

**REMARKS ON THE CESR DOCUMENT TITLED ‘UNDERSTANDING THE
DEFINITION OF ADVICE UNDER MIFID’ DRAWN UP BY THE WORKING
GROUP FORMED BY SPANISH INVESTMENT FIRMS AND ESTABLISHED
BY THE FOGAIN (SPANISH ICS FOR INVESTMENT FIRMS),**

1. General remarks.

1.1. Definition of the scope of the marketing of financial instruments.

It should be a known fact that there is an investment service dedicated to the placement of financial instruments on behalf of the issuer of same. This service entails, necessarily, that there be promotional activities to enable the sale of said financial instruments.

When an entity renders this service, one of the essential actions is communication with potential investors (who may be potential clients or actual clients of the entity).

This complex relationship (with the issuer of the securities and with the potential subscriber) gives rise to the activity consisting of the marketing of financial instruments.

This relationship incorporates three items: (i) the relationship with the issuer/originator, whereby the entity undertakes to promote the sale of its products; (ii) the way in which the product is offered and promoted among the potential investors; and (iii) the execution of investors’ instructions to subscribe or acquire the product.

In the opinion of the Working Group, the regulations on items (i) and (iii) above do not pose particular difficulties. However, when it comes to determining what promotional activities can be carried out with clients, that is, item (ii) above, financial entities face a number of serious uncertainties that the CESR document does not seem to resolve.

At least, briefly, the following is missing in the document:

- A specification of what can be done in these promotional activities (in a positive sense) in a direct relationship with clients, within the activity of marketing products when neither of the parties involved wishes to give or receive advice.
- A distinction between a ‘recommendation’ and a ‘personal recommendation’. The document focuses on the distinction between ‘information’ and ‘recommendation’, thereby ignoring the fact that there are recommendations that are not personal, because they do not take into consideration (from the standpoint of the entity-client relationship) the client’s particular circumstances.

- A definition of the scope of article 52 regarding what is a recommendation made exclusively through dissemination channels or to the public. Since these are alternative and not cumulative concepts, we need to define the status of recommendations that are given to all clients without taking into consideration (by definition) their personal circumstances, because they are addressed ‘to the public’ even though they can also be given to individuals in one to one relationships.
On the other hand, the marketing muscle (the sales force) of entities also represent a distribution channel for the purpose of MiFID.
Therefore, what is lacking in the document is a determination of which recommendations are included in this type of recommendations (hence they are recommendations) addressed to the public.

According to the foregoing, this Working Group considers that the CESR document does not take into account the full implications of the fact that (i) there are marketing activities that are carried out by entities in order to promote the acquisition of financial instruments; (ii) when carrying out this promotion, recommendations are made which are investment recommendations, because what they recommend is the acquisition of a financial instrument; (iii) these recommendations are recommendations that are addressed to the public, therefore they do not take into consideration the client’s personal circumstances, even though the entity may be aware of such circumstances; and (iv) these recommendations continue to be ‘addressed to the public’ even though they may be repeatedly made to clients in individual relationships.

Those recommendations given within the scope of marketing activities, do not represent investment advice.

In order for the CESR analysis to be definitively useful, it should –in our opinion– incorporate these reflections and analyse marketing activities from the standpoint of what marketers can do (what recommendations they can make).

The document does not seem to leave any scope for marketing activities because it can be interpreted so that all recommendations are investment advice.

2.2. Analysis of a ‘recommendation presented as suitable’

The document lacks an analysis prior to the examples that are reviewed, on whether a recommendation can legitimately be ‘presented as suitable’ without taking into consideration the client’s personal circumstances and whether it is legitimate investment advice.

Article 35 of the Level 2 Directive is clear in terms of always requiring that a suitability test be conducted (meaning that the client’s personal circumstances must be known) before that advice be given.

Therefore, although article 52 notes that a recommendation ‘presented as suitable or based on a consideration of the personal circumstances of the client’ is advice, the fact is that any recommendation that is advice must take those personal circumstances into consideration.

