FEDERATION
BANCAIRE
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December 14th, 2009

CESR'S CONSULTATION PAPER ON THE DEFINITION OF ADVICE UNDER MIFID
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FBF'S RESPONSE

General remarks:

The French Banking Federation (FBF) represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorised as banks and doing business in France, *i.e.* more than 500 commercial, cooperative and mutual banks. They employ 500,000 people in France and around the world, and serve 48 million customers.

The FBF welcomes the opportunity to give its views on this core concept of the MiFID. However, French banks feel that the CESR's work goes far beyond interpretation and changes, sometimes radically, the content and the scope of investment advice as defined by MIFID and as discussed during the implementation work with regulators.

- **As general remarks, the FBF considers that the investment advice must be seen as it is defined in the Directive and not understood as a general concept:**

Firstly, investment advice is a specific investment service, such as the execution of orders or portfolio management, while some proposals made by the CESR would imply that investment advice is more a general obligation than an investment service.

Secondly, we are of the opinion that investment advice should not be confused with the obligation to inform the client about the nature and risks of the products (risk/reward, maturity …). Such "merger" would completely change the equilibrium between information and advice and would be a step back regarding the fact that the MiFID is based on individual analysis of each client's needs which implies individual situation regarding advice.

Thirdly, it has never been envisaged by any regulator in any economic sector that marketing, which includes mainly advertising, generally implies advice.

- **The legal definition of investment advice:**

Article 4(1)(4) of Directive 2004/39/EC gives the following definition of the provision of investment advice as investment service:

> « *'Investment advice' means the provision of personal recommendations to a client, either upon his request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments* »

This definition contains four elements:
- the provision of a **personal** recommendation;
- at a client's request or at the initiative of the investment firm;
- in respect of one or more transaction;
- relating to financial instruments.

Article 52 of the MIFID implementation directive (2006/73/EC) specifies that:

> *« For the purpose of the definition of 'investment advice' in article 4(1)(4) of Directive 2004/39/EC, a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.*
>
> *That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:*
> *(a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;*
> *(b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument. »*

As a consequence of this article 52, a recommendation is considered as personalised:
- *if it is addressed to an identified investor;*
- *if it is presented as suitable for this investor or based on a consideration of the circumstances of this investor;*
- *If it recommends the realization of the following operation on a particular financial instrument :*
  - *to buy, subscribe, sell, exchange,...*
  - *to exercise or not exercise any right conferred by this particular financial instrument to buy, subscribe, sell, exchange,...*

The provision of investment advice contains numerous difficulties of interpretation and demarcation of its borders.

Even if the CESR's consultation paper gives clear examples of these difficulties, the proposed solutions and interpretations provided seems too wide for an investment service considered by the FBF as clearly framed by the above mentioned articles of the MIFID directive and its implementation text.

Indeed, this consultation paper leads us to consider that general information or generic recommendation may also be qualified as investment advice depending, for example, on the "*reasonable expectation by the client that he is being advised*", or by means of implicit considerations.

The FBF is of the opinion that the provisions governing investment advice should be interpreted restrictively or this concept will lose its meaning.

➢ **For these reasons, the FBF underlines that:**

- Marketing and advertising are not personalised, i.e. targeted for an individual.

- Advice which has been tailored to suit the needs of a particular client constitutes a "personal recommendation" and therefore can be considered as investment advice and then requires the suitability test to be performed; it is a choice of the investment services provider to provide this service and of the client to receive this service.

- The purpose of the investment advice is to consider each client as a specific investor with individual investment needs; conceptually this is the opposite of a collective approach (group of investors);

- The purpose of investment advice is to invest savings or company's assets in financial instruments; it is clearly distinct from industrial strategy or governance and that is why the Directive is very clear on the fact that corporate finance advice is a specific ancillary service.

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

First, one should bear in mind that under MIFID, "*'Investment advice' means the provision of **personal** recommendation to a client (…)*".

We wonder why the term "personal" is placed between brackets in the question posed in III-Part 1 of the consultation "*What constitutes a (personal) recommendation?*" Such wording may lead one to think that only a recommendation is sufficient to consider that investment advice has been provided whereas this recommendation must be personalised (see Directive 2004/39/CE, article 4(1)(4)).

