (not to provide any advice on the client agreement and recognise that this should entirely be the matter of commercial practice and not for Member States discretion) is in our view the most appropriate.