



Committee of European Securities
Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

Paris, 14th December 2009

**AFG response to CESR consultation paper on
“Understanding the definition of advice under MiFID”**

The Association Française de la Gestion financière (AFG)¹ is grateful for the opportunity to comment on CESR consultation paper on “Understanding the definition of advice under MiFID”.

GENERAL COMMENT:

We welcome the diagram elaborated by CESR that sets five key tests for determining whether a firm is providing investment advice under MiFID. Indeed, this decision tree asks very useful questions. However, the answers to these questions are not always straightforward. It appears that conclusions will have to be made on a case-by-case basis, depending on rather subjective interpretations. The consultation does not provide definite answers but it would be very useful to have precise examples.

Moreover, we wish to stress that each step of the diagram only represents one element of investment advice. It is important to note that only the combination of all the different

¹ The Association Française de la Gestion financière (AFG)¹ represents the France-based investment management industry, both for collective and discretionary individual portfolio managements.

Our members include 409 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups.

AFG members are managing 2300 billion euros in the field of investment management, making in particular the French industry *the leader in Europe in terms of financial management location* for collective investments (with nearly 1300 billion euros managed from France, i.e. 23% of all EU investment funds assets under management), wherever the funds are domiciled in the EU, *and second at worldwide level after the US*. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes and products such as regulated hedge funds/funds of hedge funds as well as a significant part of private equity funds and real estate funds. AFG is of course an active member of the European Fund and Investment Management Association (EFAMA) and of the European Federation for Retirement Provision (EFRP). AFG is also an active member of the International Investment Funds Association (IIFA).

elements constitutes investment advice. For example, an e-mail sent to clients regarding a new fund will be considered as investment advice only if:

- this information is a recommendation and,
- it is in relation with financial instrument and,
- it is presented as suitable and,
- it is issued otherwise than exclusively through distribution channels or to the public and,
- it is made to a person in his capacity of investor.

It seems that some time CESR jumps to the conclusion that once a criterion is met, we are faced with investment advice although in reality all criteria should be met to define investment advice.

DETAILED COMMENTS:

We welcome the use of a decision tree asking useful questions. This diagram is very clear. If the answer to any one of the questions is “no”, the clear conclusion is that the firm is not providing investment advice under MiFID.

Part 1: Does the service being offered constitute a recommendation?

The objective of part 1 of the consultation paper is to determine whether information can be considered as recommendation or not. We consider that a recommendation includes both a positive opinion about the product and an incentive to buy the product.

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

We agree that investment research does not amount to investment advice (point 19). But we disagree with point 20 whereby CESR considers that investment research sent with accompanying material (letter, email, etc) is sufficient for the client to reasonably believe that a personal recommendation is being provided. Same remark for point 16: we note that under MiFID, no biased information should be given i.e. information given to clients should always be balanced.

Should we consider that all advertisement based by nature on the advantages of a product is a recommendation? CESR's paper does not seem to take into account the possibility of direct distribution by fund producers.

Moreover, such communication, even if considered as a recommendation, will be considered as investment advice only if:

- it is presented as suitable and,
- it is issued otherwise than exclusively through distribution channels or to the public and,
- it is made to someone in their capacity of investor.

In the same way, we would like to clarify whether selecting a few investment options (for example, providing a client with the KID relating to funds A and B rather than funds C and D) constitutes 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’?

When clients use filters offered by a firm, they do so under their own responsibility. Therefore, firms should not be considered as giving them investment advice. Indeed, firms have no control over how these tools are used, and cannot verify that the information provided by clients is correct. In our view, filtering by clients of information about different financial instruments cannot be considered as a recommendation and as such cannot be considered as investment advice.

Part 2: Is the recommendation in relation to one or more transactions in financial instruments?

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?

Regarding point 42, we do not understand the meaning of the following statement: “Advice in relation to a portfolio management mandate is subject to the requirements on assessing suitability (although it is not necessarily a personal recommendation)”. Indeed, a mandate is a customised management of the client’s portfolio and is designed to suit the client’s personal circumstances. As such, it involves investment advice by nature. However, once the mandate has been signed, the portfolio manager’s discretion prohibits any intervention of the client.

Part 3a: Is the recommendation presented as suitable?

The objective of part 3 of the consultation is to determine when a recommendation is personal.

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 believe that an implicit or explicit recommendation should be considered as personal when it is suitable or based on a consideration of the person’s circumstances. But such a recommendation will be an investment advice only if we can also answer “yes” at the other questions set by the diagram.

In our opinion, suitability is based on the personal situation of a client. A recommendation relies on the analysis of the client’s specific needs. Furthermore, we believe that different pieces of information (relevant details on his personal circumstances) should be gathered in order to determine a client’s individual situation.

Moreover, regarding point 5, it is not clear how it can be determined that clients may think the message is addressed to them. This all depends on their perception. We believe it would be more pragmatic to assume that a message is not personal as long as it does not explicitly specify it is so. An objective test should determine if a recommendation is personal or not.

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

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

In our opinion, a recommendation can be considered as a personal recommendation when it is based on ALL the personal circumstances of the client. A personal recommendation should be based on a complete description of the client's personal circumstances. Only few personal circumstances (i.e. Age or number of children) can not be sufficient to determine a personal recommendation.

For example, filters (point 21) used as marketing tools, taking into account only few personal circumstances and based on client's answers, can not be considered as a personal recommendation and so as investment advice.

Same remarks for the possibility to use a website to determine an investment profile (point 26). Such a tool is based on few personal circumstances and can not be seen as a personal recommendation.

Moreover, firms have no control over how these tools are used, and cannot verify that the information provided by clients is correct. Clients using these tools do so under their own responsibility.

We believe that mailing or e-mailing to a large number of clients that is not based on their personal characteristics should also be considered as a recommendation made through a distribution channel or to the public. Some objective elements in the communication have to point out that the recommendation is based on personal circumstances.

We disagree with CESR statements in points 51 and 53 presenting as almost systematic that as long as a firm has personal information on clients, ANY recommendation made to them would constitute a personal recommendation.

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

We would like CESR to clarify the definition of a "distribution channel". We agree with CESR when it considers that an e-mail correspondence is not a distribution channel when it is addressed to a particular person AND it is presented as suitable or based on personal circumstances.

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

We believe that a webpage with no password, a mailing or e-mailing to a large number of clients should be considered as a distribution channel.

To determine whether an e-mail is a distribution channel or not, some objective elements in the communication have to point out that the recommendation is based on personal circumstances or is presented as suitable.

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

We agree that ancillary service of corporate financial advice does not amount to 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?

AFG has no comment.

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

AFG has no comment.