CONFEDERACION ESPAÑOLA DE CAJAS DE AHORROS

POSITION PAPER

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CECA's contribution to CESR consultation paper

Understanding the definition of advice under MiFID

CECA, the Spanish Confederation of Savings Banks (Cajas de Ahorros) was incorporated in 1928 with the aim to represent Spanish Savings Banks sector. CECA is formed by 45 Spanish Savings Banks, which are one of the most important players in Spanish financial system: their total assets reached €1,269 billions, 24,985 branches in Spain and 134,867 employees in 2008.

Spanish Cajas are credit institutions that act and are organized as private enterprises. They have the legal status of private institutions. Spanish Cajas are independent institutions which compete directly and individually with each other and with other financial institutions and they are free to decide on their territorial expansion.

As credit institutions with foundational origins, Cajas pursue the following main objectives: (1) universal provision of financial services; (2) economic efficiency; (3) promotion and competition and avoidance of monopolistic practices; (4) contribution to welfare and redistribution; and (5) promotion of regional and community development. From their foundation, Cajas are required to channel the surpluses that are not allocated to reserves toward projects that fall under their "Obra Social" scheme (community social investments projects).

Spanish Cajas are subject to the same legislation that applies to other types of credit institutions (commercial and cooperative banks) in terms of transparency, solvency and consolidation.

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CONSULTATION PAPER
Understanding the definition of advice under MiFID

The Spanish Confederation of Savings Banks (CECA) is pleased to submit these comments to the Committee of European Securities Regulators (CESR) in response to its Consultation Paper dated October 14, 2009, regarding the definition of financial advice under MiFID (CESR/09-665)[1] (hereinafter "CESR paper").

These comments address CECA's main worries under CESR paper. They are presented in three parts. Part I identifies concerns regarding the whole document. Part II focuses on the clarification and definition of advice. Part III discusses the specific questions posed and presented by CESR.

I. General Comments

CESR's primary objective in the paper is to provide as much clarity as possible about the definition of investment advice, to help firms to ascertain whether or not the services that they provide are subject to the requirements on investment advice. CECA considers that this is not an easy task, but respectfully believes that this goal has not been achieved. In our opinion the paper is confusing and unclear due to the following considerations:

- **Subjective criteria and unclear legal terms**. Many sections of CESR paper are based on subjective criteria and vague legal terms. One of the main problems of CESR paper is that the "perception of the client" is used as one key factor to conclude if an investment advice is being provided. In other words, the document is based on the grounds that if a client reasonably believes that an investment advice has been provided, this should be considered as a key factor to conclude that the firm is providing such service. This leaves the firms in a situation that can be qualified as "unacceptable" from a legal perspective. Moreover CESR paper frequently uses vague legal terms, such as:

  - Paragraphs 5,6,20 and 47: "it is reasonable to think", "reasonably believe", "reasonable expectation". Who determines this reasonability?
  - Paragraph 15: "circumstances in which it is provided". Who determines these circumstances? Within the document, we can only find one case and the different situations that can take place in a firm may be varied.

1 Committee of European Securities Regulators, Consultation Paper "Understanding the definition of advice under MiFID", CESR/09-665 (October 14, 2009), *available at* http://www.cesr.eu/index.php?page=document_details&id=6137

- Paragraph 22: “context in which the questioning takes place”, “significance of the opinion”.

- **Case by case basis**. Several assertions in CESR paper are based on the circumstances in which the service is provided. Therefore, firms would have to make a case by case analysis to be able to determine when “investment advice” is being provided. Consequently, we consider that the document does not clearly reveal the cases in which the firms are providing investment advice (in every given example it seems that the firm has to take into account the circumstances and the client’s perception).Below you may find some examples:

  - Paragraph 21: “It is necessary to look at the process and outcome of the questions, or questionnaire, as a whole”.
  - Paragraph 25: “Different factors would need to be assessed, on a case by case basis, to determine whether or not investment advice is being given”.
  - Paragraph 73: “Firms may need to consider whether they are providing investment advice or corporate finance advice (or a combination of the two) on a case by case basis”.

- **Diagram for the evaluation of the investment advice**. CESR paper is structured around the diagram: “the five key tests for investment advice”. This diagram is well-founded (due to the fact that the key elements are based on the Directive requirements that apply to the definition of investment advice). The problem arises when the paper focuses on the examples of issues that have to be taken into consideration. As aforesaid, if the investment advice is based on the perceptions and circumstances of the client, we would never have a solid basis for the “investment advice" concept. On the contrary, the result will provide more legal uncertainty.

