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Re: Comments DB to Consultation on Understanding the
Definition of Advice under MiFID

Dear Sir, Madam,

DB welcomes the opportunity to respond to your consultation on investment advice. In general, we are supportive of CESR's initiative as there is still substantial uncertainty in the market about what constitutes advice.

General comment

The present proposals focus on those issues related to investment advice that are presently unclear. While we applaud this initiative, we do not feel the proposals offer enough clarification. They seem to blur the lines between personal recommendations, general information and financial promotions, thus making it more difficult for firms to judge if suitability requirements apply to a specific situation. A lack of clarity for both firms and clients as to the extent clients are owed investor protections will lead to legal uncertainty on both sides.

Specific questions

1. *Do you have any comments on the distinction between the provision of personal recommendations and general information?*

There is a general understanding in the market that a recommendation is only "personal" when the recommendation is based on the individual consideration of the client's circumstances. Information that is sent to multiple clients (i.e. not geared to one specific client) or that does not contain any aspect that considers the individual situation of the respective individual client, should not be deemed investment advice, even if it contains an element of recommendation.

2. *Do you agree that the limitation that filtered information is "likely to be perceived by the investor as, assisting the person to make his own choice of product which has particular features which the person regards as important" is a critical criterion for determining whether filtering questions constitutes "investment advice"?*

As we indicated above, we feel a personal recommendation is only "personal" if it specifically takes into account a client's circumstances. We feel there should be a clear distinction between providing a client with information that a firm feels he would be interested in on the basis of a generic client profile, and providing advice that is geared to personal circumstances.

Filtering is used to provide a service to clients by offering them information on products which might be of interest to them. Filtering, by its nature, entails having to simplify and categorise client related

criteria and therefore will not take into account all the personal circumstances of a client that would be considered in the case of investment advice. Whether or not products would be suitable for clients would have to be assessed in a later stage of the process, where the client has expressed an interest in the product or service and where he has given more information about his personal circumstances. This proposal would be clarified by stating that investment advice can only be given when (potential) clients have given specific personal information.

4. *Is there sufficient clarity as to when an implicit recommendation could be considered as investment advice? If not, what further clarification do you think is necessary?*

The description in Part 3a seems to address financial promotions. Financial promotions must meet specific requirements. If promotions do not meet these requirements by presenting information in an unbalanced way, then the promotions themselves should be addressed. The consequence should not be that promotions become investment advice.

We recognise that for clients it can be difficult to assess whether something was advice that took into account their personal circumstances and we agree that disclaimers should not be used to “disclaim investment advice away”. However, a firm must be able to avoid misunderstanding on the side of the client as to what is investment advice based on a personal recommendation and what is general investment information. To this end a firm should be allowed to use warnings to draw a client’s attention to this fact. For example:

“We will not provide you with any recommendations in connection with the Transaction specifically based on your personal circumstances or provide any advice based thereon from an investment perspective, e.g. on the suitability of any single Transaction or series of Transactions or trading strategy”.

5. *Are the circumstances where it is clear the firm is making a personal recommendation sufficiently clear? Would further clarification be helpful?*

With regard to CESR’s comment ‘can a firm avoid making a personal recommendation by telling the client that its recommendation is not based on any information collected from him?’ we note MiFID’s organisational requirements which, in article 13 and 18 and article 22 para. 3 of Directive 2006/773/EC, state that a firm might be prevented from using information in one area of the business that might exist in another area of the business. For example, one part of a firm may have information about a client’s credit history. While the client might reasonably expect this information to be used for assessing the suitability of a product, Chinese Walls would disallow this. Clients do have access to firms’ conflicts of interest policies, but it cannot be automatically assumed that they read it. Therefore, a firm should be allowed to warn a client that it has not taken into account any more information than the client has given a firm in relation to that particular product. This warning would normally take the shape of a disclaimer.

7. *What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?*
8. *Are there specific examples of situations you would like considered, where it is difficult to determine the nature of the advice?*

Offering “normal” investment advice should be distinguished from the situation where a firm is engaged as a corporate finance adviser. Investment advice should be understood as advice related to the allocation of available funds to one or several investment opportunities with the aim of achieving a financial return. Alternatively, if the main focus of an envisaged transaction is the pursuit of an

industrial purpose, the focus of the advice will concentrate on its primary purpose (i.e. an industrial purpose) as opposed to financial return (and financial speculation) and should therefore be classified as corporate finance advice.

We do not agree with the position taken in para. 74: When a transaction consists of the acquisition or disposal of a control position over another entity, there should be a presumption that related advice constitutes corporate finance advice, unless there are predominant reasons that justify another conclusion. Obtaining, or disposing of, a control position with regard to a company generally follows an industrial logic and would normally not just be seen as pursuing a personal investment opportunity to generate a financial return.

In addition, a transaction should be deemed to be driven primarily by an “industrial logic” if it entails:

- any kind of business combination with the client; or
- any acquisition of a stake in a target company with a view to acquiring control at a later date; or
- any intention by the client to be involved in the management of a target company; or
- any relation of the mandate to a restructuring of the client’s business or to a re-adjustment of its business model; or
- any investment in the client’s industry or a related industry.

In general, we feel that advice to (typically professional) investors that *actively* engage in managing their investments for an industrial purpose, such as private equity investors, is, by its nature, corporate finance advice rather than investment advice. By contrast, investment advice should only cover *passive* investments. We do note that there can be situations where the distinction cannot be made that clearly. We would mention for example the disposal of a minority stake by a family of a major shareholder in the context of an IPO of the company. However, in these situations the client and the firm should be free to agree which kind of services will be provided. The Terms of Business letter should make clear for both the firm and the client if advisory services should be considered corporate finance advice or investment advice.

We trust you find these comments useful. Please do not hesitate to contact us should you have any further enquiries.

Yours sincerely,

Tillie Rijk
Regulatory Affairs Department