

COMMENTS OF THE ADVISORY COMMITTEE TO THE COMISIÓN NACIONAL DEL MERCADO DE VALORES ON THE CESR CONSULTATION PAPER "UNDERSTANDING THE DEFINITION OF ADVICE UNDER MiFID".

The CNMV's Advisory Committee has been set by the Spanish Securities Market Law as the consultative body of the CNMV. This Committee is composed by market participants (members of secondary markets, issuers, retail investors, intermediaries, the collective investment industry, etc) and its opinions are independent from those of the CNMV.

STARTING POINT/INTRODUCTION.

The Advisory Committee of the CNMV thanks CESR for the opportunity to offer its comments on the consultation paper regarding financial advice under MiFID as it is an issue of great importance for financial firms.

The Advisory Committee shares the opinion expressed in the paper: in view of the significant legal effects derived from the classification as "advice" of a certain activity by an investment firm or a credit institution that provides investment services, providing the best protection of clients' rights and the necessary legal certainty for firms requires an appropriate clarification of the meaning of "advice" as an investment service.

The clarification of the concept of "advice" must necessarily be based on the verbatim wording of the Directive and not on an exercise of interpretation.

Firstly, not all activities undertaken by investment firms constitute the provision of advice. Activities other than advice are subject to the corresponding rules of conduct. Regardless of the other investment services considered in MiFID, the activities performed by investment firms include marketing investment products and services, which MiFID distinguishes from advice. Conversely, advice is undeniably provided when a firm provides investment services as set out in MiFID and its secondary legislation.

At all events, the definition of advice must consider the concepts set out in article 52 of Commission Directive 2006/73/EC of 10 August 2006, which states that, for the purposes of the definition of investment advice as an investment service, there must be a personal recommendation to an investor or potential investor which must be presented as suitable for that person or must be based on a consideration of the circumstances of that person and refer to specific financial instruments.

Article 35 of the same Directive requires that all personalised recommendations be based on data obtained from the client with regard to his personal situation, as provided in that article.

In this regard, certain sections of the paper that seek to identify situations where a "recommendation" may exist do not adequately reflect the need to classify a recommendation as "personalised" in order for it to be considered as constituting this new service of investment advice.

Three types of activity may be distinguished:

- a) Marketing, aimed at the general public or clients of a particular firm, which uses a distribution channel to that end (bulk mailing, internet, advertisements in the media), and not taking account of the client's personal circumstances. According to article 52, a recommendation that is issued through distribution channels or to the public (which are viewed as alternatives), i.e. without taking into account the personal circumstances of the recipients, does not constitute a "personal recommendation". The Committee is of the opinion that a recommendation aimed at the general public does not become "personalised" merely by being provided in the course of a direct conversation between the marketer and potential investors.
- b) An activity whose legal classification could raise doubts in which advice is offered to a specific client and his personal circumstances are taken into consideration.
- c) Investment advice as a value-added service provided by specialised personnel, perceived and classified as such by both parties, especially in those cases where the relationship has been formalised in an advisory contract and/or the service is being paid for.

Indubitably, activities a) and c) should always be classified as marketing and advice, respectively, each being subject to its specific legal regime. Therefore, the efforts at delimitation in this consultation paper should refer exclusively to the activity detailed under b).

The general conclusion with regard to the consultation paper is that, although it strives to clarify the concept of advice, there is lingering uncertainty as to when that activity is deemed to exist. Despite the use of an apparently objective and predictable instrument such as the 5 key tests contained in the paper, a reading of the results from the tests reveals that services must be classified practically on a case-by-case basis and great importance is given to the client's own perception of the nature of the service received, which creates a situation of legal uncertainty for service providers. This is evidenced in paragraphs 5 and 47 of the paper, in which the client's "perception" (which is impossible to evaluate) overrides a written statement between the parties, creating a situation of great legal uncertainty.

Therefore, and with a view to avoiding the use of subjective criteria associated with the intention or perception of the parties, it would be advisable to create more detailed objective elements and criteria that allow for a practically irrefutable classification of the activity performed.

In this regard, the Committee welcomes the use of tests such as the ones proposed but considers that the subjective criteria and conditions contained in the paper should be eliminated.

With regard to the latter, the Committee considers that the note that advice should take account of a client's personal circumstances, thereby "personalising" the recommendation according to them, should apply in all cases and cannot be presumed merely because a complex organisation (such as a credit institution or a large investment firm) already has information about the client.

In response to CESR's questions:

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

Yes. In our opinion, the fact that information contains subjective elements (for example, in accordance with paragraph 16, emphasis on a certain characteristic of the product) does not make it a recommendation.

