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Response to CESR's Call for Opinions on the Draft Technical Advice on Possible Implementing Measures of the Directive 2004/93/EC on Markets in Financial Instruments

The department bank and insurance of the Austrian Federal Economic Chamber legally representing all Austrian credit institutions would like to comment CESR's draft as follows:

General considerations

In its Call for Opinions CESR explains that professional clients need less protection than retail clients. We support this opinion and feel that this fact can only be acknowledged adequately by dispensing with level 2 measures for professional clients under Article 19/7 of the MiFID. Professional clients usually possess much more investment experience, knowledge and expertise than retail clients. They are interested in being able to react flexibly and in not being prevented from doing so by too rigid rules. Any over-regulation would, therefore, simply lead to more bureaucracy and thus make business with professional clients more expensive.

ad Requirement of written form

Article 19/7 of the MiFID and the mandate given by the Commission do not contain any authorisation to introduce rules stipulating that agreements are only valid if they are made in written form; nor is it envisaged that CESR may specify the content of written agreements.

We thus favour the first option under consideration by CESR, stating that no advice on level 2 measures should be provided. Instead, how agreements are entered into and what they contain should be left to market participants. So existing agreements would not need to be modified and would lower the burden of cost.

ad Holding of client assets

We also share CESR's view that no further advice should be provided on the holding of client assets.

Replies to questions

Answer – Question 1:

We are of the opinion that a written client agreement should not be necessary for professional clients of an investment firm. A written contract is not necessary in all cases. There should be as much flexibility as possible. We share CESR's view that any advice on the mode of acceptance or content of agreements would be unjustified in a professional client relationship. We also believe that the question of whether a written agreement must be entered into cannot be dealt with by level 2 measures. The fears of CESR that this could lead to different interpretation of Article 19/7 in the different Member States could be dispelled by wording making clear that there is no requirement for agreements to be in written form.

CESR rightly points out too, that the introduction of mandatory written agreements for the provision of investment advice could result in unnecessary delays in the commencement of services. Ultimately, any requirement for agreements to be in writing would simply lead to more bureaucracy.

Answer – Question 2:

We reject any requirement for agreements to be in writing (see question 1).

Answer – Question 3:

From our point of view there should be no requirements because they could create additional costs without an adequate necessity. Concerning all the transactions with professional clients which are not based on a written agreement, there would be a need to introduce such agreements and to keep the records. Professional clients will certainly know by their own whether in general certain written provisions are necessary. We do not see a need to determine this by Level-2-advice.

Although in portfolio management an investment firm and a client usually enter into a written agreement, they do so on a voluntary basis and the content is up to them.

As mentioned above regulation would, in fact, create additional costs, as standard agreements would have to be modified accordingly. It could also happen that special items which would not actually be needed in individual cases would have to be incorporated into agreements.

We reject mandatory written agreements for the provision of investment advice. Such agreements do not exist, as the specific content and scope of the requirements governing the provision of investment advice to professional clients in particular cannot generally be fixed in advance but only on a case-by-case basis also (depending on the information obtained from the client and the recommended product). A record that investment advice was provided is established internally. On the basis of this record and both the details supplied by clients and the information provided to them within the scope of investment advisory services,

supervisors can then audit compliance of investment firms with the relevant requirements. This arrangement fully meets the purpose of Article 19.7 of the MiFID.

Answer – Question 4:

How agreements are entered into and what they contain should be left to market participants. Retention of this tested practice in the future would also have the advantage that existing agreements would not need to be modified.

With best regards,

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