Aside from events of breach (for instance, the wrongful appearance of advice where none is given, thus deceiving the client), which we shall consider in the following section, it should be clarified whether the Directive has purported to define advice that takes into consideration the client's personal circumstances and advice that does not (and which simply appears as being suitable).

Article 35 of the Directive allows us to contend that it has not—all advice must take into consideration the client's personal circumstances.

Supporting the contrary would mean considering that the Directive establishes that: (i) personal circumstances must always be taken into consideration in order to give advice (ex art. 35)(ii) but there could be one kind of advice that does not take those circumstances into consideration, because there could be advice appearing as suitable and another different kind of advice that takes personal circumstances into consideration.

This is, in our opinion, a question of interpretation of the Directive.

This is a very relevant issue as a starting point for all of the analyses conducted by CESR in its document, since, in our opinion it supports the idea that it is natural that investment advice is a separated service provided with the previous knowledge and collaboration of the client providing his/her personal circumstances to the entity.

In addition, it support the idea that the mere fact that a recommendation is shown as suitable does not imply necessarily that we are before an investment advice relationship. It is necessary to analyse the rest of the circumstances.

3. Handling of pathological situations.

The CESR Document is based on the consideration that when an entity is providing investment services and it makes it apparent for the client that it is an advisory service, then there is a relationship of advice.

In the opinion of this Working Group, the correct approach would be the following:

- After defining what can be done in marketing or intermediation activities, anyone going beyond that, and appearing to be giving advice to a client should be reprimanded for making the client think that said entity is providing a service that it is not providing. But it should not be concluded then that such service is being provided by that party. In this sense, it is essential that advisory and marketing services are clearly separated at entities making such separation clearly transparent for clients.
- When a marketer or distributor goes too far and prompts a client into thinking that it is advising him/her (in order to make the client more confident towards acquiring a product) the rules of conduct applying to the actual relationship with the client, are sufficient to make that conduct reprehensible (honest and unbiased professional treatment, detailed

information on the service and on the nature of the service provided, application of the inducement rules, conflicts of interest management, etc).

Protecting clients along these lines is more efficient, in the opinion of the Working Group, than asking the entity to conduct a suitability test in a relationship (a relationship of advice according to the interpretation provided in the CESR Document) that arises unsought by the parties.

4. Relevance of the will of the parties.

The Document hints at the idea that the fact determining whether there is a relationship involving advice between an entity and its client is the subjective perception of the latter. What the document does not specify is how to find out what the client's subjective perception is, and it generically refers to said perception as being reasonable.

Analysing whether that perception is reasonable entails that a simple statement by the client (which will typically take place in a subsequent situation involving a potential conflict) does not seem like it can be sufficient in any case.

In such situations what will matter, in terms of judging whether the perception is reasonable, are the objective circumstances in the matter rather than the subjective perception of the client.

And in this process of identifying the true nature of the relationship what is lacking in the Document is a reference to the will of the parties, the agreement between them regarding the nature of the relationship, which is a determining factor in the scope of the agreement and in the rendering of services.

Therefore, what we propose is that an analysis be conducted in the document of the importance of the various indications on what is the true will of the parties (the entity and the client) when determining the relationship between them. By way of illustration, whether there is a specific agreement, whether anything is charged for rendering a service given as advice, the way in which the service is rendered at the entity itself (through the advisory or consultancy department if there is one), the way in which the client has been informed that there is no relationship of advice, in order for the client to be aware of the true nature of the service being rendered, etc.

5. Characteristics of the advice.

To arrive at a conclusion as to which cases constitute advice and which ones do not, it seems to recommend that the elements defining advisory activities be defined first.

Thus, in light of the Directive, Investment Advice is an activity:

- That is of high added value for the client.
- That requires that the entity giving advice take the client's place and apply all of its know how to design the client's investment policy and make recommendations consequently.
- It is therefore a service rendered in the interest of the investor and not in the interest of the entity or of the issuer/originator.

- It is a service that because of its own characteristics must be known and wanted by the parties.
- The service that is typically rendered consists of the issuance of personal recommendations to the client.
- Recommendations must always be made based on the personal data obtained in the suitability test.

