

**ABI COMMENTS ON CESR CONSULTATION PAPER (04-689) ON
IMPLEMENTING MEASURES FOR DIRECTIVE ON MARKETS IN
FINANCIAL INSTRUMENTS MIFID (2004/39/EC) REFERRING TO
PROFESSIONAL CLIENT AGREEMENTS**

February 2005

General considerations

The Italian Banking Association (ABI), which represents virtually the entire Italian banking industry with over 800 member banks, appreciates the CESR's current consultation procedure, on paper 04-689 giving proposed implementing measures for Directive 2004/39/EC (MiFiD) on markets in financial instruments.

Full exposition of ABI's observations is given below. We should like to stress immediately that the future implementing regulations for the Directive, in our view, must establish the principle that in relations between the intermediary and professional clients, a written contract is not obligatory.

Answers to individual questions

Questions 1 & 2

Answer: We think that the signing of a written contract need not be considered compulsory but an option within the power of the professional client, in relation to all the investment services provided.

Effectively, there is little interest and little practical relevance to the idea of adopting special safeguards for professional clients as defined in the MiFiD directive, either for services of investment advice or for portfolio management services. In fact, under the Directive the persons that can be defined as “professional”, identified in highly rigorous fashion, can in any case request “non-professional” treatment, and intermediaries can in any case agree contractually to provide them with a higher degree of protection.

Question 3

Answer: Without prejudice to our objections as set out above, as far as Italian intermediaries are concerned the possible Community introduction of such a requirement would not entail significant additional costs.

Under Italian law, in fact, in addition to the fact that for fund management relations a written contract is obligatory, the practice of written contracts for other investment services is very widespread.

Question 4:

Answer: We consider that a specific Community regulation is necessary.¹ It serves to avoid putting implementation under the discretionary powers of each single Member State, which would result in non-harmonized implementation of Article 19.7 of the Directive.

¹ On the need for a Community regulation, the CESR paper, under the head “A European regime of investor protection – The professional and the Counterparty Regime”, reads (p. 10): “The members of CESR agree that conduct of business rules should include a definition of the professional investor and provide for a streamlined application thereof to such investors in order to avoid over-burdensome regulation ...The members of CESR wish to stress that the conduct of business regime for professionals is an exceptional regime, i.e. it should be considered an exception to the application of the standard conduct of business rules which aim to ensure adequate protection for less sophisticated investors”; and further, “for the members of CESR, implementing an appropriate differentiation between categories of investors for the purposes of the conduct of business regime is a necessary complement to the process of harmonising conduct of business rules. Together, progress on these two issues should contribute to an increase in the flow of financial services within the European Economic Area, by making the regulation both more uniform (and therefore easier to comply with) and less prescriptive for professional clients”.