The CESR's proposal regarding the delivered information should be qualified. Information given to an investor may contain an opinion expressed by the investment firm and based on its own analysis. Such an opinion should not be considered as advice unless it contains an invitation to invest expressly suggested by this investment firm.

For example: an investment firm providing information (through an information letter) like "*We are of the opinion that…*" or "*At [Bank] we consider that…*" shouldn't be considered as advice given to investors or potential investors unless it contains an invitation to act in accordance with the opinion previously expressed in the document. MIFID implementation directive specifies, in that regard, that investment research provided to a client does not constitute investment advice (See Directive 2006/73/EC, article 24 (1)(b)).

Therefore, we are of the opinion that the provision of an implicit recommendation gives too wide an interpretation of the notion of advice. This should be avoided because, as demonstrated in our example, general information given to investors must be considered as advice only if a proactive opinion is provided by the investment firm.

Furthermore, we believe that the example given by CESR in paragraph 16 of the consultation paper may lead to a misinterpretation of the MIFID directive by giving a wider meaning to investment advice whereas the MIFID gives a restrictive definition of the notion in article 4(4).

Moreover, criteria relating to information are clearly described by the provisions of article 19 of Directive 2004/39/EC and completed by article 27(2) of Directive 2006/73/EC. The combination of these articles implies that the example mentioned in paragraph 16 of the consultation paper constitutes more a violation of the principle of supplying "*a fair, clear and not misleading*" information than the provision of an investment advice through a personal recommendation.

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"?

It cannot be considered that filtered information given *via* a website always constitutes investment advice.

The last paragraph of article 52 of Directive 2006/73/CE specifies that "*A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.*"

In our opinion, as regards the Internet, a distinction should be made between the public and the secured part of a website.

On the public part of a website (no identification of the client), the provisions of article 52 should apply. It should not be possible to apply the provisions of the investment advice.

On the other hand, the secured part of a website (the client is identified) may lead an investment firm, under some conditions, to provide investment advice. If an email or a message is received by a client through this secured section, criteria such as the language or the formulation used (for example, "*this share complies with your needs…*" or "*we recommend you to buy this share…*") may lead one to think that investment advice is provided.

However, a mail or message could only be considered as providing investment advice if it takes into account and complies with the financial circumstances, the experience and the needs of the client. In this regard, we emphasize the fact that it would imply very specific software able to update its information from the client database, to analyse the client's needs and to perform the suitability test. As of now, most of the French banks do not have such technical facilities.

Be that as it may, in our opinion, investment advice needs to comply with two cumulative conditions:

- This recommendation has to concern a particular financial instrument (for example: "*we recommend that you to buy the share A"*). On the contrary, indications relating to a kind of financial instruments or in a business sector (for example: "*I suggest you to subscribe in bonds in spite of shares*" or "*I suggest you to invest in the energy sector*") should not be considered as investment advice: at most it might be considered as generic advice;

- This recommendation should be expressly (and not implicitly) presented as suitable to the investor. This is the case where an investment firm provides a value judgment or an opinion on a particular financial instrument when he addresses his client.

However, the expression "*likely to be perceived by the investor as (…) investment advice*" is too subjective to be used as criteria to determine whether or not investment advice has been provided.

Furthermore, the provision of investment advices through a filtering process needs a very refined and powerful technology which leads to mitigate such a possibility.

In the same way, the investment research does not constitute advice *per se* even if it is attached to a personal message sent to a specific client. It is often the case between brokers and professional clients.

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?

This recommendation seems compliant with article 19 (2) of MIFID Directive (2004/39/EC) and with 81 to 83 and article 24 of MIFID's implementation Directive (2006/73/EC).

With regard to investment research, under the brokerage activities, sales are in contact with a customer base consisting mainly of management companies or institutions.

