

Luxembourg, January 21, 2005

CESR's Advice on possible implementing measures of the Directive 2004/39/EC on Markets in Financial Instruments

(2nd Set of Mandates)

The Association of the Luxembourg Fund Industry welcomes the opportunity to respond to CESR's draft technical advice on possible implementing measures of the Directive 2004/39/EC on Markets in Financial Instruments (CESR/04-562 of 21 October 2004).

The European investment management industry and consequently the fund industry will be affected by CESR's work on the implementation of the revised ISD at the level of:

- Investment management firms operating under the ISD offering individual portfolio management services;
- Investment management companies under the UCITS Directive that carry out individual portfolio management as well as collective portfolio management services which are directly subject to the ISD;
- Distribution of fund units carried out through intermediaries, which in the future will be subject to the FIM (as investment advice is set to become a core activity);

The Directive on Markets in Financial Instruments is undoubtedly a progress in the direction of a single market for financial services. In our view the proposed Level 2 regulation can represent a further positive evolution in this field provided however that it focuses on essential components of distribution, especially the setting of European standards in the field of distribution with regard to transparency, marketing communication and advice.

GENERAL POINTS

- As already underlined in our response to the previous CESR consultation on possible implementing measures of the MiFID (CESR/04-261b), technical advice does not necessarily mean the drafting of detailed rules, which may lead to counterproductive over-regulation. ALFI is of the opinion that some issues should be left up to the market players to agree on, leaving more room for self-regulation in the investment management industry. Therefore we would urge CESR to issue as much as possible principle-based recommendations.
- Moreover, we think that full account should be taken of the recommendations made by the European Commission in the preliminary mandate given to CESR, in particular that “the right balance between the objective of establishing a set of harmonised conditions and the need to avoid excessive intervention as well as a carefully case by case evaluation of the amount of detail included in the advice”.
- In terms of market communication, reporting and advice ALFI considers it important to ensure as much as possible the applications of similar rules for comparable financial instruments or products distributed by a firm subject to the MiFID.
- In our view the technical advice should distinguish between the types of clients concerned (professional, private or retail) as the level of protection to ensure for each of these categories should be different. Another distinction should be made between the nature of the products (regulated and supervised or not) offered to the investor by the investment adviser in order to assess the level of protection needed with regard to the advice or suitability process.
- Finally, ALFI would like to stress that the specificities of individual portfolio management should be even more taken into account in the CESR’s advice and that consistency should be ensured between the new MiFID and the UCITS Directive.

Specific Comments

Definition of investment advice (Article 4(1) No.4)

We fully support CESR's suggestion on the issue of the differentiation between advice as such and other types of information, whether it be "general recommendations", "marketing communications", "information to the clients" or offers. However it must be underlined that these notions can be defined differently in the various national legislations, which will make it difficult to come to common and precise definitions on European level. Moreover, in formulating such definitions one should ensure consistency with certain definitions already contained in several other EU Directives, in particular the UCITS Directive, the E-Commerce and the Distance Marketing Directives.

In this context we would like to underline that the simplified prospectus provided for by the UCITS Directive is not, in our view, to be considered as advice but only as marketing communication.

As regards the question 1.2 ALFI is of the opinion that any personal recommendation has to be held out as being suited to or based on consideration of the client's personal situation. In our view the client's individual financial situation and needs should be assessed and taken into account when recommending a certain type of product.

Assuming that the relevant information on the client is collected, the notion of investment advice should be restricted to recommendations of specific financial instruments and should not be extended to financial planning as a whole.

We would like to add that in our view details concerning specific marketing communications should be covered if need be by national regulations or self-regulation.

General obligation for investment firms to act fairly, honestly and professionally and in accordance with the best interest of the client

Article 19.1 lays down obligations that apply to all investment firms, regardless of the services offered, and find specific applications under article 21 and 22.

It must be noted that, from the point of view of portfolio management, the new UCITS Directive includes in its Article 5h similar requirements to those of article 19.1. Consistency should be therefore achieved between rules governing collective portfolio management under the UCITS Directive and individual portfolio management under the FIM.

In our view, the general obligation to act fairly, honestly and professionally and in accordance with the best interest of the client should obviously apply to the provision of advice. However we do not think this should necessitate as many developments as suggested in the draft advice as particular circumstances of each individual case may vary and a technical advice could not and should not cover them all. Principle-based rules would be sufficient in our opinion to ensure consistency in the implementation of the Directive with regard to this issue.

Suitability test and execution-only business

ALFI agrees with CESR's draft advice concerning Article 19 and appreciates the recognition by CESR of the different characteristics and needs of retail and institutional clients. However it would be important to try to ensure a similar treatment of various types of financial products in terms of investor information.

Once again, we would like to underline the need for achieving consistency between the requirements of the UCITS Directive and of MiFID, particularly when it comes to the suitability test question. Another remark is that the advice should address portfolio management more specifically.

As regards question 4.1., ALFI is of the opinion that the drafting of detailed rules concerning the minimum information to be collected from the client will prove to be a difficult task. If the client is not able or refuses to give this information, we would consider it a reasonable rule that the financial adviser warns him that the advice he will receive will be based on the only information available.

Concerning Article 19.6 (execution only), ALFI welcomes CESR's advice which acknowledges that UCITS are highly regulated, supervised and transparent and are non-complex financial instruments. It should be underlined that the criteria for determining execution only services should include situations where a fund distributor explicitly mentions that he does not provide advice (this is the case for example of "fundmarkets" operating via the internet).

CONCLUSION

In conclusion ALFI appreciates the proposals made in this in-depth draft advice. We would however reiterate our concern that such a detailed document might result in unnecessary over-regulation which would prove counterproductive for the development of investment services in Europe. Therefore we would urge CESR to adopt a more

principle-based rules approach as far as Level 2 rules are concerned. Finally we would underline once again the need to achieve a maximum level of consistency between MiFID and the UCITS Directive with regard to all areas mentioned above.