

# ZENTRALER KREDITAUSSCHUSS

MITGLIEDER: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN • BUNDESVERBAND DEUTSCHER BANKEN E.V. BERLIN  
BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E.V. BERLIN • DEUTSCHER SPARKASSEN- UND GIROVERBAND E.V. BERLIN-BONN  
VERBAND DEUTSCHER PFANDBRIEFBANKEN E.V. BERLIN

Mr Carlo Comporti  
Committee of European  
Securities Regulators (CESR)  
11 – 13 Avenue de Friedland  
75008 Paris  
FRANCE

10785 Berlin, den 11. Dezember 2009  
Schellingstraße 4  
Tel.: 030/20 21 – 2316  
Fax: 030/20 21 – 192300  
Ec/Mt  
Az.: 413-CESR-MiFID

**CESR's Consultation Paper "Understanding the definition of advice under MiFID"**  
**Ref.: CESR/09-665**

Dear Mr Comporti,

thank you very much for the opportunity to comment on CESR's Consultation Paper  
"Understanding the definition of advice under MiFID". Please find enclosed our com-  
ments. If you have any questions please do not hesitate to contact us.

Yours sincerely,

on behalf of the

ZENTRALER KREDITAUSSCHUSS

Bundesverband der Deutschen  
Volksbanken und Raiffeisenbanken e.V.

by proxy

by proxy

  
Dr. Holger Mielk

  
Christoph Echternach

Enclosure

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## **Comments of the Zentraler Kreditausschuss<sup>1</sup> on CESR's Consultation Paper “Understanding the definition of advice under MiFID”**

**Ref.: CESR/09-665**

11 December 2009

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<sup>1</sup> The Zentraler Kreditausschuss (ZKA) is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks financial group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,300 banks.

## I. General

The ZKA welcomes the opportunity to comment on CESR's interpretation of the definition of investment advice under MiFID. The vision which is being outlined in the present Consultation Paper is largely in line with our understanding as to when investment advice within the meaning of MiFID has been given and when this has not been the case. Our more specific comments on the questions raised by the Consultation Paper shall be given below.

## II. Specific Comments

### Section III. Part 1: Does the service being offered constitute a recommendation?

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

The differentiation between the provision of investment advice and simply giving information is largely in line with our understanding. However, we feel that the generic reference in indent 15 poses a challenge. Pursuant to this provision, information may – under certain circumstances – take on the nature of advice. These “circumstances” which may lead to such a re-categorisation would need a more detailed specification beyond the examples listed.

*Question 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“?*

There should be a clarification that this will not be deemed investment advice if and when the client makes an investment decision on his own authority which is free from any concerted influence through a selective presentation of information on the part of the investment firm. In our view, there can only be derogations from the foregoing provision if and when the investment firm (whilst on the outside creating the impression that it was merely forwarding/passing on objective information in a neutral manner) deliberately selects and routes the information according to the client profile in a way that entices the client to a specific product.

#### **Section IV. Part 2: Is the recommendation in relation to one or more transactions in financial instruments?**

*Question 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?*

Concerning indent 26 f., we should like to point out that we have certain reservations over CESR's assessment that only considering the investors' investment profile (e.g. their investment profile (dynamic, conservative etc.) can be an exhaustive criterion for deciding whether certain services rendered amount to investment advice or not. In the example given, there should be the possibility to rule out the existence of investment advice by a disclaimer to the effect that the model portfolio shall inter alia reflect neither the experience and knowledge nor the financial situation and that therefore the model portfolio cannot be seen as a recommendation to buy the financial instruments listed thereunder. Hence, under indent 47., we would like to suggest to illustrate more clearly when a disclaimer has been formulated sufficiently clear. In our view, a disclaimer with the aforementioned content should meet this criterion in any case.

Indent 32 ff. should be complemented to the effect that also the recommendation of financial instruments pertaining to a certain industry (e.g. pharmaceutical assets instead of automotive assets) shall not be deemed investment advice, either.

Under indent 42 – analogous to the recommendation to become a client of a particular investment firm – also the advice given by a portfolio manager shall not automatically be deemed investment advice. At this juncture, too, such advice needs to be accompanied by a personal recommendation concerning certain financial instruments. As no specific financial instruments are recommended, also the advice given to the client by an investment firm to the effect that said client should conclude an asset management agreement does not qualify for investment advice.

#### **Section V. Part 3a: Is the recommendation presented as suitable?**

*Question 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?*

It needs to be ensured that model portfolios where the client's personal situation pursuant to Article 19 (4) MiFID has clearly not been taken into account shall not be deemed "abstract" investment advice (cf. our answer to question 3).

**Section VI. Part 3b: Is the recommendation based on a consideration of the person's circumstances?**

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

We have concerns over the remarks as far as they might be interpreted in a way where already advertising activities vis à vis clients who were previously preselected on the basis of certain criteria would be categorised as investment advice by the investment firm.

**Section VII. Part 4: Is the recommendation issued otherwise than exclusively through distribution channels or to the public?**

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

The crucial criterion for determining whether investment advice has taken place or not is whether in the context of the advertising activity for a certain financial instrument the client communication has de facto or seemingly considered the client's personal situation pursuant to Article 19 (4) MiFID, i.e. the client's experience and knowledge, his financial situation and his investment objectives. If this has not been the case, this event shall not be categorised as investment advice.

**VIII. Part 5a: Is the recommendation made to a person in his capacity as an investor or potential investor?**

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

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

We would welcome a clearer distinction between "investment advice" and "corporate finance advice". The proposed differentiation on a "case-by-case-basis" does not lend sufficient support to investment firms when it comes to determining whether an investment advice has been given or not. In our view, there will always be an instance of "investment advice" if the investor is primarily concerned with ROI and when he additionally seeks capital gains by selling the financial instrument. Contrary to this, "corporate finance advice" will generally be inseparably tied to a company's (future) strategic orientation. The investment is being made on strategic grounds and with a long-term horizon. By way of

example, we should like to mention the acquisition of company shares to round off one's own product portfolio, to increase the client base or to use synergies.

Indent 79 points out that, under certain circumstances, also the client's portfolio manager shall be deemed an "agent". However, the portfolio manager is himself a financial service provider. Therefore in our view CESR's understanding is not compatible with the principle that, basically, only the financial service provider (i.e. the portfolio manager) shall be governed by the provisions of the investment advice contract. Usually, the investment firm is unaware of the investment contract and the principles defined thereunder. There should be a clarification to the effect that the investment firm may rely on the information given by the portfolio manager concerning the client situation when it comes to recommendations which the bank issues vis à vis the client's portfolio manager. It should therefore be made clear that the investment firm shall not be held liable for those cases where the information given by the portfolio manager is incomplete or incorrect.

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