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Committee of European Securities Regulators
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Understanding the definition of advice under MiFID
CESR Consultation Paper CESR/09-665

Danish Shareholders Association supports the definition of advice under MiFID as described in the consultation paper. We find, that the document could be a help for banks and other investment firms wanting to find out and teach their employees what constitutes advice and what does not constitute advice.

But we want to stress a couple of points mentioned only briefly in the consultation paper or not mentioned at all:

- How does the investor understand the communication? Is she receiving an advice or what is she receiving?
- What is an advice? What are the consequences if advice is not given or the advice is insufficient ?

How does the investor understand the communication?

“Considering an investor’s view of whether advice is being given”. Is the headline covering paragraphs 5 and 6 of the consultation paper. The question is touch upon at other points in the consultation paper, when discussing how something that is not an advice can turn into being an advice.

It is our experience that consumers trust the personnel in banks and investment firms (in the following called “bankers”). Consumers are convinced that the banker everyday is using all the information the bank has about the consumer: His family situation, his job, his economy, his plans and investments. The consumer often regards information he receives from the banker as being a genuine personalised investment advice even when the intention of the banker is to give information or a general recommendation.

Far too often consumers understand information about a financial instrument as a recommendation. Consumers understand too often information as a suitable recommendation, based on the person’s circumstances. The consumer

understands the “recommendation” as directed to him personally in his capacity as investor or an agent for an investor or potential investor.

The banker is not always an objective person passing on information to the consumer with the only objective, to contribute to the financial education of the consumer. The banker can be a very aggressive sales person trying to market “funds of the month”.

It is of the utmost importance that banks, investment firms, and all the people working in these companies learn how to treat their clients.

We need a new culture. Bankers must distinguish between information and investment advice in such a way that the clients understand the message.

We would like CESR to develop this question more.

What is an advice?

Is an investment advice only an advice when it follows the rules and is issued at the state of the art?

Can a communication not following all the rules be an advice? If this is the case is it necessary with sanctions directed at the “relaxed adviser” and his employer.

It is a question of “good boys or bad boys”. The good boys must have level playing field.

It is not cheap for banks and investment firms to educate advisors and develop the internal systems so that it is possible to deliver qualified investment advice.

The legislator must support and help the banks and investment firms trying to follow all the rules and trying to deliver full-blown investment advices to clients.

We must set a price on bad behaviour.

Companies not following the rules must be sanctioned. The supervisory authorities should issue warnings or fines or take the authorisation from the persons or the companies who are not following the rules.

But we need more than the penal reactions. We need civil right sanctions. The consumer must have the right to step out of the agreement and/or to get compensation if she got an investment advice that was disguised as something else or if she did not get an investment advice in a situation where an investment advice was mandatory.

Consumers must also have the possibility to get compensation and/or step out of the investment if the advice is of poor quality, i.e. if the investment develops so that the results are worse than expected by the consumer and described in the advice as worst case. The consumer might feel that the bank had not given the full information.

Experience has shown that consumers have difficulties proving what was discussed and agreed with the bank. The banks and the investment firms are the professionals in these confrontations. The only way to protect the consumer is to turn the burden of proof around so that the professionals must be able to prove if they did give an investment advice or not, what the advice was, and the basis for the advice.

Danish Shareholders Association finds it important that CESR elaborates on these questions.

Preparing for the future

MiFID rules should be as clear as possible. They must support the “good boys” and deliver level playing field. Consumers must have the possibility of being compensated if the professional is cheating.

The MiFID rules concerning the sales situation and investment advice has been proposed as the benchmark in the PRIIPS project.

If MiFID-like rules shall be extended to all types of investment and to financial companies and intermediaries not used to MiFID then it will be even more important, that the rules are made as clear as possible.

In the PRIIPS scenario will it be even more important that consumers will get compensation if the professional is cheating.

Kind regards



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