

POSITION PAPER



**ESBG response to
CESR consultation paper on understanding the
definition of advice under MiFID
(CESR/09-665)**

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The European Savings Banks Group (ESBG) welcomes the opportunity to comment on the CESR consultation paper “understanding the definition of advice under MiFID”. ESBG appreciates CESR’s efforts to achieve clarification in this area. ESBG regrets that the objective has not been entirely fulfilled.

ESBG submits a number of general comments and specific responses to the questions posed by CESR in its consultation paper:

I. General comments

A) Weaknesses of the CESR paper

- **Subjective criteria and unclear legal terms.** Many sections of CESR paper are based on subjective criteria and vague legal terms. One of the main problems of CESR paper is that the “perception of the client” is used as one key factor to conclude if an investment advice is being provided. In other words, the document is based on the grounds that if a client reasonably believes that an investment advice has been provided, this should be considered as a key factor to conclude that the firm is providing such service. This leaves the firms in a situation of uncertainty which must be qualified as “unacceptable” from a legal perspective, also for the clients. Moreover CESR paper frequently uses vague legal terms, such as:
 - Paragraphs 5,6,20 and 47: “it is reasonable to think”, “reasonably believe”, “reasonable expectation”. Who determines this reasonability?
 - Paragraph 15: “circumstances in which it is provided”. Who determines these circumstances? Within the document, we can only find one case and the different situations that can take place in a firm may be varied.
 - Paragraph 22: “context in which the questioning takes place”, “significance of the opinion”.
- **Case by case basis.** Several assertions in CESR paper are based on the circumstances in which the service is provided. Therefore, firms would have to make a case by case analysis to be able to determine when “investment advice” is being provided. The document does not clearly reveal the cases in which the firms are providing investment advice (in every given example it seems that the firm has to take into account the circumstances and the client’s perception). For example:
 - Paragraph 21: “It is necessary to look at the process and outcome of the questions, or questionnaire, as a whole”.
 - Paragraph 25: “Different factors would need to be assessed, on a case by case basis, to determine whether or not investment advice is being given”.



- Paragraph 73: “Firms may need to consider whether they are providing investment advice or corporate finance advice (or a combination of the two) on a case by case basis”.
- **Diagram for the evaluation of the investment advice.** CESR paper is structured around the diagram: “the five key tests for investment advice”. This diagram is well-founded on the requirements included in the Directive that apply to the definition of investment advice. The problem arises when the paper focuses on the examples of issues that have to be taken into consideration. As aforesaid, if the investment advice is based on the perceptions and circumstances of the client, a solid basis for the “investment advice” concept is not possible. On the contrary, the result will provide more legal uncertainty.

B) Proposed clarifications

It should be clear which factors (or combination of factors) are necessary to consider that an investment advice has been provided.

First of all, ESBG believes that the requirements to consider if an investment advice has been provided should start from the exact analysis of the Directive, and, obviously, should not depend on an interpretation exercise.

Not any activity performed by investment firms should constitute an investment advice, as this would include the mere commercialization of investment products and services; an activity which is clearly differentiated from investment advice in MiFID. In any case, the definition of investment advice should comply with the concepts stated in article 52 of the Implementing Directive. According to this, in order to provide an investment advice as an investment service, this must imply a personal recommendation made to an investor or potential investor, which must be presented as suitable for that person or must be based on a consideration of the circumstances of that person, referred to specific financial instruments. The same can be set forth from article 35 of the same Directive, which demands that any personal recommendation shall be made taking into account the data obtained from the client, considering his personal circumstances.

Consequently, ESBG considers that in some of the sections of CESR paper in which recommendations are identified, the requirement of “personal” as before explained is not fulfilled.

ESBG proposes to distinguish three kinds of activities may be distinguished:

1. An activity of commercialization, addressed to the public in general, or to the clients of a particular firm, which employs suitable distribution channels (mailing, internet, advertisements on the media) and that does not take into account the personal circumstances of the client. Therefore, as stated in the article 52 of the aforesaid Directive, a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public in general, that is, without taking into account the personal circumstances of the



recipients. ESBG considers that a recommendation issued to the public, does not turn into “personalized” just for the fact that it is being granted on the course of a direct conversation among the marketing agent and the potential investors.

2. An activity, which legal qualification can be doubtful, which performs an action referred to specific clients and which may take into account some of their personal circumstances, but which is not “investment advice”.
3. The investment advice activity, as value added service granted by specialized staff, conceived and qualified as such by both parties, and especially in those cases in which the relationship would be performed in an advice contract and/ or there could be associated retributions for the granting of that service.

Clearly, activities 1 and 2 should not be qualified as investment advice. Therefore, CESR document should refer, exclusively, to the assumption described in number 3.

It would be convenient to put the eye on the objective elements and criteria that will permit a clear qualification of the activity carried out. Against this background using the five key tests is in principle a good approach, if their application is separated from the subjective criteria that appear in CESR paper.

II. Specific responses

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

Answer to question 1: ESBG is of the view that the fact that a person might provide information based on biased or leading criteria, rather than on a balanced basis (as an instance, according to paragraph 16, by placing special emphasis on the advantages of one product) does not transform it into a recommendation. Rather, there should be made reference to the cases mentioned within article 52 of the Implementing Directive, in these cases information is to be considered as an investment advice.

Moreover, “place special emphasis on the advantages of one product”, might be, in our opinion, a breach of article 27 of the Implementing Directive, that stated: “information shall be accurate and in particular **shall not emphasize any potential benefits** of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risk”.

A recommendation not to buy a financial instrument should not convey a firm’s liability.

Furthermore, ESBG also refers to its remarks on paragraph 15 and the unclear legal term of “circumstances in which it is provided”.



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”?

