ASSOGESTIONI
associazione del risparmio gestito

Milan, 21th January 2005,

Mr. Fabrice Demarigny
Secretary General
CESR- The Committee of
European Securities
Regulators

Re. 39/05

Dear Mr. Demarigny,

Re: CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Market in Financial Instruments (Ref.: CESR/04-562)

In replying to the invitation contained in your consultation document to produce observations and comments, the undersigned Association wishes first of all to thank you for the opportunity you have accorded us.

Assogestioni is the Italian Association of the Investment Management Industry and our members, who manage assets with a total value of over 900 billion euro, are directly concerned by the regulations subject to consultation, both individually and collectively.

On account of the activities provided by our Associates, our attention in relation to the contents of the consultation document focused on the following areas:

- **Article 4.4 on the definition of investment advice;**
- **Article 19.1 on the general obligation for the investment firms to act fairly, honestly and professionally and in accordance with the best interest of the client;**
- **Article 19.4 and 19.6 on suitability test and execution only business;**
- **Article 24 on eligible counterparties.**

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1. Definition of investment advice (Article 4.1 No 4)

The basic factor behind advisory work is, in our opinion, represented by the provisions contained in para. 4 of art. 19. In this sense the definition proposed by the CESR in its Draft Technical Advice, being set against factors referred to in this article, appears able to draw the distinction between investment advice and any other form of general recommendation or commercial offer.

Given this, before focusing our attention on the specific questions put in the consultation document, we wish to point out that, in the opinion of our Associates, it is of fundamental importance that, at a defining level, the greatest possible consistency be assured between the contents of Technical Advice and the regulations set down by the new UCITS directive. Nevertheless, other directives will have to be taken into consideration as well, such as the E-Commerce, Distance Marketing and Insurance Mediation Directive. Furthermore, the definitions of research, financial analysis and journalistic activity contained in the Market Abuse directive will have to be considered for the same reasons.

On the specific questions put in the consultation document concerning investment advice:

Question 1.1: Do you agree that advice on services, such as recommendations to use a particular broker, fund manager or custodian should be covered?

It is our opinion that the recommendation to use a given intermediary must remain outside the scope of the definition of investment advice. Such an indication in fact lies beyond the typical activity of advice, which stops at recommending to carry out one or more transactions on financial instruments (art. 4, par. 1, no. 4) or, even, going further, recommending the most appropriate investment service (art. 19, par. 1).

Given this, we wish however to stress that where the advice takes the form of a recommendation to carry out one or more transactions concerning quotas in mutual investment funds, it is reasonable to consider that the recommendation could also go so far as to suggest a particular fund manager. A manager strongly characterizes his product, to the extent of differentiating it markedly from products of the same type which – on paper - have the same characteristics.

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"?

Referring solely to the contractual relationship between parties does not allow for the consideration of an aspect that characterizes advisory work, i.e. that of knowing the personal details of a client and his financial situation. Given this, it is our opinion that reference to the bilateral nature of the relationship can be deemed sufficient solely where the parties have an existing contractual relationship for the provision of an investment service which already presumes an in-depth knowledge of the client (such as the individual management service) and not other services where this knowledge is neither necessary nor required.

Question 1.3: Do you think it is reasonable to restrict investment advice to recommendations of specific financial instruments or it is necessary to cover generic information including financial planning and asset allocation?

The activity which constitutes an advisory relationship is not just that which points towards specific investment options, but also that which takes the form of general, systematic planning of a client's financial portfolio when such planning is intended to promote the underwriting of a financial product or service.

We therefore feel such forms of financial planning and asset allocation should also come within the context of investment advice.

2. The general obligation for the investment firms to act fairly, honest lyand professionally and in accordance with the best interest of the client

Question 3.1: Do you agree with the proposals on portfolio management? Should any other issues be addressed under article 19(1)?

In general terms, we would point out that the obligation contained in art. 19, para. 1, represents a general obligation referring, as such, to all investment companies, irrespective of the specific type of service provided. That much said, in our case, it is mainly the individual management service and the distribution/advice service which count.

