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FEEDBACK STATEMENT

**Understanding the definition
of advice under MiFID**



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I. Executive Summary

CESR has sought in this Feedback Statement to respond to comments made and points raised in response to its Consultation Paper “Understanding the definition of advice under MiFID” (Ref. CESR/09-665), which was published on 14 October 2009. Alongside, this Feedback Statement, CESR publishes its final policy position in a set of Questions and Answers (Ref. CESR/10-293).

This Feedback Statement sets out CESR’s response to various issues that respondents raised, including by clarifying that:

- a service will only be considered as investment advice if it meets all five of the tests set out in the Questions and Answers; and
- while the tests described in the Questions and Answers apply in relation to both professional clients and retail clients, CESR accepts that in practice firms can often place greater reliance on the ability of professional clients to understand whether they are receiving advice.

Other issues discussed in this Feedback Statement include respondents’ views and concerns about:

- the inclusion of potentially subjective criteria in assessing whether or not a particular service amounts to advice (including a client’s perception of the service he receives);
- the potential for recommendations to be made implicitly, or to be implicitly presented as suitable;
- the risk that marketing communications will be viewed as presented as suitable or based on personal circumstances; and
- different ways in which investment advice and corporate finance advice might be distinguished from one another.



II. Introduction

1. On 14 October 2009, CESR published a Consultation Paper (CP) entitled “Understanding the definition of advice under MiFID” (Ref. CESR/09-665). In that CP, CESR consulted on Questions and Answers designed to clarify and illustrate situations where firms will, or will not, be considered as providing investment advice. The importance of this subject arises from the fact that investment advice is an investment service under MiFID, in relation to which specific provisions of the Directive apply.
2. CESR based its Questions and Answers around five key tests, based on Article 52 of the MiFID Implementing Directive. All five of the following tests have to be met for a service to amount to investment advice under MiFID:
 1. Does the service being offered constitute a recommendation?
 2. Is the recommendation in relation to one or more transactions in financial instruments?
 3. Is the recommendation at least one of the following:
 - a) presented as suitable?; b) based on a consideration of the person’s circumstances?
 4. Is the recommendation issued otherwise than exclusively through distribution channels or to the public?
 5. Is the recommendation made to a person in his capacity as one of the following:
 - a) an investor or potential investor?; b) an agent for an investor or potential investor?

Responding to feedback

3. CESR has sought to respond to these points in this Feedback Statement and has set out its final policy approach in a set of Questions and Answers on this topic (Ref. CESR/10-293).
4. The consultation period closed on 14 December 2009. CESR received 53 responses. CESR is grateful to all the respondents for taking time to give CESR their views. A list of all non-confidential responses can be found in Annex I.

Comments on the paper

5. Overall, the intended outcomes of CESR’s consultation received broad support, with respondents generally keen to get further clarity on the definition of investment advice. Each question received quite a range of responses, which are discussed in more detail in this paper. However, a number of general points were made in the responses about CESR’s overall approach.
6. ***The importance of meeting all the tests:*** Despite a number of responses praising the helpfulness of the diagram showing the five key tests for investment advice at the beginning of the CP, several respondents told CESR that they felt that the importance of needing to meet *all* the tests was not always sufficiently clear. With this in mind, CESR has reviewed its drafting and placed statements in both the Executive Summary and the Introduction to its Questions and Answers to make the additive nature of the tests clear.
7. ***Considering an investor’s view of whether advice is being given:*** Concerns were expressed that CESR was using subjective criteria and – in particular – that a client’s perceptions would be treated as determinative of whether investment advice was being given. CESR has revised its drafting and included text in the Introduction to the Questions and Answers to make clear that “if a recommendation is put forward in such a way that a reasonable observer would view it as being based on a consideration of a client’s circumstances or presented as suitable then – subject to the other four tests being met – this amounts to investment advice”. (This is discussed further in CESR’s response to Question 1, below.)



