

REPLY TO

THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS (CESR)

IN RELATION TO THE 2ND CONSULTATIVE DOCUMENT CESR/05-164

OF MARCH 2005

DRAWN UP BY ANALISTAS FINANCIEROS INTERNACIONALES

4th April 2005

Person of contact:
Francisco José Valero
Head of Research
fjvalero@afi.es
91 520 01 01



1. Introduction

In relation to the consultative document CESR/05-164, Analistas Financieros Internacionales (hereinafter AFI) feels it convenient to make some observations limited to its Chapter 2, on the definition of investment advice, since this is the only point of connection between the firm's activities and Directive 2004/39/CE of the European Parliament and the Commission dated 21st April 2004 on Markets in Financial Instruments which amends the Commission's Directives 85/611/CEE and 93/6/CEE and Directive 2000/12/CE of the European Parliament and the Commission, which repeals the Commission's Directive 93/22/CEE (MiFID) to which the consultative document refers. AFI does not exercise any other of the investment services and activities listed in section A of Annex I of MiFID.

AFI is a firm founded in 1987 and is dedicated to giving investment advice, but within a framework of a wider set of activities which can, in general terms, be said to be advice and consultancy on economic and financial matters. These activities are carried out on behalf of all types of economic agents, but fundamentally for financial and non financial companies and for public bodies. So, practically the whole of AFI customers are professional clients in the sense of Annex I of MiFID.

In 2004, AFI Group earned a total income of 13,35 millions euros, for all its activities including formation and technology, with a total of 115 employees.

AFI can be considered as a market leader within the independent sector dedicated to these activities in Spain, its independence being guaranteed by the participation in 50% of its capital by its professional associates, which has led over the years to it gaining a high level of prestige in the Spanish financial market.

In this submission AFI replies to the two questions posed in the CESR's consultative document, starting with the second of them since, in its opinion, it is more significant than the first one.

2.- Extent of the authorisation and the passport

Question 2: Do you believe that considerations relating to the scope of the passport and the scope of the authorisation requirements point towards the inclusion or



exclusion of generic advice from the definition of investment advice?

The activity of giving investment advice is one which, as such, is not currently regulated in Spain and is not therefore sufficiently well defined and developed at present, especially insofar as the existence of a large number of independent firms, which undertake the activity in an officially recognised form, is concerned. As far as we are aware, the situation in other EU countries on this point is very similar to that of Spain.

This means to say that said activity cannot be regulated in a manner so unyielding as to impede both its greater development and that of the firms which regularly undertake it, especially when one considers, and this is AFI's experience, that the activity of giving investment advice has clear economies of scope with other similar activities, as is the case with the provision of advice and economic and financial consultancy in general, which can on many occasions be given to the same clients.

In the tenor of the MiFID, a flexible regulation of the activities of independent firms, which are dedicated to providing investment advice, can be obtained by two methods:

- 1) Make use of the discretionary exception provided for in Article 3 of the MiFID, a matter that, in our country, would depend on any future decisions that the competent Spanish authorities might take in this respect. It is true that this exception requires, amongst other conditions which we agree to in our case, that the activities of these firms are regulated at a national level, but we consider that the regulation of an activity is one thing and the regulation of firms is another, especially when these undertake diverse activities, which demands a large degree of flexibility.
- 2) Reduce as far as possible the content defining the giving of investment advice, which is what is discussed in the CESR consultative document, taking into account that, the wider the definition, the greater will be the amount of activities undertaken by the firm that are subject to regulation, with the consequent negative implications that a greater rigidity would have on business development and/or unnecessary costs incurred by the firm.

The exceptions in Article 2(1), (2) and (j) of the MiFID which are expressly referred to the CESR document are, we



believe, too generic and would not always be applicable to a firm like AFI. The first because, when talking about a professional activity, it must be remembered that activities such as the provision of advice and economic-financial consultancy in general are not defined as a profession, neither in Spain nor in other European countries. The second, because in addition to the foregoing comment, investment advice is, on occasions, remunerated separately, since it constitutes, or can constitute, a service that is expressly differentiated from other services, which may be provided, including those given to the same client.

From this perspective, and in order to contribute to the gradual development of the activity of providing investment advice in Spain, AFI argues for a limited definition of the same, restricted to what the CESR consultative document calls specific advice, that is to say on concrete financial instruments, especially when one considers that the essence of investment advice refers to the provision of recommendations and that generic recommendations could be considered to be already included in n^o. 5 of Section B of Annex No. 1 of the MiFID, a concept which is never defined in the directive, but that, in any case, constitutes an auxiliary service and which, on its own, cannot be justified for the definition of an investment company.

This is most relevant from a Spanish point of view when one considers that an investment company that exclusively carries out the activity of providing investment advice under the conditions that have been set out does not fit in with the current models of Spanish investment societies: securities societies, securities agencies and portfolio management companies, so that their denominations and regulation are, at present, unknown.

3.- The conduct of business rules

Question 1: Do you believe that investor protection considerations require the application of the above conduct of business requirements from the point at which generic advice is provided or do you relieve that sufficient protection is provided in any event to allow the definition of investment advice to be limited to specific recommendations?

Although the CESR's consultative document pays greater attention to this point, we believe it to be less relevant than the previous one since nothing prevents the business



rules from responding to general, universal principles applicable to all agents operating in securities markets and, at the same time, the application of said rules in each concrete area could differ according to the circumstances in each case.

Thus, Article 78 of Law 24/1988 of 28th July on Securities Markets, the basic Spanish legal instrument governing this area, applies the rules of conduct set out in Title VII of said Law to all participants in the securities markets, expressly including : " investment firms, credit institutions, collective investment institutions, issuers, securities and financial investment analysts and, in general, all persons or entities which undertake, either directly or indirectly, activities related to the securities markets.".

A different question is that said business rules are more applicable in the case of specific advice, if only because of their influence of questions such as privileged information or a conflict of interests, which, by their very nature, have much less scope in the case of generic advice.

CESR's actual consultative document makes reference to the difficulty in distinguishing in this context between generic and specific advice, something which we feel is not strictly necessary from the point of view of general rules of conduct, without prejudice, as had been said, to their different application in one case or the other, an area more relevant to the casuistic of each case rather than to the principles that should shape the rules of conduct.

Therefore our reply to the first question posed by the CESR does not expressly defend the separation, for the purposes of applying the general rules of conduct in the securities markets, between specific and generic advice. Obviously, if the latter does not form part of the definition of investment advice, the problem would be better defined than if the opposite case applies, but it is not a matter that we believe to be as fundamental as the second question posed by the CESR.