Salesmen have multiple sources of information to make their opinions: Financial Analysis produced by the broker and public information. Opinions and advice given by salesmen of brokers based on objective market or impersonal financial analysis. They are never related to the individual situation of customers. Salesmen, for their expertise, also provide value-added information, complementing the opinions that are impersonal financial analysis. The views can be communicated in various forms: orally or through electronic means of distribution but are still generic, not personalized and disconnected from investment decisions of the client.

- The diffusion is systematic and impersonal: Opinions are expressed by salesmen irrespective of the characteristics of customers. It constitutes generic opinions on the evolution of financial instruments or issuers belonging to a particular industry, or any opinions on the industry itself (automotive, pharmaceutical ...).
- The allocation is made by the client and the information is not (does not necessarily) correlated to its investment decision.

With regard to management companies, brokers do not know the characteristics of funds in which the executions will be allocated and who are at the discretion of the manager. In addition, after receiving the views of sales on a particular value, the client is free to enter the order with another broker.

For these reasons, it cannot be considered in such cases that investment advice is provided.

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 do not agree that a recommendation could be considered as having been given "implicitly" to an investor or potential investor.

Neither article 4(4) of Directive 2004/39/EC nor article 52 of Directive 2006/73/EC allows the possibility of providing implicit investment advice. Such advice or recommendation shall only be given in an explicit way.

How then could it be proven that an implicit recommendation has been provided to an investor? Such consideration would require the investment firm to provide a negative proof as far as it leads to create a presumption in favour of the client that he received an investment advice.

Hence, we believe that admitting the existence of an implicit personalized recommendation is interpreting the MIFID directive in an unjustified and extensive way.

Therefore, we recommend the deletion of the last sentence of paragraph 43 and the whole of paragraph 44.

Investment advice should remain a specific investment service, otherwise, it will become a general statement and, in fact, it will lose its meaning.

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

We disagree with the content of paragraph 47.

We do not understand why a client may consider that he received investment advice while a clear disclaimer explains that the communication he received does not constitute such investment advice.

Once more, the CESR gives too wide an interpretation of the investment advice under MIFID directives.

The "*reasonable expectation by the client that he is being advised*" is too subjective to constitute an objective criterion to determine whether investment advice has or has not been provided. This may lead to a kind of legal uncertainty.

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

We understand from the content of paragraphs 63 to 65 that a personal recommendation could result from a correspondence (including emails) to a "*target audience*".

Several objections could be made.

First, as already mentioned above, article 4(1)(4) of Directive 2004/39/EC only considers **personal** recommendations. Therefore, a personal recommendation does not seem compliant with a multiple client situation where some of them may have similar "circumstances".

We do not believe that a mass mailing could comply with the major criteria of the "personal recommendation".

Secondly, even if amongst other duties, an investment firm must know its customers, the personal circumstances of these customers are always changing. Therefore, any product suitable for a customer on one day may not be suitable for him on another day (because his life has changed for any reason) and the investment firm may not have been informed of these evolutions. Therefore, we believe that any mail sent to targeted people cannot constitute a personal recommendation without having previously verified the current needs of the client (by the verification of his present needs and investments wishes, etc.). It is only when this updating duty has been carried out that an investment firm will be able to duly make a personal recommendation.

The degree of accuracy and incitement to buy may be relevant as well to determine whether the message could be regarded as investment advice or not. Moreover, it should be taken into account whether the message concerns only one specific product/service, or rather a range of products or services. Finally, the target audience should be taken into account as well. Nevertheless, where a message is intended for clients from the same socio-professional group, for instance, this is not enough to consider it as investment advice.

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?

Even though corporate finance advice is defined as an ancillary service under MIFID, the FBF believes that it should be clearly distinguished from classical investment advice.

As stated in paragraph 76 of the consultation paper, corporate finance advice is above all a business or strategic decision where the risk of a mis-selling suffered by the investor is very insignificant, especially because of the strategic nature of his decision to buy or sell corporate shares.

Such an activity should then be clearly distinguished from a classical investment decision to buy or sell UCITs shares, for example.

Of course we understand from the consultation paper that each qualification condition will be subject to examination on a case by case basis (see paragraphs 73). But we believe that introducing the possibility to bring closer classical investment advice and corporate investment advice may lead to confusion about the level of protection needed for the various kind of investors targeted.