

**Response to the CESR Consultation Paper
“Understanding the definition of advice under MiFID”**

We are grateful for the opportunity to submit our views on CESR’s Consultation Paper (the “**Consultation Paper**”) for determining whether information constitutes investment advice under MiFID. Our comments relate specifically to Part 5a of the Consultation Paper, in particular question 7.

The business model of a significant number of consulting and corporate finance firms consists of providing advisory services for enterprises relating to strategic or entrepreneurial acquisitions of holdings (mostly controlling participations) in target companies operating in certain sectors. Such services are typically based on a systematic collection, review and analysis of information pertaining to the target and the relevant business sector. The final product of such services often consists of a short-list of potential acquisition targets. The consulting or corporate finance firms are specifically compensated by their clients for the aforementioned services.

This business model is different from that of traditional corporate finance firms which offer certain advice on potential acquisition targets with the objective of being appointed to structure the acquisition process, assist in the due diligence process and the negotiations and possibly in the financing of the transaction. In this case, the corporate finance advisory services are not separately remunerated and would fall under the MiFID exemption pursuant to Art. 2 (1) lit. j.

The Consultation Paper already contains some remarks regarding the distinction between corporate finance advice from investment advice. However, no. 74 and 75 of the Consultation Paper so far mainly describe opposing views on the scope of corporate finance advice with regard to M & A transactions. Question 7 of the Consultation Paper explicitly asks for a specification of information which would be helpful to assist in determining whether or not firms provide investment advice or corporate finance advice. In our view, legal certainty in the application of the concept of “investment advice” could be enhanced if CESR included guidelines on the qualification of advisory services relating to strategic or entrepreneurial acquisition opportunities in the Consultation Paper.

1. In order to distinguish corporate finance advice from investment advice, it would be helpful to take into consideration the type of customer for whom the services are rendered and the objectives pursued by such customer.
 - 1.1. Corporate finance advice is typically given to corporates or to private equity funds intending to exercise active entrepreneurial influence over the target company.
 - 1.2. Financial investors, on the other hand, are typically neither interested nor capable of exercising active entrepreneurial influence over the issuer of financial instruments. The investment consists in the reallocation of liquidity into financial instruments in the expectation that the investment will generate a return as a result of market movements and without further involvement of the financial investor in the business of the issuer.
2. The difference is furthermore underlined by the fact that strategic decisions to acquire shares in a target company is typically a management decision supported by the internal corporate development department of the strategic buyer while investment decisions are prepared and executed by the treasury division of the financial investor.
3. Customers of consulting and corporate finance firms for the aforementioned services also differ from financial investors with regard to their need for protection:

a) Relative bargaining power

Strategic buyers are typically capable of negotiating the terms of their acquisition individually with the shareholders of the relevant target company and customarily receive specific representations and warranties in relation to the target company. Financial investors, on the other hand, typically invest on the basis of terms and conditions determined by the financial instruments of the relevant issuer and the current financial market environment without receiving any further assurances.

b) Information asymmetries

Strategic buyers typically conduct a comprehensive due diligence (legal, HR, tax, environmental, etc) before acquiring a holding in a target company which includes confidential information not available to the public. Therefore, strategic buyers typically have in-depth knowledge of their target companies. While financial investors may also analyze issuers before investing, their analysis is generally limited to publicly available information.

c) Knowledge and experience

Strategic buyers are generally sophisticated and experienced in relation to the business sector in which the target company operates. Financial investors generally only have a very general knowledge of the various sectors before making their strategic and tactical asset allocation.

d) Need for protection

It follows from the above that strategic buyers do not need the protection which MiFID affords to financial investors. This does not contradict the (limited) MiFID protection of eligible counterparties which are sophisticated participants in the financial markets and have significantly more knowledge and experience of the financial markets than private or professional investors. However, if eligible counterparties act as financial investors, they typically do not have the information, bargaining power and knowledge and experience of a strategic buyer. Furthermore, even eligible counterparties typically do not seek active entrepreneurial influence over issuers – unless they act as strategic buyer (e.g. the purchase of a credit institution by another credit institution) and are sometimes even prevented from doing so by regulatory requirements.¹

HENGELER MUELLER

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¹ Cf. with regard to UCITS, Art. 22 (1), (2) of Directive 85/611/EC.