II. Clarification of investment advice and other relevant issues

- **Clarification of investment advice.** It should be left clear which factors (or combination of factors) are necessary to consider that an investment advice has been provided. That is the main purpose of the paper and we consider that CESR do not accomplish this objective. On the contrary the document is confusing. For this reason, we respectfully consider that CESR should review its proposals and proceed cautiously in this area.

  First of all, we believe that the requirements to consider if an investment advice has been provided should start from the exact analysis of the Directive, and, obviously, should not depend on an interpretation exercise.

Not any activity performed by investment firms shall constitute an investment advice, as one of them obviously would consist on the mere commercialization of investment products and services; an activity which is clearly differentiated from investment advice in MiFID. In any case, the definition of investment advice should turn around the concepts stated in article 52 of the Implementing Directive. According to this, in order to provide an investment advice as an investment service, this must imply a personal recommendation made to an investor or potential investor, which must be presented as suitable for that person or must be based on a consideration of the circumstances of that person, referred to specific financial instruments. The same can be set forth from article 35 of the same Directive, which demands that any personal recommendation shall be made taking into account the data obtained from the client, considering his personal circumstances.

Consequently, we believe that in some of the sections of CESR paper in which recommendations are identified, the requirement of "personal" as before explained is not fulfilled. Under this scenario we may distinguish three kinds of activities:

1. An activity of commercialization, addressed to the public in general, or to the clients of a particular firm, which employs suitable distribution channels (mailing, internet, advertisements on the media) and that does not take into account the personal circumstances of the client. Therefore, as stated in the article 52 of the aforesaid Directive, a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public in general, that is, without taking into account the personal circumstances of the recipients. We consider that a recommendation issued to the public, does not turn into "personalised" just for the fact that it is being granted on the course of a direct conversation among the marketing agent and the potential investors.

2. An activity, which its legal qualification can be doubtful, which performs an action referred to specific clients and which may take into account some of their personal circumstances, but which is not "investment advice".

3. The investment advice activity, as value added service granted by specialised staff, conceived and qualified as such by both parties, and especially in those cases in which the relationship would be performed in an advice contract and/or there could be associated retributions for the granting of that service.

Clearly, activities 1 and 2 should not be qualified as investment advice. Therefore, CESR document should refer, exclusively, to the assumption described in number 3.

Finally, as we mentioned before, the general consideration of CESR paper is that, even though an effort of clarification of the concept of investment advice is made; there is still legal uncertainty. In fact, despite the use of an apparently objective and foreseeable instrument, as it is the "test"; after a reading of its content, the

qualification of the service given shall be made case by case and granting a key importance to the perception of the client regarding the nature of the given service.

Therefore, and in order to avoid subjective criteria regarding the intention or perception of the parties, it would be convenient to put an eye on the objective elements and criteria that will permit a clear qualification of the activity carried out. Therefore, using a test like the one proposed is positively valued, always if we separate its application from the subjective criteria that appear in the CESR paper.

Moreover, in our opinion what CESR paper should further clarify is when firms should assess the "suitability" or the "appropriateness", according to articles 35 and 36 of MiFID Implementing Directive.

- **Other relevant issues**

Can "investment research" amount to investment advice?

CESR paper refers to investment research on paragraph 19 and shows an example in paragraph 20. The paper states that "*research can be an element that, when used in conjunction with other activities from the firm, could result in the provision of investment advice*" and present the following example as an investment advice "if firms email investment research to a number of clients and subsequently engage in telephone calls discussing the merits…"

We consider that it is an example of nonsense, which not only is contrary to what is said in the legislation in force, but also generates more doubts about investment advice. Therefore, we have some questions regarding this point:

- Telephone calls asking clients general opinion about the investment research constitute investment advice?
- In which scenario are we?
  i. If the client is the one who calls in order to discus the merits of the particular financial instrument?
  ii. If the firm only refers to the data collected in the investment research?
  iii. If the client reasonable believes that an investment advice has been provided?

III. Specific questions

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

Yes we do. In our opinion, the fact that a person might provide information based on biased or leading criteria, rather that on a balanced basis (as an instance, according to paragraph 16, by placing special emphasis on the advantages of one product) does not transform it into a recommendation. According to our interpretation, in order for information to be considered as an investment advice, it should be referred to the cases contemplated within article 52 of the Implementing Directive.

Moreover, "place special emphasis on the advantages of one product", might be, in our opinion, a breach of article 27 of the Implementing Directive, that stated: "information shall be accurate and in particular **shall not emphasize any potential benefits** of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risk"

On the other hand, a recommendation not to buy a financial instrument should not convey a firm's liability.

