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Re: MIFID advice

The Bank and Insurance Division of the Austrian Federal Economic Chamber representing the entire Austrian Banking and Insurance Industry would like to comment on CESR's Consultation Paper as follows:

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

We do not agree with some of CESR's conclusions regarding the distinction between the provision of personal recommendations and general information. While agreeing with the diagram/decision tree, we would like to see objective criteria and tests playing a role in the definition of personal recommendation.

Moreover, 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.

CESR correctly stated in its 2004 Consultation Paper on Draft Technical Advice on Possible MiFID Implementing Measures - 2nd Set of Mandates¹ (page 10, second paragraph) that "a recommendation issued on behalf of an investment firm without prior request of the client or potential client shall also be deemed to be personal if, from the position of a reasonable observer of the type of the client or potential client, all relevant circumstances together indicate that the recommendation is suited to, or based on a consideration of, the client's or potential client's personal circumstances." Such an objective test must be used to make a distinction.

¹ CESR Ref.: CESR/04-562

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.

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.

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?

We agree 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.

However, we 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.

Once again we would like to underline 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

² Art. 52(1) MiFID implementing Directive

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

Consequently, we do not refer 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 important 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 the move to the recommendation/advice phase.

We agree 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 consider 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.

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 gives the impression it is based on personal information. 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.

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.

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 the client's personal circumstances.

Yours sincerely,

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