

RESPONSE TO THE CONSULTATION PAPER ON THE 2nd SET OF MANDATES OF IMPLEMENTING MEASURES OF THE MiFiD

The Bank and Insurance Department of the Federal Economic Chamber, legally representing all Austrian Credit Institutions would like to comment on the Consultation Paper as follows:

The Austrian Banking Industry welcomes the opportunity of commenting on this Consultation Paper concerning the 2nd set of mandates of the implementing measures of the Markets in Financial Instruments Directive (MiFiD) as we feel that this current Consultation Paper deals with a range of complex and very important issues that deserve careful analysis and discussion. Moreover we would like to appreciate CESR'S open style of this Paper as well as we would like to underline that we also appreciate the fact that CESR refrains from excessive detail in its advice on several issues. We hope that the following input to the questions raised in the CP is helpful and we will of course engage in further detailed discussion on these issues if needed.

Definition of “investment advice” (Article 4(1) No. 4)

Question 1.1.:

Do you agree that advice on services, such as recommendation to use a particular broker, fund manager or custodian, should not be covered?

Answer to 1.1:

Yes, we agree with CESR that advice on services, such as recommendation to use a particular broker, fund manager or custodian, should not be covered. Brokers, fund managers and custodians will provide „investment advice“ by themselves if „investment advice“ is required to recommend „investment services and/or financial instruments“.

Question 1.2.:

Do you agree with the approach that a personal recommendation has to be held out as being suited to, or based on a consideration of, the client's personal situation or do you consider this criterion to be unnecessary or ambiguous and would like to refer to the bilateral nature of the relationships and bilateral contacts between the firm and its clients? In the latter case which criteria would you use to differentiate between a “personal recommendation” and a “general recommendation” or a “marketing communication”?

Answer to 1.2.:

We agree with the approach that a personal recommendation has to be held out as being suited to, or based on a consideration of, the client's personal situation. We therefore believe that

investment advice should not include “general recommendations” and other forms of information, which is given in the ordinary course of personal relationships between clients and or potential clients and investment firms and/or their bilateral communication (e.g. by phone or email).

Question 1.3.:

Do you think it is reasonable to restrict “investment advice” to recommendations of specific financial instruments or is it necessary to cover generic information including financial planning and asset allocation services for financial instruments?

Answer to 1.3.:

Based on our view that a personal recommendation has to be held out as being suited to, or based on a consideration of, the client’s personal situation, we generally feel that an asset allocation or financial planning service should be considered as investment advice, if it is based on a personal and specific recommendation, and should not be, if it is based on general information. On this note we feel that it is sometimes necessary to cover generic information that might be included in financial planning and asset allocation services, because in many cases a personal recommendation can be qualified as either specific to a financial instrument or generic information. Otherwise competitive differences between investment firms, providing investment advice and generic advice, and firms, providing exclusively generic advice, might occur. Therefore the regime of investment advice should apply not only to recommendations relating to specific financial instruments but also to generic information including financial planning and asset allocation services for financial instruments.

Furthermore we believe that only a limitation of the term to the recommendation of specific financial instruments or transactions corresponds to Art. 4 par. 4 of the MiFID.

GENERAL OBLIGATION TO ACT FAIRLY, HONESTLY AND PROFESSIONALLY AND IN ACCORDANCE WITH THE BEST

INTERESTS OF THE CLIENT (ARTICLE 19.1)

Question 3.1.:

Do you agree with the proposals on portfolio management? Should any other issues be addressed under Article 19(1)?

Answer to 3.1.:

We agree with the proposals on portfolio management. No other issues should be dealt with under this paragraph.

SUITABILITY TEST (ARTICLE 19(4))

In general we urge CESR to differentiate between the different types of service that investment firms may provide to their clients and to acknowledge their different duties and obligation embedded in their special definitions. In the category of advisory services one can differentiate between the two types: portfolio management on one hand and investment advice on the other. In our view there is a clear distinction between portfolio management and investment advice in regard to the obligations of the investment firm to monitor the portfolio of the client.

While the firm providing portfolio management will – by definition - keep the portfolio of the client under review, it is fully inappropriate to impose this obligation on the firm if a client has received the service of investment advice on a concrete transaction/specific instrument, before the client makes his/her investment decision.

We strictly oppose a continuing responsibility to monitor those transactions of the client which do *not* occur under the service of portfolio management.

In line with that view, we can absolutely not agree with the CESR statement (printed in bold letters) on page 42 of the consultation paper: *“a portfolio manager (...) should therefore take reasonable steps to review the suitability of the client's portfolio in addition to conducting the suitability-test in relation to each recommendation or decision to trade. **This sort of arrangement is not confined to portfolio managers. In some instances, the firm will have accepted a similar responsibility for giving advice about the specific instruments to be held within a portfolio. In this case, the same obligations shall apply.**”*

Question 4.1.:

Do market participants think that adequate investment advice or portfolio management service is still possible on the basis of the assumption that the client has no knowledge and experience, the assets provided by the client are his only liquid assets and/or the financial instruments envisaged have the lowest level of risk if the client is not able to or refuses to provide any information either on his knowledge and experience, his financial situation or its investment objectives? Or would this assumption give a reasonable observer of the type of the client or potential client the impression that the recommendation is not suited to, or based on a consideration of his personal circumstances?