8. ***Providing practical guidance to firms that do not wish to give investment advice:*** CESR acknowledges the practical challenge faced by firms in needing to make a case-by-case assessment of whether or not the services they provide constitute a recommendation. With this in mind, CESR has sought to be more definitive in its drafting, and has added two new paragraphs to the Introduction to its Questions and Answers that suggest practical steps that firms might take if they do not wish to provide investment advice, to manage risk of inadvertently doing so.
9. ***The relevance of the paper to advice given to professional clients:*** A number of respondents questioned how relevant the Questions and Answers would be in regard to professional clients. In response, CESR has sought to take a pragmatic approach, and notes in the Introduction to the Questions and Answers that, in practice, firms can often place greater reliance on the ability of professional clients to understand whether or not they are receiving advice. The overall tests for determining whether investment advice is being given remain the same for professional clients as for retail clients, but in practice CESR accepts that it may be clearer to firms and their clients whether or not the tests are being met where professional clients are involved.

III. Part 1: Does the service being offered constitute a recommendation?

10. In this section of the CP, CESR discussed the concept of a recommendation under MiFID, noting that “In specifying that a service will only amount to investment advice if it constitutes a recommendation, the Directive draws a distinction between providing advice and simply providing information”. The CP suggested that “Advice requires an element of opinion”, in contrast to the provision of information that does not make “any comment or value judgement on its relevance to decisions which an investor may make”.
11. CESR went on to describe the possibility that “information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation”, giving examples where information may be given on a biased or leading basis, or as part of a multiple-step process, such that – in practice – it amounts to a recommendation.
12. In the CP, CESR asked the following question:
Q1. Do you have any comments on the distinction between the provision of personal recommendations and general information?
13. While some respondents agreed with the distinctions made between information and advice, others felt that CESR had taken too broad an approach to what counts as investment advice by allowing for the existence of implicit forms of recommendation. For example, some respondents felt that the distinction between information and a recommendation depended on the existence of an explicit advisory contract, while some were concerned that any communication that emphasised a certain characteristic of a product could be viewed as a recommendation.
14. As noted in the Introduction to this paper, general concerns were expressed by several respondents that CESR was suggesting the use of subjective criteria, involving factors such as case-by-case analysis and consideration of client perceptions, for determining whether or not advice is being given. Suggestions for changing the paper to deal with this concern varied. Some respondents simply wanting the language to be written more objectively (e.g. to base criteria on how “a reasonable observer” would view the circumstances) while others were looking for a much more detailed specification of the particular circumstances in which a recommendation would or would not be given.
15. On a separate issue, a few respondents were concerned about a suggestion in the CP that a recommendation *not* to buy a particular financial instrument could constitute a



recommendation, owing to the possibility that this might shift all the investment risk to the firm giving the advice.

CESR's response

CESR believes that the standards that firms face should be objective. As noted in the Introduction to this paper, CESR has revised its drafting and included text in the Introduction to the Questions and Answers to make clear that “if a recommendation is put forward in such a way that a reasonable observer would view it as being based on a consideration of a client’s circumstances or presented as suitable then – subject to the other four tests being met – this amounts to investment advice”.

But in accepting the importance of objective standards, CESR stands by the need for firms to take responsibility for considering whether or not their services involve a recommendation, and indeed meet all five tests and amount to investment advice, in practice. CESR is clear that the definition of investment advice set out in MiFID necessarily encompasses recommendations that are not explicitly labelled as recommendations (see also CESR’s response to Question 4 on the subject of implicitly presenting a recommendation as suitable). Were the definition of investment advice limited to services explicitly labelled as such, it would be a simple matter for firms that wish to avoid taking responsibility for their recommendations to re-label their services in other terms.

On the question of whether a recommendation *not* to buy a particular financial instrument could constitute a recommendation, CESR remains of the view that it can. CESR does not agree that making a recommendation not to invest in a specific product would shift all of the investment risk to the institution providing the advice – in the same way that a firm is not held liable for having recommended one investment product simply because, in practice, another performed better. In the interests of clarity, this subject is now covered in Part 2 of the Questions and Answers (see ‘What does it mean to make recommendations in relation to transactions in financial instruments?’).

