

Committee of European Securities Regulators  
11-13 avenue de Friedland  
75008 – Paris  
France

Milan, 14 December 2009

Dear Sirs,

## 1. INTRODUCTION AND SCOPE OF THE RESPONSE

We welcome the opportunity to comment on the Consultation Paper “*Understanding the definition of advice under MiFID*” (the “**Consultation Paper**”) issued by the Committee of European Securities Regulators (“**CESR**”) and, in particular, to provide our views on the distinction between the “core” investment advice service and the “ancillary” service provided for under Section B(3) of Annex I to Directive 2004/39/EC (the “**MiFID**”), as examined in Part 5.a of the Consultation Paper.

Our comments are specifically addressed to question 7 of the Consultation Paper. In this respect, attention is given to the possible impact of the approach described in point 74 of the Consultation Paper<sup>(1)</sup>, and in particular about the impact on:

- (i) the status and the activity of various consultancy firms; and
- (ii) the level of competition in the relevant market.

We focus on those firms that may not benefit from any other exemption from the core investment advice rules under the MiFID <sup>(2)</sup>, including those corporate finance firms - such as

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<sup>(1)</sup> According to this, the MiFID suitability requirements may apply regardless of the sophistication of the individuals to which the advice is given, naturally provided that the requirements of the definition of “*investment advice*” set out in Article 4(2)(4) and Article 52 of Directive 2006/73/EC of the MiFID (the “**MiFID Implementing Directive**”) are satisfied.

<sup>(2)</sup> We refer to:

- (i) Article 2(1)(j) of the MiFID, pursuant to which the MiFID does not apply to “*persons providing investment advice in the course of providing another professional activity not covered by this Directive, provided that the provision of this advice is not specifically remunerated*”;
- (ii) Recital 81 of the MiFID Implementing Directive, according to which “*generic advice about a type of financial instrument is not investment advice*” for the purposes of the MiFID; and
- (iii) Recital 81 of the MiFID Implementing Directive, according to which the provision of a general recommendation about a transaction in a financial instrument or a type of financial instrument

the advisory companies of the private equity funds - that:

- (a) do not necessarily structure M&A deals and/or provide financing to implement transactions as part of an overall investment package, but rather
- (b) provide their clients with a complete analysis of potential targets, (e.g. by giving a clear picture of the financial situation of each of potential target, a description of the relevant market and an outline of the potential synergies and business development opportunities), and which are compensated for this activity.

In theory, this kind of activity may satisfy the requirements of the definition of investment advice, i.e. the provision of a recommendation which is tailored to the investor's wants and needs in respect of a transaction relating to a specific financial instrument.

## 2. INTERPRETATION OF THE DEFINITION OF "ANCILLARY" SERVICE

Under the literal interpretation of the definition of the "ancillary" service set out in Section B(3) of Annex I of the MiFID<sup>(3)</sup>, the service must:

- (i) be addressed to clients which are either companies or individuals carrying out a commercial business; and
- (ii) refer to either capital structure, industrial strategy and related matters or to mergers and the purchase of undertakings.

Consequently, any advice provided to a retail investor that is not at the same time an entrepreneur (i.e. a person who purchases or sells the financial instrument for purposes relating to his trade, business or profession) would not in principle fall within the scope of the ancillary service and may trigger the application of core investment service rules. Moreover, an overlap may only occur between the core and the ancillary service if the advice concerns a transaction involving one of the financial instruments listed in Section C of Annex I of the MiFID. Otherwise, the advice may be freely provided by firms that are not authorised to carry out investment services and activities.

Without prejudice to the above, our view is that: (a) the background of the ancillary service; (b)

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constitutes the provision of an ancillary service within Section B(5) of Annex I of the MiFID.

<sup>(3)</sup> "Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings".

its purpose; and (c) the type of client, should be regarded as the key elements to distinguish the ancillary service from the core investment advice service.

In particular:

- (a) contrary to the core investment advice service, the ancillary service normally requires a deep analysis of the target undertaking's business, including from a legal stand point, and not only an overall assessment based on publicly available information;
- (b) in our view, the ancillary service is mainly aimed at supporting private equity investments<sup>(4)</sup>. Another key aspect of the private equity investments is that this kind of investment is not limited to the acquisition of a controlling/minority stake in an undertaking, but typically includes the transfer of know-how and a direct investor participation of the in the management of the undertaking; and
- (c) the ancillary service is, in principle, addressed to institutional investors.