For information to be considered as advice, we understand that this requires the situations considered under article 52 of the Level 2 Directive.

Q.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"?

The use of an electronic filter cannot be presumed to constitute advice (and the absence of a filter cannot be taken as meaning the opposite) since it will depend on each situation, the filter's level of detail, and whether it entails a true definition of the client's profile, financial situation, knowledge and investment objectives and not a mere categorisation of clients.

Broadly speaking, a rule could be established that the use of filtering techniques does not imply *per se* that investment advice is being given, except if its use determines or significantly influences the client's investment decision regarding specific instruments.

Q.3. Do you believe the distinction between general recommendations/generic advice and investment advice is sufficiently clear? Do you have examples of types of advice where the designation is unclear?

These concepts should be distinguished on the basis of the requisites detailed in article 52. In this regard, we understand that the use of a client's personal information is key when distinguishing between the two, as is whether the recommendation refers to a specific instrument (stock or bonds issued by a specific company, etc.) and not to types of instruments (fixed-income vs. equities) or geographic references (investment in emerging countries, etc).

Therefore, if the client's personal information was not obtained and the recommendation was not focused on specific transactions in specific instruments (precisely as a function of such information), then under no circumstances can it be considered a case of investment advice.

This view is further reinforced when the recommendations (even those provided person-to-person) form part of a campaign or product marketing initiative during which the same recommendation (promoting the product, the very goal of marketing) is repeated to all potential investors.

Q.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?

No. An "implicit recommendation" as defined in the consultation paper does not comply with the requisites under article 52 of the Level 2 Directive.

The former is evidenced most clearly in the example contained in paragraph 44, which refers to "selective information ... provided about the advantages for an investor of one specific product compared to others" In our opinion, this does not constitute a recommendation as defined by the Directive.

In this connection, the statement in paragraph 45 is especially striking: "It is certainly not necessary for a firm to tell a client that a recommendation it is making is suitable for them in order for its recommendation to be viewed as being presented as suitable." In our opinion, not only would the situation described above not constitute financial advice, but it could not even be classified as an actual recommendation.

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

In our opinion, as the paper is worded, it is understood that once an entity has information about the client, any action taken by that entity is assumed to be based on the client's personal circumstances, which is an extension of the concept of advice of such a scale as to render it incompatible with the service proposed in the MiFID, consisting of a value-added service for a restricted pool of clients.

In the case of credit entities and investment firms that seek to provide services to clients with whom they have had a commercial relationship in the past, this interpretation would imply that all future marketing activity must be classified as advice, since, by imperative of prudential regulations (particularly the rules on prevention of money laundering), entities must have exhaustive information on their clients before commencing a commercial relationship with them.

Consequently, the Committee would like to nuance the wording of the paper so that, for there to be investment advice, the firm must first have obtained the client's personal data (whether in the context of

a specific transaction or previously in the context of a pre-existing or more general commercial relationship) and those data must be exploited in connection with a specific transaction in such a way that the personalised recommendation is based precisely on those data.

In this way, the possession of the client's data would not lead to the presumption of its use in making a recommendation, but neither would this negate the possible provision of advice in situations where the client information was acquired prior to the contact leading to the specific transaction.

Q.6. Are there other criteria you believe should be considered when determining whether messages to multiple clients constitute investment advice?

We do not believe a message sent to multiple clients via the internet constitutes the provision of personalised advice. In fact, it would be a good idea to establish a presumption in this connection that would also be applicable to similar activities such as "mailings".

In contrast with the statement in the consultation paper, only in very special circumstances would such a message constitute personalised advice (recipients would have to have the same exact risk and financial profiles, the same knowledge, etc.).

Article 52 acknowledges that a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public; however, there might be (rare) exceptions to that rule.

Q.7. What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?

The two concepts refer to different activities that may overlap in a specific situation, but this is not necessarily the case. Corporate finance advice given to a company may include investment advice, but this will only be the case if that specific activity, in connection with a specific transaction on specific financial instruments, meets all the necessary requirements to be classified as such. Under no circumstances may it be presumed that investment advice has been given merely because of the existence of an ongoing corporate finance advice relationship.

Q.8. Are there specific examples of situations you would like considered, where it is difficult to determine the nature of the advice?

Broadly speaking, practical problems may arise in delimitation when there is a direct bilateral contact between an entity and its client with regard to an investment decision.

In such cases, the delimitation criteria should be very similar to those proposed in the consultation paper, but without "subjective" factors. The two critical elements would be the existence of a

recommendation that is "personalised" (based on the client's personal circumstances) and specific (referring to a transaction with specific instruments).