16. The CP went on to discuss whether or not a recommendation is likely to be given in situations where a firm guides a client through a set of filtering questions, or gives investors access to a model investment portfolio. CESR suggested a number of factors that may be relevant in deciding whether a filtering process involves a recommendation (e.g. the role played by the questioner who guides a person through the questions, the type of questions and whether they infer the use of opinion or judgement by the firm) but also put forward one critical factor: whether the process is limited to, and likely to be perceived by the investor as, assisting the person to make his own choice.
17. Similarly, CESR suggested that whether or not providing access to a model investment portfolio amounts to investment advice will depend on the particular circumstances in question. CESR suggested that if buying the financial instruments identified in a model portfolio is positioned as the appropriate action for the investor to take, the overall service might be viewed as a personal recommendation.
18. In the CP, CESR asked the following question:

Q2. 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”?

19. Some respondents agreed with the statement put forward in the question, but some felt that it was not a sufficiently objective criterion to provide clarity for firms. As with the responses to Question 1, there were some concerns about reliance on investor perception, with one



respondent suggesting that the statement in the question be aligned with text elsewhere in the CP by using the term “reasonably believes” rather than “likely to be perceived”.

20. It seemed, however, that significant numbers of respondents were answering a wider question about whether filtered information should automatically constitute investment advice – with many respondents expressing views that providing filtered information should not always be considered to be investment advice. A few responses focused on the importance of clear disclosure, when using filtering processes, so that customers knew that they were not getting investment advice.
21. Views expressed in relation to model portfolios were mixed, with a couple of respondents suggesting that, in the example given in the paper, the firm should be able to use a disclaimer to make clear that investment advice had not been given.

CESR’s response

CESR considers that whether a process is limited to assisting a person to make his own choice of product is a critical criterion for determining whether filtering questions constitute investment advice. As discussed in response to Question 1, CESR believes that it is important to consider how a reasonable observer would view the process, but agrees with those respondents that suggested that it is not appropriate simply to consider how the process is likely to be perceived by any particular investor.

In response to the views expressed about whether filtered information should automatically constitute investment advice, CESR considers that its drafting accurately reflects the fact that if a firm enables a client to filter the information that he receives about different financial instruments, this does not automatically mean that a recommendation is being given. Similarly, CESR has not made any substantial changes to the text it consulted on in relation to model portfolios.

22. Part 1 of the CP also dealt with the issue of whether investment research can amount to investment advice. CESR received some responses in relation to this but, owing to the similarity between the issues raised in relation to investment research and issues raised in relation to other situations where messages are sent to multiple clients, this material is now discussed in Part 4 of this Feedback Statement (see paragraph 43).

IV. Part 2: Is the recommendation in relation to one or more transactions in financial instruments?

23. In this part of the CP, CESR described the concepts of generic advice and general recommendations, which are not investment advice under the Directive.
24. In the case of generic advice, the CP explained that this is owing to the fact that they do not relate to a particular financial instrument. In contrast, general recommendations are not investment advice because, being addressed to the public in general, they are not by definition presented as suitable for, or based on an evaluation of the personal circumstances of, a particular investor (this is covered in greater detail in Part 4: Is the recommendation issued otherwise than exclusively through distribution channels or to the public?).
25. CESR also set out its view that a recommendation can involve the presentation of several specific financial instruments as alternatives, rather than necessarily just one product.



26. In the CP, CESR asked the following question:

Q3. Do you believe that 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?

27. Some respondents to this question were content that the distinction between investment advice and both general recommendations and generic advice is sufficiently clear. Those that did not feel that it was clear raised a range of concerns. Some respondents raised concerns about the subjective nature of the approach (as discussed earlier in this Feedback Statement) while others felt, for example, that the distinction should take account of whether there is personal information involved.

28. A number of suggestions were received for areas that would merit clarification – with respondents generally looking for CESR to confirm that particular examples were not investment advice – but without any consensus between respondents. Some examples of the situations on which further clarification was requested were: advice to invest in certain industries, geographical time zones or asset classes; explaining the implications of exercising certain rights and explaining the structure and terms of a financial instrument.