Answer to question 2: The employment of a filter cannot be considered a factor to determine if an investment advice has been provided or not; it will depend on the case, the amount of detail and if it implies a true definition of the financial situation profile, knowledge and investment targets of the client and not a mere categorization of the clients.

The employment of filtering techniques does not imply, per se, the existence of an investment advice, apart from the cases in which its employment means a targeted choice of information to be provided (according to the client’s profile) which shall produce an outcome which determines or conditions relevantly the client’s investment decision in relation to specific instruments.

With reference to paragraphs 19 and 20 on the issue of “investment research” and the example given by CESR (“if firms emails investment research to a number of clients and subsequently engages in telephone calls discussing the merits...”) ESBG expresses its concerns. The example given is contrary to what is said in the legislation in force and generates more doubts about investment advice, notably:

- Do telephone calls asking clients’ general opinion about the investment research constitute investment advice?
- Which scenario of the following scenarios applies?
 - i. A client is the one who calls in order to discuss the merits of the particular financial instrument.
 - ii. A firm only refers to the data collected in the investment research.
 - iii. A client reasonably believes that an investment advice has been provided.

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?

Answer to question 3: In general terms, the difference among these concepts must be articulated around the requirements of article 52 aforementioned. In ESBG’s understanding the employment of the client’s personal data is a key question by the time of making a distinction, like it is the fact that the recommendation is referred to specific instruments (the action or obligation issued by a specific company...) and not to instrument categories (fixed securities vs. variable securities) or geographical references (investments within emerging countries...).



It should be stated that in those cases in which the personal data from the client is not obtained or employed, there should be no reference to investment advice. This opinion is particularly reinforced when the recommendations- even those made in a person to person relationship- are part of an advertisement campaign, or part of the commercialization of a product to the public, in the course of which the same recommendation is repeated- as a promotion of the product inherent to commercialization- to all the potential investors.

Commenting on paragraph 26, ESBG strictly opposes to the view that the service of model portfolio should be seen as advice. Model portfolios are used for learning and information purposes. Investors “play and learn” with this instrument and do not necessarily chose options corresponding to their needs and aims.

Generic advice, as explained in paragraph 32, should also include advice on the merits of investing in certain industry sectors.

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?

Answer to question 4: ESBG expresses its doubts regarding the clarity provided. An “implicit recommendation” as it is defined on the CESR paper, does not meet the requirements stated within article 52 of the Implementing Directive. The best sample of the aforesaid is given by the example employed in paragraph 44, which refers to “information is provided about the advantages for an investor of one specific product compared to others”. In ESBG’s view this is not a recommendation as it is defined within the Directive.

Paragraph 45 states that “It is certainly not necessary for a firm to tell a client that a recommendation it is making is suitable for them in order of its recommendation to be viewed as being presented as suitable”. In ESBG’s view this case is neither an activity of financial advice nor a real recommendation.

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

Answer to question 5: The CESR paper can be understood in the following manner: once the firm is in possession of the client’s information, it is going to be taken for granted that any activity is based on their personal circumstances. This would even concern all advertisement and commercialisation activities. This is an extension of the concept of assessment, which is in ESBG’s view going beyond the MiFID requirements. Particularly, in the case of credit or investment firms that endeavour to give services to clients with whom they have already had a commercial relationship in the past, this interpretation would imply that any future activity of commercialization should be qualified as advice,



taking into account that, according to the prudential legislation and to the anti money laundering legislation, the companies have to start up from an exhaustive knowledge of the client's characteristics before entering into a commercial relationship with him/her.

ESBG proposes to clarify the text so that it states that in order to be investment advice, there must have been, in any case, a previous activity of obtaining the client's personal facts, either because of a specific operation or on the grounds of a previous commercial relationship, and mainly the employment of these facts should be linked to a specific operation so that the personal recommendation based on these facts.

In this way, there would be no presumptions on the grounds that the availability of these facts implies its utilization by the time of formulating a recommendation. Albeit, it will not deny the possible existence of advice in those cases in which the capture of the client's facts would have been done before the beginning of the contacts leading to a specific operation.

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

Answer to question 6: The case of a message being sent to multiple clients through the internet, should in ESBG's view not been interpreted as a personal advice. In ESBG's view a presumption should be established which applies this concept to similar activities like mailing. Contrary to what the consultation paper states, only under specific circumstances, this could be considered as personal advice (when targeting clients sharing the same profile, financial and knowledge risks...).

Article 52 of the Implementing Directive admits that a recommendation would not be personalized if it is disclosed exclusively through distribution channels or to the public.

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

Answer to question 7: Both concepts are referred to different activities that can merge into a specific case but do not necessarily. If a firm gets services of corporate finance advice, it is possible that part of that advice could represent an investment advice but that will be so, exclusively in the case that, that specific activity, related to a specific operation about specific financial instruments, meets the necessary requirements to qualify it as so. In no circumstances, the presumption would be correct that an investment advice is given, because of the existence of a corporate finance advice continuous relationship.



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

Answer to question 8: Generally speaking, there could be practical problems where the determination criteria would be similar to those contained within the paper proposed, though lacking in “subjective” appraisals.

Looking at paragraph 76f, ESBG expresses its doubts regarding the proposed case-by-case distinction between corporate finance advice and investment advice. In ESBG’s view a general rule should be established such as to link corporate finance advice with the (future) strategy of the company.



About ESBG (European Savings Banks Group)

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of €5967 billion (1 January 2008). It represents the interest of its Members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG Members are typically savings and retail banks or associations thereof. They are often organized in decentralized networks and offer their services throughout their region. ESBG Member banks have reinvested responsibly in their region for many decades and are one distinct benchmark for corporate social responsibility activities throughout Europe and the world.



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