Answer to 4.1.:

We believe that adequate investment advice is certainly possible on the basis of the assumption that the client has no knowledge and experience, the assets provided by the client are his only liquid assets and/or the financial instruments envisaged have the lowest level of risk if the client is not able to or refuses to provide any information either on his knowledge and experience, his financial situation or its investment objectives. Nevertheless we strongly want to point out that this is a very conservative assumption and that actually there is no proof nor any justification of this assumption, that the client has no knowledge and experience, the assets provided by the client are his only liquid assets and/or the financial instruments envisaged have the lowest level of risk if the client is not able to or refuses to provide any information either on his knowledge

and experience, his financial situation or its investment objectives. Such personal recommendation would be suitable only to some of various types of clients. Therefore it is possible that this kind of conservative assumption might lead to an even more unsuitable than suitable recommendation.

On the other hand, we do not see any need in asking for the same kind of information from a portfolio management client, since experience and knowledge of the client are not relevant for a portfolio management service. In fact, the kind of information needed from a portfolio management client will be very different than that required for a client for suitability service. It will be much lighter in the sense that there will be no need to find out about the experience or knowledge of the client. Rather, it will be necessary to know the investment objectives of the client.

Furthermore we do not see a necessity, to review the client profile whenever the retail client seeks advice. This could lead to an immense and burdensome red tape without any further use for the client.

EXECUTION ONLY (ARTICLE 19(6))

Question 5.1.:

In determining criteria, should CESR pay more attention to the legal categorization or the economic effect of the financial instrument?

Answer to 5.1.:

Whereas financial markets are open as well as constantly evolving firms should be able to develop new products and financial instruments to meet market needs and consumer demands, the criterion for non-complex instruments should be considered as high level principles that are flexible and leave enough space to allow for the emergence of new types of instruments. Stating this, we believe that - with a view to ensuring good practical application - CESR should pay more attention to the economic effect of the financial instrument. Moreover, since the principles of contract law are not harmonized throughout Europe, the legal categorization of a financial instrument might vary according to the relevant jurisdiction.

Concerning the definition of non-complex instruments we would like to point out that CESR should not per se categorize all derivatives as complex. Since there are many different types of derivative financial instruments that have very different features. Some are very complex and some are much less complex. Therefore we believe that non-complex instruments for the purposes of Article 19 (6) should at least include all derivative products that are low-risk and/or reduce the risks in investors' portfolios.

BOX 10: Non-complex instruments shall mean all non-derivative financial instruments: ...

c) where information on:

- (i) their structure; and
- (ii) the costs and expenses for acquiring, holding and realizing the client's investment in them, is easily accessible, and likely to be understood, by the average retail client.

CESR's technical advice should exemplarily specify criteria for information (safe harbour), e.g. relating to financial instruments traded on regulated market and MTFs, the availability of prospectus.

Question 5.2.:

Do you think that it is reasonable to assume that a service is not provided "at the initiative of the client" if undue influence by or on behalf of the investment firm impairs the client's or the potential client's freedom of choice or is likely to significantly limit the client's or potential client's ability to make an informed decision?

Alternatively, do you think that the consideration of this overarching principle is not necessary because the use of undue influence could be subject to the general regulation under the UCPD and that CESR should base its advice more strictly on Recital 30 or refer entirely to this Recital advising the Commission that it is not necessary to adopt Level 2 measures in this area?

Answer to 5.2.:

We are of the opinion that the question concerning the "initiative of the client" is already sufficiently clear dealt with in Recital 30. We therefore do not see any need for further measures on level 2.

We think that the consideration of an overarching principle is not necessary because the use of undue influence could be subject to the general regulation under the UCPD. Therefore CESR should refer its advice entirely to Recital 30 advising the Commission that it is not necessary to adopt Level 2 measures in this area. The regime of unfair business-to-customer practices is applicable regardless of the provision of a service „at the initiative of the client“. Such an assumption is not reasonable.

TRANSACTIONS EXECUTED WITH ELIGIBLE COUNTERPARTIES (ARTICLE 24)

Question 6.1.:

Do Market Participants agree that the quantitative thresholds for undertakings to request treatment as eligible counterparties should be the same as the thresholds for professional clients?

Answer to 6.1.:

In the light of coherence the quantitative thresholds for undertakings to request treatment as eligible counterparties should be the same as the thresholds for professional clients.

PRE-TRADE TRANSPARENCY - DEFINITION OF SYSTEMATIC INTERNALISATION (ARTICLE 27)

Question 8.1.:

Do consultees agree with criteria for determining systematic internaliser? Should additional/other criteria be used and if so, what should these be?

Answer to 8.1.:

Pursuant to Art. 27 MIFID a firm can only be considered a „systematic internaliser“, when it deals on an organized, frequent and systematic basis on its own account by executing client orders in shares outside a regulated market or MTF. In other words, the engagement in internalisation on an ongoing commercial basis is the decisive factor. The directive does not intend to capture investment firms, that only occasionally deal on own account, but on the contrary practice internalisation as their principal business. From our point of view the currently proposed criteria (Box 14) are not sufficiently clear. The definition as it stands is far too wide and as such would capture activities that should not qualify as systematic internalisation. Therefore we urge CESR to link the definition closer with the intention of the Level 1 text.

Question 8.2.:

Should the criteria be fulfilled collectively or used separately?

Answer to 8.2.:

The criteria should have to be cumulative they should have to be fulfilled collectively.

Question 8.3.:

Should CESR set criteria for the term “frequent”? If so, do consultees support the setting of numeric criteria or do they believe that a more flexible approach would be useful? What should these criteria be?

Answer to 8.3.:

The establishment of a threshold for the percentage of a firm’s trading that is internalised, would be an administrable criteria as well as a more flexible „qualitative“ approach in categorizing a firm as a „systematic internaliser“.

Best regards

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