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**CESR's Draft Technical Advice on Possible Implementing Measures of
the Directive 2004/39/EC on Markets in Financial Instruments – 2nd Set
of Mandates (Ref.: CESR/04-562)**

Dear Mr. Demarigny,

BVI¹ welcomes the opportunity to comment on CESR's Consultation Paper on draft technical advice on the implementing measures concerning several aspects of the Markets in Financial Instruments Directive 2004/39/EC (MiFID) - 2nd Set of Mandates.

General Remarks

Again, we would like to stress the fact that, according to Article 2 (1) h) MiFID, only asset management companies which are not engaged in fund management activities are subject to the Directive and, consequently, CESR's advice on possible implementing measures. According to Article 66, fund management companies are affected only insofar as Articles 2 (2), 12, 13 and 19 of the Directive are concerned.

The consultation deals with implementing measures with respect to several provisions of the Directive 2004/39/EC (MiFID) on level 2 of the so called

¹ BVI Bundesverband Investment und Asset Management e.V. represents the interests of the German investment fund and asset management industry. Its 76 members currently manage more than 7,500 investment funds with assets under management in excess of € 1,000 bn. The units of these funds are held by some 15 million unit holders.

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Lamfalussy Process. Level 2 rules should be principle-based guidelines leading to clarity and legal certainty, as laid down in the Commission's formal mandate of June 25, 2004, Paragraph 2.3. The draft advice, however, shows a high degree of additional regulation, the implementation of which will lead to considerable expenses for the investment firms while the improvement of investor protection remains questionable. One could even assume investors being at a certain point annoyed by the amount of formal steps required in the forefront of the investment decision and thus turning away from the strictly regulated investment forms to more flexible and less supervised financial instruments like "certificates" in Germany. Such a development seems hardly in line with the directive, which explicitly aims at enhancing the level of investor protection (cf. recital clause 2).

We therefore urge CESR to revise the level of detail in its technical advice, balancing the objective of establishing a set of harmonised conditions for the licensing and operation of investment firms and regulated markets and the need to avoid excessive intervention in respect of the management and organisation of investment firms (cf. the Commission's Mandate, page 5).

Furthermore, it is of utmost importance that CESR's rules on market communication, reporting and advice apply to all comparable financial instruments or products targeted to private investors and distributed by an investment firm subject to the MiFID alike and thus constitute a level playing field at the point of sale.

Specific Comments

In representation of the German asset management industry, BVI would like to comment on the following issues:

I. Definition of "investment advice" (Article 4 (1) No. 4 MiFID)

First of all, we welcome the provision of draft Level 2 advice by CESR on this issue as far as it differentiates "advice" from other types of communications to investors, in particular from "general recommendations", "marketing communications", "information given to the clients" and simple offers.

We agree with CESR's proposal that recommendations to use a particular service provider (cf. **Question 1.1**) and general information relating to financial planning and asset allocation (cf. **Question 1.3**) should not fall within the scope of "investment advice". Any other interpretation would be contradictory to the wording of Article 4 (1) No. 4 MiFID as a result of which investment advice means "personal recommendation (...) in respect of one or more transactions relating to financial instruments". Consequently, the directive implies that the provision of investment advice takes place on assumption of one or more specific transactions, which is neither the case if

the recommendation is limited to a certain fund manager nor if it only results in a general planning advice.

Furthermore, we agree with CESR that the term “investment advice” should be restricted to individual recommendations which are held out as being suited to or based on consideration of the client’s personal situation (cf. **Question 1.2**).

The reference to the personal situation of the client is an important criterion of investment advice. It should therefore be made clear that a recommendation does not necessarily have to show a disclaimer in order to qualify as non-personal. EU regulation should not encourage intermediaries to make excessive use of disclaimers in order to protect themselves from regulatory burdens, as an abundance of disclaimers will render them ineffective in the end. Instead, a recommendation is to be considered non-personal as long as there are no unambiguous hallmarks for a personal quality.

An assumption of personal recommendation in each case of bilateral contact between the investment firm and the client seems highly inappropriate, as there are countless cases of providing general information by ways of telephone or e-mail without any regard to the client's individual needs.

II. General obligation under Article 19 (1) MiFID

The general obligation laid down in Article 19 (1) applies to all investment firms, irrespective of the very different services offered by them. For fund management companies, the new UCITS Directive includes in Article 5h similar requirements, which in our opinion adequately reflect the responsibilities of fund managers. Therefore we would like to point out the need for consistency between these two provisions, as several of our member companies also render individual management services in accordance with Art. 5 (3) No. 1 of the UCITS Directive.

III. Suitability test (Art. 19 (4) MiFID)

Regarding the scope of information to be obtained from the client on his knowledge and experience in the investment field, we believe that the respective legal requirements should reflect both the nature of the financial product and its materiality to the client’s financial situation. However, it appears neither advisable nor necessary to lay down fixed and detailed rules.

BVI agrees that in cases where the client refuses to provide information requested by the investment firm or where the information obtained is not sufficient to conduct the suitability test (cf. **Question 4.1**), the investment firm should be allowed to provide investment advice or individual portfolio services on the basis of the assumption that the client has no knowledge or experience, and that the assets provided are his only liquid assets or the financial instruments envisaged have the lowest level of risk. Prior to that, a notifi-

cation should be issued to the client that he will receive services on the basis of that assumption.

Nevertheless, given that there may be different sources for information on the personal situation and qualification of the investor, it should be clear that the investment firm is not confined to this procedure and may choose to assess the situation and qualification differently.

IV. Execution only (Art. 19 (6) MiFID)

BVI welcomes CESR's technical advice with regard to the criteria for determining what is to be considered a "non-complex financial instrument". It is clear from the wording of Article 19 (6) MiFID, that UCITS as highly regulated, supervised and transparent saving vehicles are considered to be "non-complex" for the purpose of this rule. It is also obvious, however, that not only UCITS, but any collective undertakings are to be considered as non-complex as long as they are subject to equal standards of regulation and supervision. The level of complexity of a financial instrument does not depend on whether regulation or supervision takes place on EU or national level.

It would therefore be helpful if CESR would make clear that, according to Article 19 (6), all sufficiently regulated and supervised collective investment undertakings are to be considered as non-complex financial instruments.

We hope that our comments are helpful for CESR's future work on implementing measures of the MiFID and remain at your disposal for any further discussion.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

A handwritten signature in blue ink, appearing to read "Stefan Seip".

Stefan Seip

A handwritten signature in blue ink, appearing to read "M. Mecklenburg".

Marcus Mecklenburg