Whatever does not meet these characteristics, in the opinion of the Working Group, should not be considered as an investment advice service, notwithstanding the reprehensibility of the appearance of such a service being rendered due to a breach of the corresponding rules of conduct applicable to the service that is actually rendered, and notwithstanding the fact that the giving of investment advice without meeting all of the legally required conditions is likewise reprehensible.

6. Specific treatment of a professional client or eligible counterparty.

In the rendering of intermediation services to institutional clients (which can be included within the definition of professional clients or eligible counterparties) investment recommendations are often made with a varying degree of detail.

Understanding that these recommendations, which are not personal and are made in the context of the rendering of an intermediation service, constitute advice would leave intermediaries in a much different situation than the one they are currently in, compared to large investors who know what they are doing and do not need the protection provided by an extension of the concept of advice.

In addition to this, it cannot be neglected that this would place intermediaries in a position of very high risk, because the extension of the concept of advice contained in the document not only has implications in the field of rules of conduct, but also, quite worryingly, in the field of liability in respect of their clients. This new position of risk that arises even though it is not sought by the entity (and often not by the client either) is something that is unacceptable in any event when dealing with clients who have significant knowledge and decision-making capacity in respect of investments, for instance eligible counterparties, who on the other hand usually execute large orders.

The Working Group proposes that the document state that, in any event, in these situations there is generally not a relationship of investment advice, instead there is a relationship of intermediation, which includes ancillary recommendations that do not constitute advice.

7. General appraisal of the document.

The fact that at least the preceding aspects were not considered leads to a document, in the opinion of the Working Group, in which the commendable efforts put forth do not achieve the goal of clarifying the frame of reference for the actions of entities and clients, leaving many aspects undefined.

2. Remarks on specific aspects of the document.

The general remarks made in the preceding section are applicable, in one way or another, to all or to a majority of the considerations in the document, and therefore to a majority or to the entirety of the questions. Notwithstanding the above, we shall briefly go over each one of the questions:

Q.1. A correct differentiation, which is important in determining the scope of investment advice, is not to be made, in our opinion, between information and recommendation, but between recommendation and personal recommendation, insofar as there are recommendations that do not constitute advice and which are not presented as suitable, within marketing activities.

Q.2. In the Working Group opinion, determining whether filtering the information that can be accessed by a client amounts to investment advice will depend basically on the prior relationship established between the parties.

Q.3. No. General recommendations and generic advice are concepts that should refer to the qualification of the recommendation but not to the object thereof. We are of the understanding that a general recommendation or generic advice are those which are not personal, that is, when they arise they are not intended as personal advice or recommendations and therefore they do not qualify as such. Thus, generic advice is opposed to personal advice, and a general recommendation is opposed to a personal recommendation.

Q.4. A recommendation may be implicit, although a lot of care is required when understanding that there is an implicit recommendation in a specific situation.

What is relevant is that for a recommendation to constitute advice (whether implicit or explicit) it must be personal and the relationship between the parties must be identified as one of advice.

Q.5. No. The use of disclaimers is a necessary information tool which complies with the requirement in the Directive of informing the client of the nature of the service being rendered. Therefore, in general terms, a disclaimer is considered an appropriate instrument, and this Working Group considers it relevant that this be acknowledged by CESR in the document.

On the other hand, if an entity has had a relationship of advice with a client many years ago, and several years later it addresses the client to render a service that does not require a suitability test, it should be clarified in the document that it is not necessary to update any data or to act on the basis of the old data that are available.

Q.6. In our opinion, the document should clarify that recommendations made to the public at large are not deprived of that condition just because they are repeated in a direct relationship with a client. Those recommendations are considered non-personal recommendations and do not constitute investment advice.

Q.7. We consider that the setup of corporate finance advisory services and investment advice are different. The purpose of the former is of a strategic and business-oriented

nature whereas the latter is meant to guide the investment or disinvestment. The fact that the former sometimes include the recommendation of buying or selling securities does not change the main consideration which, in our opinion, should determine the nature of the service taken globally, without dividing it into specific services.

Q.8. N/A.