



ASSOGESTIONI

associazione del risparmio gestito

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Response to CESR's consultation paper "Understanding the definition of advice under MiFID"

Assogestioni welcomes CESR's consultation paper "Understanding the definition of advice under MiFID" (hereinafter "Consultation Paper") because it gives the asset management industry the opportunity to comment on the main issues concerning investment advice service.

We appreciate the approach chosen by CESR in the Consultation Paper, which is practical oriented, given that it focalises on the key points to be considered in order to verify whether the activity provided by a firm can be qualified as investment advice, according to MiFID; we deem particularly useful the definition of a question and answer format which enables firms to identify the main steps of the thought process necessary to understand if they are providing such investment service.

General comments. Preliminary to our observations and replies on the specific issues taken into account by the Consultation Paper, we would like to express some general comments on the approach adopted by CESR.

In this regard, we underline, first of all, that several statements of the document do not express a clear position of CESR on a specific issue, because the wording used seems to allow firms to adopt different interpretations of the specific situation taken into account. In particular, where CESR states that "it is possible" that a certain activity represents investment advice, this means that the same activity could also be qualified in a different manner. Such approach could create confusion among firms which, on a prudential basis, could be induced to always consider the activity provided as investment advice. Therefore, we deem very important that, when CESR considers "possible" that a certain activity represents investment advice, it should also clearly specify when and under which conditions such qualification is "not possible".

In this respect, the examples defined in the document often do not give to investment firms a sufficient support on the correct interpretation of the relevant rules; many examples seems to be a mere explanation of such rules and do not always go beyond what is deducible from the single dispositions. As a consequence, it would be useful to include in the document more examples, particularly tailored on situations where it is not easy to correctly qualify the activity provided.



Furthermore, given that the document is focused mainly on the conditions that need to be satisfied in order to qualify an activity as investment advice, we deem important that CESR indicates also examples which represent cases where such service is not provided.

Moreover, investment firms need that CESR details the scope of investment advice through an approach which takes into account only the specific characteristics of such service, as defined by the relevant dispositions, and not other subjective elements, which could create dangerous uncertainties. In this respect, for example, we deem not appropriate what stated in paragraph 5 of the Consultation Paper with reference to test 3 of the diagram: “where the client reasonably believes that a personal recommendation is being provided, because it is reasonable either that the recommendation is being presented as suitable or that it is based on a consideration of his circumstances, it should be considered that investment advice is being provided, subject to the fulfilment of the four other tests”. In the same perspective, it should be carefully considered the opportunity to maintain in the text criteria linked to what an investment firm “might reasonably be expected” to do or to the investor’s need for protection. Given the subjective nature of such elements, the document does not enable investment firms to identify objective criteria according to which adopt appropriate operational measures in order to distinguish the activities that are investment advice from those which do not fall under that definition.

Finally, we deem important to recognise to an investment firm the possibility to inform the client on the specific type of activity it is exercising, in order to allow, on the one hand, the firm to make clear to the client the qualification of the activity provided and, on the other hand, the client to understand the nature of such activity. In this respect, CESR should clearly state that the use of disclaimers is not irrelevant but that, on the contrary, they are a useful measure, in order to inform clients that investment advice is not being provided to them (see, for example, statements in paragraphs 47 and 54 of the Consultation Paper). In particular, CESR should take into account the following three examples where the use of disclaimers should or should not be relevant:

- (i) an investment firm provides an activity which undoubtedly satisfies the five conditions required for the qualification as investment advice; in such case, a disclaimer indicating that “the service provided is not investment advice” is not relevant, because it is contradicted by the nature of the activity concretely offered and, therefore, cannot be used;
- (ii) an investment firm provides an activity which does not satisfy the five conditions required for the qualification as investment advice; however, to make clearer that the activity offered is not investment advice, such firm uses disclaimers indicating that “the service provided is not investment advice” or that “the recommendation provided is not based on your personal circumstances nor it should be intended as a recommendation suitable for you”; in such cases, the disclaimers are a further measure which allows the firm to expressly define the activity offered and, at the same time, assures that the client clearly understands the exact nature of the service received;
- (iii) an investment firm provides an activity which undoubtedly does not satisfies the five conditions required for the qualification as investment



advice; in such case, a disclaimer indicating that “the service provided is not investment advice” can be adopted, even though it could be considered useless, due to the fact that the nature of the activity offered is clearly not that of investment advice.

