

14/12/2009 - Febelfin Position Paper

Understanding the definition of advice under MiFID

CESR Consultation Paper of 14th October 2009

Febelfin, i.e. the Federation which regroups four trade associations from the Belgian financial industry¹, welcomes the opportunity to express its views on the consultation paper mentioned above.

While supporting the position paper from the European Banking Federation, members expressed the desire to indicate a number of specific concerns.

I. General Remarks

The efforts of the CESR in its attempt to determine what is investment advice and what is not is valuable for the financial institutions. It is indeed one of the most important concepts within MiFID. The mere fact that the CESR feels necessary to intervene two years after the MiFID provisions entered into force demonstrates that the concept as applied in daily banking activities still deserves more clarity.

Unfortunately, the Paper generates additional concerns.

1) The most significant criticism is based on CESR's assumption that in a number of cases the investor's view (on whether or not advice is being given) dominantly prevails.

We consider that CESR's stance goes way too far when using such a unilateral and subjective way of appraising whether or not an advice is being given. Such an approach, of which the existence of a sound legal basis is highly questionable, creates uncertainty and could potentially lead to numerous clients' claims and court cases even in the events where actually no advice is provided.

We do not question the fact that abuses and misuses have to be avoided by investment firms but we strongly doubt that purely relying on the client's impressions in a large number of situations² would be an acceptable position.

Moreover, the uncertainty that is generated through this assumption will be reinforced as numerous provisions are too vague and lack the criteria for further assessment.

¹ The following trade associations are part of Febelfin: the Belgian Bankers' and Stockbroking Firms' Association (ABB/BVB); the Professional Association of Credit Providers (UPC/BVK); the Belgian Association of Asset Managers (BEAMA); the Belgian Leasing Association (BLA).

² (nr's 5, 6, 20, 23, 47, 51, 52, 64 of CESR's Consultation paper dd. 14.10.2009)

2) CESR introduces uncertainties as to the validity of disclaimers³.

We consider that investment firms should remain allowed to state that communications, information or recommendations have a general character or that advices have a generic nature and, provided they are not presented as suitable, are not given on the basis of the client's personal circumstances.

3) The use of a very broad definition of 'a person's circumstances'⁴ practically implies that nearly all information sent to customers will be considered as investment advice and that the use of diversification as good practice in investment strategies will no longer be possible.

Any factual information or more subjective information about a client's wants and needs can be considered as part of a person's circumstances. Mailing to a targeted audience requires the use of the clients' addresses but it is not because a mailing is sent to a client for whom the investment firm has his investment objectives, his financial situation and his level of knowledge or experience that it automatically means that the communication he received is per se suitable for him.

If the client is targeted in this audience, it is probably because in theory the investment firm supposes there could be an opportunity for him (e.g. diversification via a product of which he holds no investment, communication on an IPO in a sector in which he has already made investment etc). What would be the point in sending communication, information or recommendations which are so general that they could never be of interest to the clients concerned ? A pre-judgment is indeed required if we want the information to be relevant to the client. But it does not mean therefore that the proposal is suitable per se for the client as this sort of information will not have taken into account the 3 pillars of suitability. This is even more true once we come to a portfolio approach where it is necessary in each individual case to ascertain that there is sufficient room in the existing assets allocation, a parameter which also depends on the level of investment the client wishes eventually to make.

4) We consider that the provisions of MiFID applicable to the ancillary service of corporate finance are limited and we would rather follow the option retained under item 75 and not under 74 which goes too far in our view.

5) Finally, we have the impression the author of the consultation paper mainly focuses on plain, exchange traded equity products. The view about what is investment advice and all examples given are "obvious" when speaking about equities. It is clear that sending "information" about a stock could more easily amount to investment advice, as there is no objective need to explain to a client what equity is. As far as structured products and derivatives are concerned (more or less

³ Consultation paper, N° 47

⁴ Consultation paper, N° 48

structured), there is more often a need to send product information to the clients to help them understand the products; the sending of this product information cannot and should not systematically be viewed as a personal recommendation.