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 employment of a filter cannot be considered a factor to determine if an investment advice has been provided or not; it will depend on the case, the amount of detail and if it implies a true definition of the financial situation profile, knowledge and investment targets of the client and not a mere categorization of the clients.

Generally speaking, we could say that the employment of filtering techniques does not imply, per se, the existence of an investment advice, apart from the cases in which its employment shall produce an outcome which determines or conditions relevantly the client's investment decision in relation to specific instruments.

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

The difference among these concepts must be articulated around the requirements of article 52 aforementioned. We understand, in this regard, that the employment of the client's personal data is a key question by the time of making a distinction, like it is the

fact that the recommendation is referred to specific instruments (the action or obligation issued by a specific company…) and not to instrument categories (fixed securities vs. variable securities) or geographical references (investments within emerging countries…).

It should be stated that in those cases in which the personal data from the client is not obtained or employed, we could not refer to it as an investment advice.

This opinion is particularly reinforced when the recommendations- even those made in a person to person relationship- are part of an advertisement campaign, or part of the commercialization of a product to the public, in the course of which the same recommendation is repeated- as a promotion of the product inherent to commercialization- to all the potential investors.

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?

No there is not. An "implicit recommendation" as it is defined on the CESR paper, does not meet the requirements stated within article 52 of the Implementing Directive. The best sample of the aforesaid is given by the example employed in paragraph 44, which refers to "information is provided about the advantages for an investor of one specific product compared to others". In our opinion, this is not a recommendation as it is defined within the Directive.

It is remarkable, in this sense, the content of paragraph 45 when it states that "It is certainly not necessary for a firm to tell a client that a recommendation it is making is suitable for them in order for its recommendation to be viewed as being presented as suitable". Certainly, in a case like this one, there would not be, in our view, neither an activity of financial advice nor could we talk about the existence of a real recommendation.

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

In our opinion, in the way it is drawn up the CESR paper, it can be understood that once the firm is in possession of the client's information, it is going to be taken for granted that any activity is based on their personal circumstances. This is an extension of the concept of assessment so large that, it cannot be compatible with the service posed within the MiFID. Particularly, in the case of firms that endeavour to give services to clients with whom they have already had a commercial relationship in the past, this interpretation would imply that any future activity of commercialization should be qualified as advice, taking into account that, according to the prudential legislation and to the prevention of money laundering legislation, the companies have to start up from

an exhaustive knowledge of the client's characteristics before entering into a commercial relationship with him/her.

Therefore, we propose to clarify the text of the paper so that it states that in order to be investment advice, there must have been, in any case, a previous activity of obtaining the client's personal facts, either because of an specific operation or on the grounds of a previous commercial relationship, and mainly the employment of these facts should be linked to a specific operation so that the personal recommendation departs from these facts.

In this way, there would be no presumptions on the grounds that the availability of these facts imply its utilization by the time of formulating a recommendation. Albeit, it will not deny the possible existence of advice in those cases in which the capture of the client's facts would have been done before the beginning of the contacts leading to a specific operation.

Furthermore, we ask CESR for a further clarification regarding the possibility to take into account the person's circumstances in order to shortlist clients. This is a common practice before commercializing products which are meant to be directed to a specific public and we consider that doing so does not change the commercialization into advice.

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

In our opinion, in the case of a message sent to multiple clients through the internet, the most reasonable thing would be to think that it does not constitute a personal advice. In fact, it will be logic to establish a presumption in which this concept will also be applicable to those similar activities like mailing. Contrary to what the consultation paper states, only under specific circumstances, this could be considered as personal advice (we should be dealing with clients sharing the same profile, financial and knowledge risks…).

Article 52 of the Directive admits that a recommendation would not be personalized if it is disclosed exclusively through distribution channels to the public. In some exceptional cases, it could be considered as so, but it would be an exception.

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

Both concepts are referred to different activities that can merge into a specific case but not necessarily. If a firm gets services of corporate finance advice, it is possible that part of that advice could represent an investment advice but that will be so, exclusively in the case that, that specific activity, related to a specific operation about specific financial instruments, meets the necessary requirements to qualify it as so. In no

circumstances, could we presume the existence of investment advice because of the existence of a corporate finance advice continuous relationship.

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

Generally speaking, there could be practical problems of determination when bilateral and direct contacts are made between a company and its client, when referred to an investment decision. In these cases, the determination criteria would be similar to those contained within the paper proposed, though lacking in "subjective" appraisals. The two key elements would be the existence of a personal recommendation (based on the client's personal circumstances) and a specific one (referred to an operation with specific instruments).