In light of the above, the use of a disclaimer should always be considered a correct *medium* to inform and underline that the activity exercised is not investment advice, except when the concrete circumstances contradict the content of the disclaimer.

Part 1: Does the service being offered constitute a recommendation?

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

In general terms, we agree that personal recommendations necessarily imply an element of opinion on the part of the adviser and that giving information without making any comment or value judgement on its relevance to decisions which an investor may make is not advice. Such approach enables a clear distinction between advice and providing simple information because it identifies the relevant elements that characterise each activity. The examples in paragraph 14 represent a useful instrument which allows firm to know what kind of information they can provide and how they can illustrate it to clients without falling within the scope of investment advice; therefore, we deem appropriate that CESR identifies further examples which would strengthen the utility of the above criteria.

Furthermore, with respect to paragraph 16, the reference to “placing special emphasis on the advantages of one product” should not be presented as the determinant element for the identification of an “implicit recommendation”, given the subjective nature of such element. CESR should delete the abovementioned statement, due to the fact that it could be interpreted with an excessive discretion and, therefore, could determine uncertainty and confusion on which activity is being provided.

Moreover, with reference to paragraph 20, we do not agree with the example concerning investment research, which seems to imply that the latter is always provided in conjunction with investment advice when the sales force of a firm engages in telephone calls with clients. Such example could be misleading because it does not take into account that, usually, the content of such telephone calls do not imply investment advice.

In this respect, paragraph 20 does not consider the real nature of the relationship between a broker and a management company which purchases research from the broker through dealing commissions; in this case, although the sales force of the broker usually “engages in telephone calls discussing the merits of the particular financial instrument that the research identifies”, such activity usually does not have the characteristics of investment advice, given that the financial instrument is not presented as suitable for the management company. In fact, the broker does not acquire the information necessary to make the assessment of suitability, because



such acquirement is not part of the activity agreed with the management company; this approach is coherent with the fact that the management company and the broker are institutional investors, perfectly able to define and agree the type of service provided and to establish the relevant amount of the remuneration which, in this case, refers only to the investment research.

In light of the above, we suggest to underline that telephone calls result in the provision of investment advice only when the broker expressly offers such service, by amending paragraph 20 as follows “For examples, if the sales force of a firm emails investment research to a number of clients and subsequently engages in telephone calls expressly offering investment advice by discussing the merits of the particular financial instrument that the research identifies, presenting it as suitable for the client, the firm’s actions may amount to the provision of investment advice”.

Q.2. Do you agree that the limitation that filtered information is “likely to be perceived by the investor as, assisting the person who made 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?

We agree with the criterion defined by CESR in order to distinguish the mere assistance to an investor from the provision of investment advice, especially through the example made in paragraph 24. In fact, the absence of recommendations in the filtering process clearly indicates that the client is choosing autonomously its investment and that the firm is not expressing any opinion or judgement in this respect nor it is considering the particular characteristics of such client.

Part 2: Is the recommendation in relation to one or more transactions in financial 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?

We believe that firms would need CESR to provide indications with a higher level of detail, given that the paragraphs concerning generic advice and general recommendations do not offer a sufficient explanation of the differences between such activities and investment advice. A further level of clarity would be necessary in order to guarantee to firms a “safe-harbour” which assures them that, if they comply with CESR’s indications, they for sure do not provide investment advice and, therefore, they are not subject to the relevant applicable legislation. In this regard, at the moment, CESR’s statements are limited to a description of principles and situations already included in MiFID Implementing Directive.

In the perspective of a more detailed exemplification, paragraph 32 should clearly state that the generic advice occurs even when such advice concerns the merit of



investing in a certain geographical zone or asset class, without comparing it, respectively, with another geographical zone or asset class.

Furthermore, given that the advice concerning a specific asset class is generic advice, it should be specified that also the comparison between specific categories of the same type of financial instruments (*i.e.* UCITS *vs.* non-harmonised collective investment undertakings or funds with a high risk profile *vs.* funds with a low risk profile) is not investment advice. In fact, in such cases, there is not a reference to a “specific financial instrument” and there is not a recommendation based on the personal circumstances of the investor nor presented as suitable for him.