CESR's response

In the absence of any strong reasons for changing the text, CESR has made very few amendments to this section of the Questions and Answers since consultation. As discussed in earlier sections, CESR stands by the need for firms to take responsibility for considering whether or not their services amount to investment advice in practice.

V. Part 3a: Is the recommendation presented as suitable?

29. In Part 3a of the CP, CESR explored the question of what it means to present a recommendation as suitable, suggesting in particular that an implicit or implied recommendation could be considered as financial advice. CESR suggested that if the presentation of the information seeks to influence the client's choice then the firm might be making an implied personal recommendation.

30. CESR also set out its views on the role of disclaimers in this section, suggesting that if a disclaimer does not change the nature of a communication, meaning that the communication would still create a reasonable expectation by the client that he is being advised, the firm may be viewed as providing investment advice.

31. In the CP, CESR asked the following question:

Q4. 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?

32. Several respondents were concerned about CESR considering the idea of an implicit recommendation at all, in the same way as was noted in response to Question 1. These respondents were particularly concerned about any form of reliance on a client's perception of the service he or she receives in determining whether investment advice is being given. However, some respondents did answer that there was sufficient clarity about when an implicit recommendation could be considered as investment advice, while others were



content with the concept but requested further examples. A couple of respondents suggested that a different approach should be taken to professional clients.

33. CESR also received comments in relation to the text in Part 3a of the CP on the use of disclaimers. There were mixed views about the extent to which disclaimers should determine whether or not a communication constitutes advice, with some respondents wanting to be able to rely fully on disclaimers. Of those respondents agreeing with the idea in the CP that disclaimers should not automatically determine whether or not advice is being given, many commented that disclaimers should still be taken into consideration, if they are clearly written and presented.

CESR's response

CESR accepts the need to ensure that ordinary marketing communications are not inappropriately classed as being 'presented as suitable' simply because of the fact that they only involve the communication of selected information. However, CESR remains firmly of the view that a financial instrument can be implicitly presented as suitable. With both these factors in mind, CESR has reviewed the text it consulted upon and made some small changes.

The Questions and Answers now make clear that if a person places special emphasis on the advantages of one product over others for a client, in a way that would tend to influence the decision of the recipient to select that particular product over others presented, this could well amount to investment advice. To aid understanding, CESR has also added a new example into this section of a situation where a recommendation might implicitly be presented as suitable (see paragraph 46 of CESR/10-293).

CESR has also amended its text to make clear that disclaimers can be of some use in providing clients with information about their services. However, CESR remains of the view that disclaimers cannot be relied upon, on their own, to ensure that a service does involve presenting a recommendation as suitable. If, for example, a firm stated that its products would suit a particular client's needs, the inclusion of a disclaimer saying that this was not advice would be unlikely to change the nature of the communication; the recommendation would still be presented as suitable.

VI. Part 3b: Is the recommendation based on a consideration of the person's circumstances?

34. Part 3b of the CP considered what it means to base a recommendation on a consideration of a person's circumstances, discussing in particular what happens if a firm fails to make use of information that it holds about a person's circumstances. CESR suggested that if a firm has information about a client's circumstances, including information on areas like his investment objectives or financial situation, it might reasonably be expected that the information is being used to create a picture of his needs and wants to form the basis of a recommendation.

35. In the CP, CESR asked the following question:

Q5. Are the circumstances where "it is clear the firm is making a personal recommendation" sufficiently clear? Would further clarification be helpful?

36. While some responses indicated that there was sufficient clarity in this area, several responses expressed concern about the suggestion in the CP that a client might reasonably



expect information collected on him by a firm to be used in forming a recommendation that he receives. Respondents suggested that information might be collected in different contexts, and that firms should not be prevented from providing execution-only services to customers just because, for example, they have given them advice in the past and hence held information on their personal circumstances.

37. Another issue raised by a number of respondents was a concern that the stance taken by CESR in the CP would lead to some marketing activities being inappropriately classified as investment advice, if they are distributed to existing clients on whom the firm holds information. A few respondents also suggested that matters should be treated differently in the wholesale markets than in the retail markets.

