

11 December 2009

Committee of European Securities Regulators
11-13 Avenue de Friedland
75008 Paris
France

Your reference
CESR/09-665
Our reference
JCXP/BEMH
Direct line
020 7090 3211/3768

Dear Sirs,

Consultation Paper (CESR/09-665): Understanding the definition of advice under Directive 2004/39/EC of 21 April 2004 on markets in financial instruments ("MiFID")

We write in response to the CESR Consultation Paper "*Understanding the definition of advice under MiFID*" (the "**Consultation Paper**"). Our comments relate to Part 5a of the Consultation Paper and, in particular, respond to question 7.

In summary, and as discussed more fully below, we consider that the following factors helpfully assist in determining whether or not corporate finance advice is being provided:-

- the type of transaction contemplated by the advice; and
- the objectives and type of client receiving the advice.

1. Provision of specifically-remunerated advice on a stand-alone basis

- 1.1 A clear distinction between "*investment advice*" (Section A(5) of Annex I to MiFID) and the ancillary service described at Section B(3) of Annex I to MiFID ("**corporate finance advice**") is important for many types of adviser.
- 1.2 This includes advisers otherwise outside the scope of MiFID such as the significant number of consulting and corporate finance firms which regularly provide specifically-remunerated corporate finance advice to clients on a stand-alone basis (i.e. not as part of any other professional activity).
- 1.3 Such firms are often engaged to collate and analyse market sector and company-specific information in order to draw up short-lists of potential target undertakings suitable to their clients' investment or acquisition objectives.

CFI Saul
SM Edge
NPG Boardman
GW James
EA Codrington
RMG Goulding
GES Seligman
PJ Bennett
RM Fox
RJ Thornhill
GJ Ains
CR Smith
GP White
NJ Archer
AG Balfour
CM Horton

EA Barrett
PP Chappatte
RJN Cripps
P Jolliffe
CD Randell
WSM Robinson
RV Carson
SL Edwards
JM Featherby
F Murphy
PM Olney
PH Stacey
CWY Underhill
OA Wareham
RJ Clark
SJ Cooke

DL Finkler
CW Harvey-Kelly
SJ Phillips
JD Rice
MA Whelton
MD Bennett
RD de Carle
SP Hall
WJ Sibree
RC Stern
JR Triggs
EGL Wyld
A Beare
JD Boyce
MEM Hattrell
KI Hodgson

N von Bismarck
PWH Brien
JM Fenn
AN Hyman
AC Johnson
EF Keeble
KR Davis
SR Galbraith
NDF Gray
MS Hutchinson
SRB Powell
AG Ryde
JAD Marks
SD Wama-kula-suriya
DA Wittmann
TS Boxell

SJ Luder
AJ McClean
JC Twentyman
GN Eaborn
CG Earles
HK Griffiths
STM Lee
AC Cleaver
EJD Holden
KM Hughes
G Iversen
DR Johnson
RE Levitt
S Middlemiss
RA Swallow
DCR Waterfield

DJ Bicknell
CS Cameron
CA Connolly
PJ Cronin
BJ-PF Louveaux
MS Rowe
MST Leung
R Doughty
E Michael
RR Ogle
SL Paterson
PC Snell
HL Davies
JC Putnis
RA Sumroy
GP Brown

JC Cotton
RJ Turnill
WNC Watson
MJD Dwyer
CNR Jeffs
SR Nicholls
DG Watkins
BKP Yu
EC Brown
RA Chaplin
J Edwards
AD Jolly
S Maudgil
JS Nevin
JA Papanichola

JM Zaman
RA Byk
GA Miles
GE O'Keefe
T Pharoah
MD Zerdin
SFL Cardell
RL Cousin
BJ Kingsley
IAM Taylor
DA Ives
MC Lane

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- 1.4 This advice is neither: (i) ancillary to an activity or service within Section A of Annex I; nor (ii) advice within the exemption in Article 2(1)(j) of MiFID. Consequently, whether such advice is determined to be corporate finance advice or investment advice is determinative of whether those firms must be regulated under MiFID.

2. Distinction between investment advice and corporate finance advice

- 2.1 Investment advice and corporate finance advice were, in Council Directive 83/22/EEC of 10 May 1993 on investment services in the securities field (the "ISD"), separate "*non-core services*" (Section C of the Annex to the ISD). That these two types of advice were listed as separate services tends strongly to suggest that the former was not regarded merely as a corollary or sub-set of the latter but that each type of advice was a distinct head of activity capable of being performed independently.

