



**Deutsche Vereinigung für Finanzanalyse und Asset Management e.V.**

**CESR**

Via website ([www.cesr-eu.org](http://www.cesr-eu.org))

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**Consultation on understanding the definition of advice under MiFID**  
**Comments by DVFA - Society of Investment Professionals in Germany**

Dear Sirs,

DVFA - Deutsche Vereinigung für Finanzanalyse und Asset Management - is the Society of Investment Professionals in Germany with more than 1,100 members representing over 400 investment firms, banks, asset managers, consultants and counselling businesses. DVFA is a member of EFFAS, the umbrella organisation of European Analysts Societies, building a network of more than 14,000 investment professionals in 25 nations.

We welcome the opportunity to respond to this consultation and would like to answer the questions as follows:

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

The consultation paper does not address a particular case which is to be placed between mere information and recommendation. If an investment firm informs all its clients without consideration of suitability or other personal circumstances of a new financial instrument it has included into the line of its products, this may be considered presenting information on a new product. On the other hand, since every investment firm presents information regardless of which kind (also those instances listed in the consultation paper), one might as well call such presentation a marketing or advertising measure. Such presentation is, however, not tailored to specific client or a group of specific clients, one cannot call such a presentation either an explicit or an implicit recommendation.

We refer also to our response below on the issue of adding a „disclaimer“.

We criticise the consultation paper for only admitting the two categories „information“ and „recommendation“. Tertium non datur. The rendering of financial services in the real world is, however, not as simple. There are in-between areas. This should be recognised by the regulators. The Directive 2004/39/EC (MiFID) in Article 19(4) expressly acknowledges marketing information which obviously is not 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 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“?*

Yes, we agree.

*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 the distinction is sufficiently clear.

*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?*

No. It is not sufficiently clear.

The introduction of „implicit advice“, albeit necessary, is one of the difficulties investment firms face in their day to day operation. The labelling of a statement as „implicit recommendation“ combined with other interpretations advanced by CESR in the consultation paper, leave the investment firms at the mercy of their respective regulators who can arbitrarily call a statement an implicit recommendation leading to investment advice. It is no consolation that a firm might prevail that the statement was no implicit recommendation at the end of the day.

We believe that „implicit recommendations“ cannot be reasonably defined. It suffices to say: One knows a communication to the client to be an implicit recommendation when one sees it. All other theoretical reasoning on the quality of an „implicit recommendation“ is useless for the firms in their daily operations.

For example, the consultation paper states:

„Can a firm avoid providing investment advice using a disclaimer in its communications?

47. Even if a clear, prominent and understandable disclaimer is provided stating that no advice or recommendation is being given, a firm could still be viewed as having presented a recommendation as suitable for the client. If the disclaimer does not change the nature of a communication, meaning that the communication would still create a reasonable expectation by the client that he is being advised, the firm may be viewed as providing investment advice.“

We disagree with the approach taken by CESR. Instead of presenting a clear and unequivocal disclaimer as a means for investment firms (especially firms accepting and transmitting orders or arrangers to reasonably avoid the grey areas of implicit advice, CESR takes a view from a so called reasonable client that he/she is being advised. A client disregarding a clear and unequivocal disclaimer that no advice is given although a suitability test as to knowledge and experience of client has been made cannot be called reasonable. We regret that CESR take a negative approach of establishing blatant abuse cases as a rule instead of tasking a positive approach presenting disclaimers as a reasonable tool for the investment firm to avoid grey areas.

Furthermore, the consultation paper states:

„Can a firm avoid being viewed as making a personal recommendation by failing to use information about a person's circumstances?

51. No, not if a firm has accumulated information on a person's circumstances - either during a single interview or during the course of an ongoing relationship - and it might reasonably be expected that this information is being taken into account. In this case, any recommendation made will be treated as being based on a consideration of the person's circumstances.

52. In this situation, the firm will be held responsible for directly or indirectly giving the impression that it is basing its recommendation on information about the person's circumstances.

Can a firm avoid making a personal recommendation by telling the client that its recommendation is not based on any information collected from him?

53. No, not if the firm has information on the person's circumstances and - in all other ways - created a reasonable expectation that this information will be taken into account in making a recommendation.

54. For example, adding a disclaimer to a client agreement noting that information collected will not be used to make a recommendation will not be sufficient to prevent the firm from being treated as having given a personal recommendation, if it is clear from the circumstances that a firm is making a personal recommendation."

We believe that these statements are in contradiction with the provisions of the MiFiD.

It is stated in Article 19(5) that "Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

In case the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format.

In cases where the client or potential client elects not to provide the information referred to under the first subparagraph, or where he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client or potential client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him. This warning may be provided in a standardised format."

Article 37 of the MiFID Implementing Directive 2006/73/EC elaborates this obligation:

"1. Member States shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:

(a) The types of service, transaction and financial instrument with which the client is familiar;

(b) The nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;

(c) The level of education, and profession or relevant former profession of the client or potential client.

2. An investment firm shall not encourage a client or potential client not to provide information required for the purposes of Article 19(4) and (5) of Directive 2004/39/EC".

According to the consultation paper, the service of accepting and transmitting order or arranging a transaction in a financial instrument could only be made under Article 19(6) of the MiFiD. Article 19(5) would become meaningless because according to CESR their

could not be any recommendation without being investment advice. The consultation paper in Text no. 46 considers knowledge and experience expressly as „personal circumstances“. Therefore, any recommendation based on this information is, according, to CESR investment advice. A disclaimer is not accepted by CESR.

According to MiFID, an investment firm must take into account the suitability of an instrument for an investor depending on the knowledge and experience of the client. If it is not suitable, MiFD imposes warning obligations on the investment firm. All this does not make a recommendation or a recommendation to abstain „investment advice“.

We think that CESR ought to reconsider large parts of its consultation paper and take the regime and take the differentiation of investment services by MiFID into account.

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

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

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'F. Rau'.

Fritz H Rau  
Chairman