

EFAMA COMMENTS ON CESR'S CONSULTATION PAPER UNDERSTANDING THE DEFINITION OF ADVICE UNDER MIFID

EFAMA¹ is grateful for the opportunity to comment on CESR's Consultation paper, as advice – together with suitability and appropriateness tests – is a key elements of investor protection in MiFID.

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

EFAMA disagrees with several of CESR's conclusions regarding the distinction between the provision of personal recommendations and general information. While agreeing with the diagram/decision tree, our members would like to see objective criteria and tests playing a role in the definition of personal recommendation.

First and foremost, we disagree with the notion expressed in Para. 5 and Para. 20 that it is sufficient for the client to reasonably believe that a personal recommendation is being provided (in Para. 5 in reference to a recommendation, and in Para. 20 in reference to research material). The decision whether a specific communication to a client qualifies as personal recommendation should be based on an objective test, not simply on the subjective beliefs of the client or prospective client.

To be deemed a personal recommendation for the purposes of advice provision, *"that recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person"*², so a personal recommendation should be based on all the personal circumstances of that person.

¹ EFAMA is the representative association for the European investment management industry. It represents through its 26 member associations and 45 corporate members approximately EUR 12 trillion in assets under management of which EUR 6.8 trillion was managed by approximately 53,000 funds at the end of September 2009. Just under 37,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit www.efama.org.

² Art. 52(1) MiFID implementing Directive

In reference to CESR's argumentation on the distinction between providing information and providing a recommendation, we are concerned by the fact that CESR's paper does not take into account the possibility of direct distribution by fund producers. Such direct distribution will obviously focus on their own product range, and in that case CESR's example in Para. 16 (where "placing special emphasis on the advantages of one product" seems to equate to biased information) might apply. Even in such a situation, however, it should be distinguished whether there is a true personal recommendation being provided or a simple provision of information on a product, and the language in this paragraph should therefore be modified.

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?

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?

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?

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

EFAMA agrees with CESR that filtering technology provided to clients by a firm does not necessarily amount to the provision of recommendations and the circumstances need to be taken into account (Para. 21). In practice, filters are used by our members as marketing tools, do not take into account all personal circumstances of the client, and the results are not personal recommendations.

We strongly disagree with CESR's suggestion in Para. 26 that the use of the internet or of another medium by clients to define their own investment profile, if coupled with a model portfolio could be viewed as a recommendation to the client. This should be treated in the same way as any other filter, as the resulting information would equally not be based on all personal information and therefore not fulfill the criteria of personal recommendation.

We underline here once again the need for an objective test of the filtered information, as the definition as personal recommendation cannot be left entirely to the client. In this respect we believe that the language used in communicating with the client is highly important, and it should be clear and not misleading. If the language used by the firm in connection with the filter clearly states it does not take all personal circumstances into account, states that the filter technology does not mean to provide a personal

recommendation or suitable advice, and possibly also invites the client to seek advice, the resulting filtered information could not be considered as investment advice.

We are not in this context referring to some purely legal disclaimer (discussed by CESR in Para. 47 and 54), but rather to good and clear communication to the client on the purpose (and limitations) of the filter, in order to avoid the expectation or impression by the client or prospective client that advice or a personal recommendation are being provided. This is crucial in written communications (internet, mail), but could also be used during in-person meetings with clients to create a two-step approach to client counseling: after an initial stage with the exchange of general information, the advisor might wish to clearly communicate to the client (possibly also formally in a document) the move to the recommendation/advice phase.

EFAMA agrees that the way the information is provided and the context of the provision remain determining factors for the determination whether a personal recommendation is provided, but as long as the content provided respects the provisions, firms should be able to use clear language indicating the type of service provided (or not provided), and to warn clients and prospective clients to seek advice elsewhere. We find CESR's statements in Para. 47 and 54 as too far-reaching regarding the use of disclaimers, as by its nature a clear disclaimer could change the nature of the communication. In any case, we repeat our preference for the use of good communication with clients, rather than purely legal disclaimers.

Lastly, it should be possible for firms to decide whether they wish to provide certain services (such as advice) or not, even if they have client information at their disposal. If they do not wish to provide advice, they should have the right to clearly inform clients of this fact, while still being able to provide general marketing information as well as useful tools that might help educate clients about their products and/or asset allocation. We disagree with CESR's statements in Para. 51 and 53 presenting as almost unavoidable that if a firm has personal information, any recommendation to clients would then become personal recommendations. Such assessment can only be made if the content of the communication to the client actually fulfills the criteria for personal recommendation. The same reasoning applies to the provision of lists with "best products" or "funds of the month" (Para. 59).

Furthermore, in Para. 20, we suggest that the text be amended from "engages in telephone calls discussing the merits of the particular financial instrument that the research identifies, presenting it as suitable for the client" to "engages in telephone calls **offering investment advice**". We wish to avoid that all telephone calls by investment firms discussing research recommendations with clients be considered as provision of investment advice, as brokers do not acquire the information necessary to assess suitability and do not present the recommendation as suitable for investment managers.

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

Regarding the use of the internet, we believe that a webpage without password should be considered as a distribution channel to the public. Some of our members are of the opinion that an e-mail sent to a large number of clients not on the basis of personal information should also be considered as information distributed through a distribution channel to the public.

A determination whether a recommendation via webpage, via e-mail or by mail constitutes a personal recommendation should be based on its content and whether it is based on all the client's personal circumstances.

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

EFAMA has no comment.

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

EFAMA has no comment.

We hope our comments will be of assistance and remain at your disposal for any clarifications.

Peter De Proft
Director General

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