II. Detailed Remarks

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

We would suggest to opt for criteria which are less debatable. A recommendation can in our view only be personal if it is based on the personal situation of the client itself based on the 3 pillars of suitability.

We are not confident in the concept of "implicit recommendation". Either there is an advice, or not. We wonder whether there are other cases than those mentioned under item 16 in which information may take on the nature of an advice. Would for example, the answer given by the investment firm on a specific financial instrument which would not be suitable according to the agreement but on which the client asked details be possibly considered as investment advice by the mere fact that the information is given by the investment firm?

Q.2. Do you agree that the limitation that filtered information is "likely to be perceived by the investor as, assisting the person to make his own choice of product which has particular features which the person regards as important" is a critical criterion for determining whether filtering questions constitutes "investment advice" ?

The client's perception is again very subjective. It is not necessarily because the client is electronically assisted to determine some features, solely based on product characteristics, relevant to him and corresponding to a panel of products that those products are per se suitable to him. The information can only be qualified as investment advice if a suitability test is organised at the moment the client effectively subscribes.

Q.3. Do you believe the distinction between general recommendation/generic advice and investment advice is sufficiently clear ? Do you have examples where the designation is unclear ?

The distinction between general recommendations/generic advice and investment advice is not sufficiently clear. We wonder to what degree targeting the audience could transform a general recommendation into an advice. We also refer to item nr 64. We understand that targeting a certain type of clients as mentioned above would not change a recommendation into an advice as long as on an individual basis the client is not provided with an invitation to subscribe because the investment is suitable for him personally.

In other words, it is not because a communication on a new dynamic UCITS recently launched is sent to all clients having a dynamic profile that per se it will fit in their individual cases. It would on the other hand become an advice by the time the specific client would be told to proceed with an arbitrage before making the new investment.

Q.4. Is there sufficient clarity as to when an implicit recommendation could be considered as investment advice ? If not, what further clarification do you think is necessary ?

Let's assume that a selection of products is made on the basis of the types of profiles without further analysis of individual cases. It is true to say that some judgment was exercised in the pre-selection but would that mean that an implicit recommendation is given ? Isn't by definition an advice either requested by the client or given by the investment firm on a more conscientious basis (as an offered service) ? As a result, do the investment firms have to present every product to every client without discernment to be sure that he will not consider himself as being advised ? Wouldn't this reach the opposite result compared to the one pursued ?

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

We do not believe these circumstances are sufficiently clear.

We have serious doubts about CESR's presumption that the information collected on the client is reasonably expected to be used to create a client's profile as this information may be received out of any investment context and may not be freely available in situations where the use of Chinese walls is at hand.

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

Is a mailing with the "best products" or "the funds of the month" addressed to a large number of clients considered as a general recommendation addressed to the public ?

CESR makes furthermore a restrictive interpretation of Art 52 level 2. What 's the precise definition of the public within MiFID and is there an analogy with the definition in the Prospectus Directive?

Under nr 64, again, a high level of subjectivity is present in the examples. "If the language is such that the client could reasonably perceive the message as being investment advice". In practice, it will be extremely difficult for investment firms to work out communications to a group of clients should such subjective criteria prevail. CESR is requested to clarify whether the conditions under item 64 are cumulative or not.

In our view messages to multiple clients constitute investment advice if the communication is made on the basis of an individual pre-analysis of the client's investment objectives, knowledge and experience and financial situation which is by definition not the idea underlying massive mails. As long as the communication whilst inviting the client to invest suggests meanwhile that he asks for advice before investing or that it has to be ascertained whether or not the investment is suitable in his individual case, we do not consider that the communication can be interpreted as an investment advice per se. Assuming that the client has no possibility via the bank internet tool to pass a suitable test and to look at the allocation of the assets in his portfolio, standard information sent about products to numerous clients presenting the same features should not be assessed as an investment advice.

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

Q.8. Are there specific examples of situations you would like considered, where it is difficult to determine the nature of the advice ?

The consultation paper is silent about the 'request for quote business', whereby professional clients request a quote for a specific financial instrument, followed by price negotiations and finalised with an indicative term sheet. This valuable interaction might be jeopardized if, due to the overly broad criteria, qualified as investment advice.