

Member of **FEFIF**
The European Federation of Financial
Advisers and Financial Intermediaries

ANASF comments on CESR MiFID
Second sets of mandates

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To: CESR
Committee of European
Securities Regulators
11-13 Avenue de Friedland
75008 Paris

ANASF COMMENTS ON

CESR's draft advice on the second set of mandates from the European Commission on the Markets in Financial Instruments Directive (MiFID)

SUBJECT-MATTER: Directive 2004/39/EC of the European Parliament and of the Council of April 21, 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

REGULATION OF THE ADVICE

By the new directive, the advice (precisely, the “*investment advice*”) is an investment intended for service investment firms (Attachment 1, section A, n.5). According to the article 4, 4th paragraph of the directive, the “*investment advice*” means “*the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments*”.

The limitation duly introduced and that deals with the advice in respect of one or more transactions relating to financial instruments, in conformity with the principles of the rules, nothing else means but an imposition to the investment firm on the development of such an advice activity relating to the typical activity of the investment services, and therefore of the financial transactions .

Consequently, such a limitation does not certainly appear sufficient to prevent the execution by the investment firm (also through tied agents) of the advice activity consisting only in the research of the best investment profile (activity of "asset allocation"), which not only represents the preliminary essential stage for the subsequent transactions, but, above all, which is to be considered an identifying and qualifying element. Such an element is apt to determine the current guidance and the current assumption of the main investment options.

The choice of the single securities belongs to different phases, the allocation, the dealing and the qualification of the advice as only pertinent to such an option. This latter shall not interfere with the choices upstream, which, as said, must be considered much more qualifying and not belonging to any other investment service (with the exclusion of the management, that, moreover, generally implies the subtraction, for the client, of the single choices). The choice of the single securities would mean nothing else but an acceptance of reductive significance of the advice, acceptance which clashes with the fundamental nature of the investment services, and which does not meet any reasonable justification.

The important thing is that such a reduction is not at all authorized by the law. According to the legal structure, it deals with an advice relating to single operations and therefore to services and products both advised by the investment firm. Such an advice therefore must still be carried out within the general or particular possibilities of investment offered by the investment firm, but not as an instrument of them: as above pointed out, the use of such an expression cannot be finalized to make an advice activity only useful for the single operations and finalized not to allow the investment firm (and on his behalf the "tied agent", article 23) to carry out the advice activity only relating to the research of the ideal investment for the client (activity of asset allocation).

This is jeopardized by the literal expression "*in respect of.....*", which means relation of relativity and not of instrumentality. The relativity does hold: the advice relating to the phase of "*asset allocation*" cannot be an instrument for the single transactions, which can be executed or not, but the advice is certainly pertinent to them, since it constitutes their essential condition.

The crucial element is represented, above all, by the substantial and systematic significance of the rule – and in fact it is renowned that in the European Community Directives, the literal expressions can be misleading as a result of the inadequacy of the translation from a language to another -: the advice, rendered in the financial instruments, belongs to the category of services which guide the client and does not belong to the category of services which execute the client's requirements.

Advice exactly belongs to the first category. Still belonging to the first category is the handling of orders as a more qualifying service. On the opposite, the dealing, the reception of orders (and with an extreme profile of peculiarity, the allocation, which also represents the more remarkable service soliciting the public savings), belong to the second category.

Going back to the first category, the one of guidance, it is renown that the borderline between the advice and the dealing is represented by the execution of investment transactions, for which the investment firm is entrusted and which is unfailingly present in the handling of orders, and for which the client is entrusted and which is only discretionary in the advice activity.

Apart from the above said issues, there are no differences between handling and advice, both defined by the client's guidance for the purpose of an optimal enrichment of his assets. It is renown that handling activity consists of two phases: the activity of "asset allocation", that means selection of the range of investment and diversification of the client's assets per category, currency, area, expiration, etc. and (in logical sequence) the subsequent phase of "stock picking", that means the concrete selection of the single securities. Therefore, it is self-evident, according to the modern financial management theories, that the handling itself, particularly in the individual management of the funds, can wind up only into the "asset allocation", only through the choice of categories, each of them represented only by one security (maximum portion of a fund).

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In such a view, the exclusion, from the investment advice area, of an activity of advice relating to the sole phase of the “asset allocation” and therefore perfectly mirror-like to the management, would not be understandable. Such an interpretation would disclose a reductive approach and would certainly be clashing with the unitary and systematic vision of the investment services.

We remain available for any further clarification you may require.

With kindest regards.

The Chairman
Elio Conti Nibali