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Comittee of European Securities Regulators

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Date 14 December 2009

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Re: Understanding the definition of advice under MiFID – response to consultation
re corporate finance advice vs. investment advice

Dear Madam / Sir :

We have taken notice of CESR's consultation paper "Understanding the definition of advice under MiFID". Below we respond to Q.7 of the paper relating to the distinction between corporate finance advice and investment advice.

In our view, advice rendered by strategic consultants / corporate finance firms will typically qualify as the form of advice that is described under Section B, item 3, of Annex I to the Directive ("**corporate finance advice**"). Where advice qualifies as an "ancillary service", it should not qualify as an "investment service" (such as "investment advice".)

Nevertheless, paragraph 76 of the consultation paper suggests that certain forms of advice may qualify at the same as corporate finance advice and as investment advice.

We believe, however, that typically the advice given by strategic consultants / corporate finance firms should not qualify as investment advice for the following reasons (alternatively one could phrase this as: should not qualify as investment advice as long as the following conditions are met).

Firstly, corporate finance clients are not advised on a financial investment but rather on a purchase of a strategic stake in a target¹ (or, as the case may be, a split-off from their company). The corporate finance client will want to exercise management control (or at the very least an important degree of influence) over the target's business from the perspective of his strategy for his own, existing, business. For instance this client will through the acquisition of the stake want to increase market share, or achieve synergies. This is different from a client receiving investment advice on a purely financial investment, where typically the client would be much more passive in respect of the investment (not seek an important degree of influence, let alone control, over the issuer's business).

Secondly, corporate finance clients typically have specific knowledge of the business of the targets, which would go further than just the information that is available from public sources. In comparison recipients of investment advice will typically only have generic knowledge of the issuer's business, derived from public sources only.

As a final point, and of a more legal nature: as corporate finance clients' intentions and involvement in relation to the participation go beyond a passive financial investment, one could argue that these clients cannot be regarded as "investors" within the meaning of the MiFID. As also stated in paragraphs 66 and 72 of CESR's consultation paper, advice can only qualify as investment advice if rendered to an "investor" (see Article 4(1)(4) MiFID jo. Article 52, 1st paragraph MiFID Implementing Directive).

Yours sincerely,

Joost Schutte and Lotte Bolhuis

¹ Such purchase does not necessarily need to relate to all or substantial all shares of a company; it can also relate to a minority interest obtained for strategic or entrepreneurial reasons.