Paris, 14 December 2009,

CESR CONSULTATION

UNDERSTANDING THE DEFINITION OF ADVICE UNDER MIFID

RESPONSE OF BNP PARIBAS GROUP

sent by 14.12.2009

Presentation of BNP Paribas Group

Name and address of the respondent

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EC Interest Representative Register ID : 78787381113-69

Field of activity of the respondent

BNP Paribas Group (www.bnpparibas.com) is a European **leader in banking and financial services**, with a significant and growing presence in the United States and leading positions in Asia. The Group has one of the largest international banking networks, a presence in over 85 countries and 205,000 employees including 165,000 in Europe - among them 19,500 in Italy, 18,800 in Belgium, 63,900 in France and 3,800 in Luxembourg. BNP Paribas enjoys key positions in Corporate and Investment Banking, Private Banking and Asset Management, Insurance, Securities Services and Retail Banking.

BNP Paribas welcomes the opportunity to respond to CESR's consultation on understanding of the definition of advice under MiFID as part of a dialogue between the industry, regulators and stakeholders with the objective of a common understanding and harmonised approach to investment advice.

In the course of our analysis of the above document, BNP Paribas has contributed to responses compiled by industry bodies in a number of jurisdictions including The Association for Financial Markets in Europe (AFME), the Association Française des Marchés Financiers (AMAFI) and the French Banking Federation (FBF) and in the main agrees with their positions in respect of the specific issues raised.
We nonetheless remain concerned in relation to certain aspects of the paper and therefore wish to focus upon these concerns in our own response.

At a high level, our concerns are as follows:

1. Focus of paper. The paper appears to have been written from the perspective of retail markets rather than wholesale markets, and takes little or no account of the differences between the two. Whilst we broadly accept the need for the approach suggested in respect of retail clients, for professional clients (particularly wholesale market counterparties) the suggested approach would be too onerous to implement and would harm the smooth functioning of the market without commensurate (or necessary) benefits in terms of necessary protection for professional clients nor the control of systemic risk.
2. Recognition of market practices**.** It is a fundamental feature of the wholesale market that it primarily functions on a "RFQ" (request for quote) basis. There is no scope – or need – for an "investment advice" regime overall and/or protection in relation thereto unless professional clients ask specially for the provision of investment advice (for which a fee may be payable). The guidance in the paper does not however recognise this.
3. Contractual relationship. The starting point for the relationship between professional clients should be the contractually agreed terms, in the context of the overall general legal analysis (e.g. liability for misrepresentation, "sham" transactions, rules of interpretation etc).
4. Identifying a set of clients with similar characteristics to whom more specific information could be targeted, does not automatically constitute investment advice.
5. "Investment advice" and "corporate finance advice" are mutually exclusive.

These points are developed in further detail below.

We would request that CESR provide clarification as to the intended focus of the paper. At present, CESR makes no distinction between the retail and the wholesale markets nor differentiation between the level of market expertise amongst clients active in these markets (as recognised under MIFID through the client classification regime and the acknowledgement that suitability rules are applicable in a more limited way to professional investors). We believe that it is extremely important that this distinction is recognised along with the different dynamic that exists between a firm and its counterpart in the wholesale marketplace.

Whilst we are in agreement with CESR that the behaviours outlined in the paper <u>could</u> constitute the provision of investment advice, there is limited focus on the behaviours that do not. This we believe should be more clearly stated, particularly in the wholesale market context.

Specifically, the paper makes several references to the fact that, notwithstanding

- a client's understanding,
- the basis of the cleint's relationship with a firm, or
- any disclaimers or documentation used,

a recommendation is still likely to constitute investment advice. However, there is little or no reference to circumstances where it may be legitimate to rely upon these factors as an indication that investment advice is not being given.

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

We would agree that a statement of opinion may constitute investment advice if it is presented as a personal recommendation or in the interests of the investor. However we would contend that the provision of information to clients may constitute investment advice only if the other tests of the diagram are met.

A statement of opinion may also fall outside the scope of advice if it is merely intended to inform the investor. For example, it is common practice for BNPP, and other wholesale market participants, to issue statements of opinion in the form of market commentary or trading ideas.to our professional client base. This is part of the service that our professional clients expect and pay for, and is provided with the understanding that our clients have the expertise to determine for themselves the usefulness of the opinion or ideas therein.

Whilst this commentary may be sent to single or multiple client(s) to which we believe the information is relevant and potentially of use, there is no intention from BNPP nor (more importantly) expectation from our professional clients that a personal recommendation is being provided.

CESR appears to recognise this factor in paragraph 79 of the paper ("where an investment firm provides a recommendation to a portfolio manager, it will usually be the case that the investment firm is not giving investment advice to the portfolio manager's client but is simply providing a general recommendation, such as an investment tip"), however, this recognition should be applied to the rest of the document.

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

We support responses by industry bodies and BNP Paribas would highlight in particular the situation in relation to the wholesale markets.

We have particular concerns over the content of paragraph 6 of the consultation in which CESR suggests that "*where the recommendation is in fact based on a consideration of the client's circumstances, this will constitute investment advice regardless of what the client believes or knows. In addition, where it is reasonable to think that a recommendation is being presented as suitable, this will constitute investment advice regardless of whether the recommendation is suitable for the client*", along with the application of this principle in paragraphs 48 to 54.