In this context we consider that this provision, already accompanied by the further, specific rules of behaviour set out in the following paragraphs of art. 19, need not require detailed level 2 implementation, just as it applies in terms of the governing rules dictated by the UCITS, which places similar obligations solely under art. 5, i).

3. Suitability test, appropriateness test and execution-only business

The issue of Suitability/Appropriateness is a reminder of the need to establish regulations which clarify the division of responsibility between the various intermediaries concurring to provide investment services to the same client (as

moreover recommended by the OECD in the document "Governance of collective Investment Schemes" - cfr. Section B page 11). From an operational viewpoint, in fact, very often the provision of investment services, in the course of the relationship but also in the prior stage of advice and offer to the client, produces an overlapping of intermediaries. Given this, it is advisable to have regulations established concerning the reception, processing and circulation of information which the client provides to the intermediary with whom it enters in direct contact and which is subsequently transferred by the latter to the manager in an already processed and summarised form, in what is known as the "client profile". In this context, it is clear that there is a need to set minimum standards on level 2 of the Lamfalussy procedure concerning the preciseness expected of the first intermediary in collecting the information and in the subsequent work of processing and passing it on.

That much said, in the context of the Suitability test (and similar tests) it is essential to relate each assessment to three main factors:

1. the nature of the investment service;
2. the nature of the financial instrument subject of the investment;
3. the nature of the client (professional or retail).

With regard to the first of the factors indicated, it is clear that an assessment of suitability varies in the same way as the degree a client entrusts himself to an intermediary varies in relation to the type of investment service required (so-called "full advisory service"; "basic advisory service"; "Non advisory service"). The nature of the financial instrument also impacts on the assessment procedure at paras. 4, 5 and 6 of art. 19, in particular in relation to the levels of understanding of the characteristics which affect its returns and the risk level. Finally, it is essential to take into adequate consideration the different protection needs of a professional party and of a retail investor. The former's level of awareness, in fact, often accompanied by a reluctance to indicate and provide exhaustive information on his own asset allocation, means that an assessment of suitability can only be carried out within the limits of the information provided. Against this, it is no doubt advisable to establish operating standards which are more protective where the retail client is concerned.

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 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 the consideration of his personal circumstances*?

The *Suitability test* represents a process summarising the characteristics of the client drafted on the basis of the information received from the latter. Cases where the client refuses to provide information concerning his/her knowledge of and experience in investments in financial instruments, his/her own financial situation and investment objectives are very rare. It is more frequent for the client not to refuse the request for information altogether but rather to provide partial information. Given this, the essential condition for being able to provide an individual management service is at least the knowledge of the client's investment objectives. Whilst it may be possible to arrange a management service in the absence of information concerning the financial situation and knowledge and experience concerning investments in financial instruments, this is not the case whenever the investment objectives are not known.

Question 5.1*.: In determining criteria, should CESR pay more attention to the legal categorisation or the economic effect of the financial instrument?*

The complexity of a financial instrument is in relation to and depends on the degree to which it can be understood in relation to its economic effects.

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?*

Yes, it is reasonable provided that what constitutes "impairment to the client's ability to make an informed decision" is defined.

4. Eligible counterparties (Art. 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? Please provide the reasons for your position.*

No, a further factor in addition to the quantitative thresholds used for professional clients needs to be identified. In our opinion, in fact, if the same parameter for

thresholds as used for professional clients were to be adopted, this would essentially devalue the distinction between professional clients and eligible counterparties and, in particular, the decision to distinguish between parties who are eligible "in themselves" (and indicated at paragraph 2 of art. 24) and those who can be considered eligible upon request.
Having said that, the further requirement with respect to the quantitative thresholds proposed could be that of having, amongst the activities which come under the company's object, a financial operability, not necessarily subject to authorisation, or, alternatively, that of meeting all three quantitative thresholds, and not just the two thresholds presently set down for professional clients.

We are at your disposal for any further clarification which you may require.

Yours sincerely,

The Director General