We share CESR's view that there are situations in which the ancillary service and the core service seem to overlap. In this respect, the example set out in the Consultation paper relating to the advice given to different members of a family owning a firm (which is typical scenario in Italy) in relation to the possible sale of their stake seems to fall in a "grey area" between the two services. Given that in this case it is difficult to draw a line between the two services, a careful examination of the client's position should be carried out.

By way of example, if the potential seller is a manager of the relevant firm and, therefore, has specific experience and knowledge in the market as well as an overall picture of the firm, his need for protection would be relatively low. On the contrary, where the co-owner of the firm does not play a key role in the firm or in any case has no specific experience of the relevant market and of the firm itself, the need for protection would be high. In any case, as suggested by the CESR, if the aim of the transaction is to achieve a particular industrial action, this will

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<sup>(4)</sup> With regard to the Italian legal framework, this consideration seems to be confirmed by the Bank of Italy's Resolution 14 April 2005, Title II, Chapter III, paragraph 5, where it is stated that those Italian asset management companies which promote and manage closed-ended investment funds may provide undertakings with advices relating to capital structure, industrial strategy and related matters and advices and services relating to mergers and the purchase of undertakings (without a specific prior authorisation). For the sake of clarity, we would consider it appropriate to include in this category: (i) the advice given in connection to investments made in undertakings, that have potential in terms of development or growth, by institutional investors to increase their value and disinvest after a medium-long term period, and to earn a capital gain; and (ii) the corporate finance advice given to industrial entities seeking an aggregation with another market player or a financial support from an institutional investor.

not entail the provision of the core investment advice service.

### 3. INVESTOR'S NEED FOR PROTECTION

Bearing in mind the above, below is our view on the main differences typically existing between clients of the core service and the clients of the ancillary service in terms of need for protection:

| Relative bargaining power  |   |
|--|---|
| <p><u>Ancillary service:</u> the client is an institutional investor that is normally in a position to negotiate the terms and conditions of the acquisition of the undertaking, requiring representations and warranties from the seller and, if necessary, preparing an <i>ad hoc</i> business plan together with his consultants. The investor may influence the management of the relevant undertaking and, as a result, he is directly responsible for positive/negative results.</p> | <p><u>Core investment service:</u> the client may be either a professional or a retail customer but, in any case, is not normally in a position to require specific representations and warranties from the seller and does not need the preparation of an <i>ad hoc</i> business plan. In principle, the client cannot influence the management of the undertaking in which he holds a stake, apart of course from the possibility of exercising voting rights in the shareholders' meeting.</p> |

| Information asymmetries  |  |
|--|--|
| <p><u>Ancillary service:</u> the client has a complete picture of the undertaking into which invests both from a financial and a legal standpoint. This is the outcome of the due diligence carried out by the investor through his consultants (legal, financial, environmental, tax etc.).</p> | <p><u>Core investment service:</u> the client seeks the advice of an authorised intermediary to find a suitable investment for him. The analysis carried out by the intermediary is based on reports provided by brokers or other forms of publicly available information.</p> |

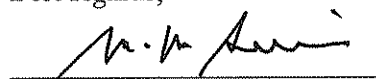
| Knowledge and experience  |  |
|---|--|
| <u>Ancillary service</u> : the client is an institutional investor possibly with specific knowledge and experience in the relevant market of the undertaking in which it invests. | <u>Core investment service</u> : the client is not necessarily an institutional investor and may not have specific knowledge and experience in the relevant market of the undertaking in which it invests. |

| Need for protection   |  |
|---|--|
| <u>Ancillary service</u> : the client is not dependent on any advice he received by consultants to the extent that he has the technical instruments (in terms of financial capacity, organisation, knowledge and experience) to ascertain the risks deriving from the investment, the relevant financial impact and its suitability in respect of the investment targets. | <u>Core investment service</u> : the client is somehow dependent on the advice received by consultants either because of being not able to assess the financial impact of the transaction or the relevant risks or its suitability in respect of the investment targets. |

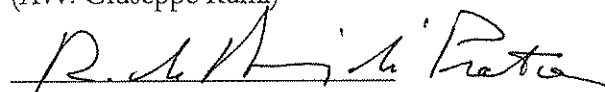
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We kindly ask you to treat this document as confidential.

Best regards,



(Avv. Giuseppe Rumi)



(Avv. Roberto de Nardis di Prata)