Finally, with reference to paragraph 34, we deem important to specify that a general recommendation is being provided when an investment firm illustrates the advantages of investing in a specific investment product through its website and, in particular, in a page available to the public in general (*i.e.* a page where no password is required). In such cases, in fact, the general recommendation is “intended for distribution channel or the public” and is not based on the personal circumstances of a specific investor and is not presented as suitable for him.

Part 3a: Is the recommendation presented as suitable?

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?

We agree with CESR’s interpretation of the elements that characterise an implicit recommendation which shall be considered as investment advice. However, given the relevance of such issue, we deem appropriate that CESR provides further examples in this respect without going beyond the position already expressed in paragraphs 43 and 44.

Part 3b: Is the recommendation based on a consideration of the person’s circumstances?

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

CESR’s position needs to be further clarified in order to avoid misinterpretations of paragraph 50, according to which “if a firm has information about client’s circumstances, including information on areas like his investment objectives or financial situation, it might reasonably be expected that this information is being used to create a picture of his needs and wants to form the basis of a recommendation”. In our opinion, a personal recommendation is not always directly linked to the fact that information concerning client’s circumstances are available for the firm. For example, when a firm has some information concerning the financial situation of a client, such knowledge does not necessarily imply that the



firm knows all the relevant elements of the financial situation of that client; in this case, if the above information are not completed through a specific questionnaire filled by the client, any recommendation made should not be considered based on his personal circumstances.

Furthermore, we do not agree with CESR's position expressed in paragraph 51 because it shall be preserved the right of the investment firm not to provide investment advice, even when it has all the client's relevant information. Therefore, it should be clarified that a firm can avoid to make a personal recommendation where it decides not to use information about person's circumstances; in other terms, the fact that a firm has such information can not automatically imply the duty for the firm to use them, when it makes a recommendation.

Part 4: Is the recommendation issued otherwise than exclusively through distribution channels or to the public?

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 that other criteria should be considered when determining whether messages to multiple clients constitute investment advice. However, with reference to the three criteria defined by CESR in paragraph 64, it is necessary that CESR clarifies in a more detailed manner when investment advice is provided, given the relevance of the contacts between firms and investors through e-mail, telephone, websites and other interactive software systems.

In particular, as regards the "target audience" criterion, an internal procedure, which selects the clients to be contacted on the basis of their particular personal circumstances, should not be considered sufficient to qualify the message as investment advice, given that even all other elements indicated by MiFID Implementing Directive should occur (*i.e.* the message should also constitute a recommendation to take one of the steps indicated in article 52, paragraph 2, letters a) or b) of the mentioned directive). As a consequence, firms should be considered providing investment advice only when, in addition to the criteria of "target audience", also the "content of the message" and the "language" criteria identified by CESR are met.

In light of the above, newsletters sent to investors selected on the basis of their personal characteristics which do not contain any recommendation, but only promotional or generic information, should not be qualified as investment advice and, particularly, as an implicit recommendation.

Finally, the "target audience" criterion should be considered satisfied only where such "audience" is selected on the basis of all the information that should be taken into account when the suitability valuation must be done (*i.e.* the information necessary for the provision of investment advice). Therefore, if, for example, the target audience is identified on the basis of the age or of the income of the clients,



such selection is not relevant for the qualification of the activity as investment advice.

Part 5a: Is the recommendation made to a person in his capacity as an investor or potential investor?

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

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

With reference to paragraph 66, we deem important that CESR clarifies that when a product provider gives to the distributor specific explanations on its products, such explanations do not represent the service of investment advice, given that such information are provided to a person (the distributor) not in its capacity as an investor or potential investor. The same conclusion should be reached when the product provider gives the abovementioned information to an independent adviser.

Furthermore, we do not agree, in general, with the interpretations stated in paragraphs 74 and 77 because, according to them, the qualification of the service provided (investment advice vs. corporate finance advice) depends on the client characteristics, with particular reference to his need of protection, his knowledge and his experience. Such approach does not seem consistent with MiFID and its Implementing Directive, given that it is not based on any specific provision nor on any further objective element. The correct approach should be to identify which activity is being provided and, on the basis of such identification, coherently apply the discipline related to such activity.

In the above perspective, we ask CESR to adopt an interpretation which takes into account only the applicable rules and objective criteria, not linked to the characteristics of the client nor to its need for protection. Such approach should also include the illustration of appropriate examples.

We remain at your disposal for any request of clarification or further comments on the content of our response.

The Director General