- 2.2 With the replacement of the ISD by MiFID, both types of advice were preserved, essentially without amendment, but with "*investment advice*" alone promoted to Section A of Annex I in MiFID. Recital (3) to MiFID explains:-

Due to the increasing dependence of investors on personal recommendations, it is appropriate to include the provision of investment advice as an investment service requiring authorisation.

- 2.3 The fact that corporate finance advice was not also promoted to Section A indicates that the requirement for authorisation was not intended to encompass corporate finance advice alone. In addition, the fact that corporate finance advice was retained as a separate and distinct activity indicates that it must be possible to provide corporate finance advice without providing investment advice.

- 2.4 "*Investment advice*" (as now defined in Article 52 of Commission Directive 2006/73/EC) is a broad enough concept also to encompass types of corporate finance advice falling within the second limb of Section B(3) of Annex I to MiFID:- "*advice and services relating to mergers and the purchase of undertakings*". As is stated in paragraph 76 of the Consultation Paper, the "*two forms of advice appear to overlap to a very significant extent*". The definition indeed encompasses the "*personal recommendation*" (as defined in Article 52) integral to the scenario described above, whereby an adviser is retained to produce a short-list of potential acquisition targets for a client on a stand-alone basis and in so doing provides what we would expect should be categorised as corporate finance advice.

- 2.5 In our view, the position of many advisers, including those consulting and corporate finance firms providing stand-alone advice in relation to potential acquisitions, would be clarified to a great extent if, when determining the nature of any advice, the following factors were taken into account: (i) the type of transaction contemplated; and (ii) the type and objectives of the client. The characteristics of corporate finance advice under these

heads, in our view, distinguish it from investment advice and justify the attendant reduction in investor protection.

3. Type of transaction

- 3.1 The starting point when distinguishing between corporate finance advice and other forms of advice should be that corporate finance advice relates to “*mergers and the purchase*” of **undertakings** (Section B(3) of Annex I to MiFID).
- 3.2 The emphasis is clearly on the sale or purchase of a **business** or of a **company**, in either case valued as such, as distinct from primary / secondary market transactions in investments (where the emphasis is on the sale or purchase of financial instruments such as shares, valued as such).

4. Objectives and type of client

- 4.1 Advice can also be distinguished by the objectives and nature of the client. A client receiving corporate finance advice is typically interested in transactions as actual or potential owner and / or manager of an **undertaking**, and acting to further their objectives as such, rather than being interested as an investor in the more traditional sense.
- 4.2 In paragraph 76 of the Consultation Paper, it is stated that “... *the provision of ‘corporate finance advice’ and the provision of investment advice are not mutually exclusive*” and, to illustrate the point, the example is given of a firm that is family-owned:-

...advice on whether to sell shares in the firm could involve the provision of both corporate finance advice and investment advice, perhaps for different members of the family.

- 4.3 By “*not mutually exclusive*” we understand that both forms of advice can be provided in respect of the same transaction. Depending on the standing of particular individuals in relation to a transaction, they may be viewed as investors (e.g. passive family shareholders) or active participants whose goal is a business transaction (e.g. owner-managers). In practice, however, one might expect the provision of both types of advice to members (or indeed any group of investors) by a single adviser to present a conflict of interests. Such a conflict would be likely to preclude a single adviser from providing both types of advice.
- 4.4 In any case, we do not consider it correct that corporate finance advice should be re-characterised as investment advice merely because it is provided in tandem with investment advice or because an investor might be expected to require investment advice in addition to corporate finance advice.

5. Conclusion

- 5.1 If the guidance in the Consultation Paper on the distinction between investment advice and corporate finance advice were to be issued in its current form, this would have serious and unwarranted implications for corporate finance consulting and advisory firms. Many such firms which do not currently require authorisation as an investment firm under MiFID would, as a consequence, require authorisation despite the fact that the nature of their client base and the types of transaction being advised on are such that the investor protections afforded by MiFID are arguably unnecessary.
- 5.2 An approach to the distinction which takes into account the type of transaction contemplated by a client and the type and objectives of a client would provide a welcome clarification to the position of many consulting and advisory firms under MiFID. This includes those which, on a stand-alone basis, draw up short-lists of potential target undertakings suitable to a client's investment or acquisition objectives and so provide advice of a type which should typically be regarded as confined to corporate finance advice and should not, therefore, require authorisation under MiFID.

We should be grateful if you would keep the contents of this letter strictly confidential.

Yours faithfully,

A handwritten signature in cursive script that reads "Slaughter and May". The signature is written in a light grey or blue ink.