CESR's response

CESR understands respondents' concerns about firms being expected to make use of information that they happen to hold about a client. CESR has now amended its Questions and Answers so that it is clear that, in some cases, it would not be reasonable to expect that a firm will access and use all of the information that it may happen to hold about a client's circumstances. However, the Questions and Answers make clear that, if information on a client was collected recently, or indeed over time as part of an established relationship, a client returning to the firm for follow-on advice can reasonably expect his previous information to be taken into account.

In relation to concerns that marketing activities could be inappropriately classified as advice, where communications are received by individuals on whom the firm holds information, CESR has not made any specific changes. In situations where those activities either involve the presentation of a financial instrument as suitable for an investor or where the firm is making a recommendation based on the consideration of a person's circumstances, investment advice would be provided. To this end CESR is of the view that the Q&A paper of the definition of advice will help firms in distinguishing communications that deliver continuing investment advice from those that do not.

VII. Part 4: Is the recommendation issued otherwise than exclusively through distribution channels or to the public?

38. CESR sought to describe what it means to make a recommendation exclusively through distribution channels or to the public, such that it does not amount to investment advice. The CP acknowledged that not all messages to multiple clients would automatically constitute advice, but suggested that there were circumstances in which they could.
39. CESR suggested three elements that should be taken into account: the target audience (if the personal circumstances that led the individual to be contacted are highlighted); the content of the message (e.g. if it contains a solicitation or judgement regarding the advisability of the transaction); and the language used (e.g. the tone and the way it could be understood by the client).
40. In the CP, CESR asked the following question:

Q6. Are there other criteria you believe should be considered when determining whether messages to multiple clients constitute investment advice?

41. Most respondents felt that messages to multiple clients should not be considered as investment advice except in very limited circumstances. In particular, several responses



suggested that publicly accessible webpages, emails and other such messages should be viewed primarily as being through distribution channels. Some responses suggested that information to which a large number of persons have access (including messages to multiple clients) is likely to become publicly available by its nature and therefore counts as ‘through distribution channels or to the public’ under MiFID.

42. Respondents also addressed the criteria suggested in the CP for determining whether a message sent to several clients can still amount to investment advice:
- **Target audience:** Several respondents felt that use of a target audience alone was not sufficient to determine whether investment advice was being provided. It was suggested that general marketing material that may contain generic comments or value judgements could be sent to investors on the basis of their personal characteristics without this amounting to investment advice. In contrast, a few respondents suggested that where an individual received a message from his advisers, this should automatically be considered as investment advice.
 - **Content:** Several respondents wanted clarity that standardised information, financial promotions, direct offers, financial publications or other media that may contain information that customers might find useful in making investment decisions should not be considered as advice, where it does not express a recommendation. In support of this argument, the example was given of investment research where the analyst’s opinions, recommendations or judgements are typically included in the documentation, but the research is not considered investment advice.
 - **Language:** As discussed in earlier sections of this paper, some respondents expressed concern about what they saw as subjective references to the client’s understanding of whether investment advice is being provided
43. As noted in Paragraph 22 of this Feedback Statement, CESR also received responses in regard to investment research and market commentary. Several respondents were concerned that firms should be able to provide research and commentary without this being perceived as advice. A few comments were made in relation to text in the CP that suggests that sending out investment research could sometimes amount to a personal recommendation, with respondents expressing concern that letters or phone calls associated with the distribution of investment research will not normally amount to investment advice.
44. Concerns were sometimes expressed in the specific context of a firm communicating with a professional client base where it was felt, for example, that sales notes and market or trader commentary, did not amount to investment advice.

CESR’s response

CESR has made a slight amendment to its Questions and Answers to make clear that it accepts that the many messages sent to batches of clients are unlikely to amount to investment advice, but that the fact that a recommendation is made to multiple clients would not automatically mean that it could not be a personal recommendation.

Overall, CESR remains of the view that situations can exist where personal recommendations are given through a mechanism such as a mail shot or the Internet, even though this will not be the norm and it will be necessary to examine the circumstances. CESR believes that its Questions and Answers already make clear that selection of a target audience alone would not be sufficient to determine whether investment advice is being provided, and that its comments on the relevance of content and language are appropriate, so has not amended the text in these areas.