Whilst we appreciate the point that CESR is seeking to make with this wording, clarification is needed as to how this principle should be applied in the wholesale markets. There are limited circumstances in which a wholesale market client will require, believe it is receiving, or indeed want to pay for investment advice, and this must be recognised in CESR's analysis. This could be achieved by focussing on the contractual relationship between a firm and its client (which is a key consideration), and the nature of the client (non-professional vs professional).

As a result of its ongoing relationship with a client, BNP Paribas may well obtain information as to the strategy employed by a particular fund or indeed the longer term investment aims of the fund manager. In addition, a significant amount of business in the wholesale markets is done on a "RFQ" (request for quote) basis, whereby the client will outline their specific objectives for a transaction to enable the firm to provide trading ideas. Possession of such information by the firm should not be a key determinant as to whether a recommendation is being provided in these circumstances, as suggested by Paragraph 50. We would expect a professional client to be able to decide which ideas are the most appropriate given its needs and overall objectives, and a firm to provide trading ideas on this basis.

CESR's comments on filtering in paragraph 23 "A critical factor would be whether the process is limited to, and likely to be perceived by the investor as assisting the person to make his own choice of product…."; and paragraph 24 "In such cases, the ability of the clients to make their own choices about the features they are looking for, and the absence of apparent judgement about which features or products they should choose, would make it unlikely that the service offered would be viewed as investment advice" appear to indicate CESR's recognition of these considerations, albeit in a different context. We would request that CESR consider wider recognition of this concept when applied to wholesale markets.

In paragraph 47, CESR states that notwithstanding the existence of a clear, prominent and understandable disclaimer stating that no advice or recommendation is being given, a firm could still be viewed as having presented a recommendation as suitable for the client if the nature of the communication is such that it would create a reasonable expectation by the client that he is being advised.

We believe that the starting point should instead be the contractual relationship between the parties (where both parties are professionals), in particular, a provision that unless otherwise agreed with the client the firm will not be providing personal recommendations and therefore no communication to a client is to be taken as a personal recommendation, as a method of removing the firm from the scope of suitability obligations other than on an exceptional basis. This is currently common practice in the wholesale markets.

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

Generally speaking, the mere fact of sending an email to a client (which is personalised only to the extent that the name of the client is used) can not be considered in itself as constituting a personal recommendation.

In addition, in many instances, general recommendations are not addressed randomly to all clients of the firm. An initial filtering of the client base is generally performed to identify a set of clients with similar characteristics to whom more specific information could be targeted. The fact that a message is addressed to a set of clients (and not to all the clients) does not change the nature of the message. In addition, conceptually, investment advice does not sit well with the notion of multiple clients, since the purpose of the service is to consider the personal circumstances of each individual and not the common feature(s) shared by a group of people.

Q.7. What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?

The criterion to distinguish "investment advice" from "corporate finance advice" cannot be whether or not the advice involves the investment in financial instruments – because in both cases, there may eventually be the purchase or the sale of financial instruments.

The key criterion to distinguish "investment advice" from "corporate finance advice" should be the objective pursued by the client when seeking advice from a professional firm.

In the first situation (investment advice), the client has a "patrimonial" objective, i.e. he is looking for (or receiving at the initiative of the firm) a personal recommendation concerning the type of investment he should make to have the sort of return on his investment that he is seeking. Very simply, the client has some money and wants to invest it into some type of financial instruments (whatever its nature and/or the company concerned) that will give him a return on his investment. It may also be that the client wants advice as to whether he should sell certain financial instruments that he holds – still with the objective of making money (or at least losing as little money as possible, depending on the surrounding economic circumstances of the matter). In both cases, whether the client is receiving advice as to whether he should buy or sell certain financial instruments, the advice he is given may be characterised as "investment advice" provided that the other criteria of this service are met.

In the second situation, the client has an "industrial/entrepreneurial/strategic" objective. In this case, he is looking for "corporate finance advice". The identification of the client in this context is particularly important. The client is generally the main shareholder of the undertaking (alone or with a group of "industrial investors/entrepreneurs"). It may also be the management of such undertaking (president, manager or board depending on the form of the company). Very often, particularly in small or medium size - and certainly in family-owned - undertakings, the main shareholder and the management is the same person. In larger companies, they can be different and have different objectives although both have an industrial/entrepreneurial objective when seeking corporate finance advice.

The "industrial/entrepreneurial/strategic" objective is easy to understand and does not require a lot of explanation. At its base, there is always an industrial motivation: to expand the company's business, to find new partners, to find new ways of financing the current activity of the company or to develop new activities, new products, etc… If the objective is to sell, it can be, for instance for an ageing client, to sell his company or its business to somebody who will be able to pursue it and maintain the workforce, etc…In all these cases, the key difference with the purely "patrimonial" objective is that the search for a profit is not the only motivation. Naturally, the corporate finance client also wants preferably to make a profit but it is not the sole or the primary objective.

In addition, we believe that whilst in a limited number of cases (for example a tender offer), it could be true that both types of advice could be rendered, they will never be rendered simultaneously to the same client. In that sense, investment advice and corporate finance advice, in AMAFI's response, are mutually exclusive.