In relation to investment research, CESR has amended its text to reflect the fact that firms can use distribution channels to provide their clients with investment research without this amounting to a personal recommendation. Again, though, CESR is clear that there could be circumstances in which such information is provided in such a way that it amounts to a personal recommendation.

VIII. Part 5a: Is the recommendation made to a person in his capacity as an investor or potential investor?

45. The majority of respondents recognised that MiFID firms struggle to determine whether the advice they provide to their clients constitutes investment advice or corporate finance advice, and agree with CESR that, a clear distinction between investment advice and corporate finance advice is required, to ensure that any uncertainty is resolved.
46. Several respondents were of the opinion that no further clarification is required. Their reasoning being threefold; that the distinction between the two types of advice is already clear to all market parties concerned; that the existence of two separate definitions by MiFID suggests that the activities involved in the provision of the advice are sufficiently separate and therefore need no further interpretation; and the firms' requirement to comply with MiFID's overall principle "to act honestly, fairly and professionally in accordance with the best interests of its client," is sufficiently wide enough to ensure the full protection of the parties.

CESR's response

CESR considered the arguments given for not providing further clarity between investment advice and corporate finance advice to that already stated in the MiFID provisions, and was not persuaded by the arguments to change its view.

CESR has chosen to maintain its view for the following reasons; the overwhelming agreement from the majority of the respondents that MiFID firms do experience difficulties determining whether they are providing investment advice or corporate finance advice; the need to rectify any subsequent lack of consistency in approach by MiFID firms and any uncertainty in whether firms are subject to MiFID.

Q7. What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?

Q8. Are there any specific examples of situations you would like considered, where it is difficult to determine the nature of the advice?

In practice, how should corporate finance advice be distinguished from investment advice?

47. Some respondents inferred from CESR's analysis of the provisions, that for advice to be considered investment advice, the advice must involve investment in a financial instrument or more precisely lead to the sale or purchase of a financial instrument and for corporate finance advice, no investment in a financial instrument would occur. The apparent lack of a related investment in a financial instrument lends itself as a distinguishing feature between the two categories of advice.
48. Several respondents disagreed with CESR's view that firms should take into account whether the overall aims of investor protection that MiFID seeks to achieve are relevant, for instance; considering the investor's need for protection, his relative bargaining power, whether there are information asymmetries and his knowledge and expertise when



reviewing the type of advice to provide. Their reason was that as the suggestion is not based on a provision or objective element of MiFID then there is no legal basis to place reliance upon it. Several respondents raise that, in their view, this approach would create more uncertainty for the firms and could therefore lead to an increase in the operational risk of the firm. Some respondents did agree with CESR's view of taking a more subjective approach when reviewing the client to determine the type of advice being provided.

49. The majority of respondents agreed with CESR that clarity was required to distinguish between the two categories of advice, as in limited circumstances they appear to overlap. For instance, where it is challenging to isolate corporate wealth from the private finances of an entrepreneur or family owned business, there is a need for further clarification between the types of advice rendered. Several respondents challenged CESR's view, their reasons included that in the aforementioned situation, the timing, specific financial instrument, specific circumstances and specific clients to which the advice is given, means that firms are able to distinguish themselves and without difficulty, when they are providing investment advice or corporate finance advice.
50. A number of respondents were similar in their suggestions for a distinguishing feature. A widely held view was that the criterion should be the 'objective pursued by the client when seeking advice from the firm'. Where the client has a patrimonial objective, the client is seeking a personal recommendation in order to generate a financial return, the advice given is investment advice. Where the client has an "industrial/ strategic or entrepreneurial" objective, and the primary purpose of the advice will be for an industrial purpose rather than a return, the advice is corporate finance advice.
51. Several respondents proposed that the distinction should be made based on the type of client requesting the advice and type of transaction the advice would relate to B3 of Annex 1 of the MiFID was referred to, to demonstrate the respondents' views. Respondents suggested that where advice is being given to an undertaking on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings, the advice given is corporate finance advice. It was acknowledged that uncertainty may arise using this distinction where the entrepreneur is also an investor.
52. Other respondents gave consideration as to whether a distinction can be made based on the client's involvement and management of the investment. They proposed that investment advice should only cover passive investments, where the client is not involved or involved to only a limited extent with the management of the investment; and conversely, that corporate finance advice is provided in situations where the client is substantially involved in the determining of the on-going strategy of the undertaking to which the investment relates.
53. A general view was that investment advice can be provided in a principal or incidental manner and for this reason the documentation (terms of business, or mandate/engagement letter for corporate finance advice) should clearly state the type of advice being provided and protection given, and where both arise, investment advice and corporate finance advice should be clearly separated and addressed in the appropriate manner.
54. The majority of respondents opposed CESR's approach according to which, where doubt remains, investment advice prevails, the reasons being that such an approach goes against CESR's own emphasis on proportionality and would create uncertainty about the MiFID requirements for firms to be licensed. Proponents of CESR's view, stated that the proposed stance would clarify the current ambiguity and augment protection for all interested parties.

CESR's response

CESR does not consider the apparent lack of investment in a financial instrument as a



distinguishing feature between the two categories of advice, as interpreted by some respondents to the Consultation Paper, and agrees with the respondents that investment advice and corporate finance advice may both include the sale or purchase of a financial instrument.

CESR accepts that its proposed method to review the circumstances on a case by case basis, may fail to sufficiently establish the coveted certainty or increase the consistency of the approach by firms, and therefore concludes that instead a clear distinction between the two categories of advice is required. However, CESR re-affirms that MiFID firms should always take into consideration the investor's need for protection; his relative bargaining power; whether there are information asymmetries, and his knowledge and experience as set out in MiFID.

CESR agrees with the majority of respondents that a way of discerning between the two categories of advice is to establish the 'objective pursued by the client when seeking advice from a firm.'

Where the client's primary purpose for seeking advice is in order to generate a financial return or hedge a risk, the client's objective is patrimonial in nature and the advice provided would be investment advice. Conversely, where the client's primary purpose for requesting the advice is for an industrial, strategic or entrepreneurial purpose, the objective of the client is industrial, entrepreneurial and strategic in nature and the advice provided would be corporate finance advice. In situations where it is impossible to identify the primary purpose because both a patrimonial and a strategic/industrial/entrepreneurial purpose are present and neither one outweighs the other in importance, CESR considers that (at least) the service of investment advice is provided.

Where a client is acting in pursuit of his own interests with the primary intention of generating a financial return on his investments or future investments, he will receive investment advice. In particular, where the client is requesting advice about his personal interest in a company (this is irrespective of whether he is the majority shareholder of the company) and the advice is in relation to how the client can achieve the maximum financial return on his investment, the client would receive investment advice.

CESR is of the opinion that whether the client exercises control over the undertaking is not a distinguishing factor when determining whether the client seeks corporate finance advice or investment advice. This upholds the view that, majority and minority shareholders can receive both investment and corporate finance advice, depending on the situation.

IX. Part 5b: Is the recommendation made to a person in his capacity as an agent for an investor or potential investor?

55. This section of the CP described some of the, relatively unusual, situations in which it will not be clear that someone is acting in his capacity as an agent of an investor (e.g. where a portfolio management firm commission advices for a client from a third party). CESR noted the importance in such a situation of the firm being clear about the fact that it is acting as an agent for a particular client. This section is unchanged from the version consulted upon.



ANNEX I: List of responses

Activity	Name
Banking	Association of foreign banks in Germany (Verband der Auslandsbanken i Deutschland) Associazione Bancaria Italiana Austrian Federal Economic Chamber (WKO) British Bankers Association Caixa Geral de Depósitos Deutsche Bank European Association of Co-operative Banks (EACB) European Banking Federation (EBF) European Savings Banks Group (ESBG) Natixis Spanish Banking Association (AEB) Spanish Confederation of Savings Banks (Cajas de Ahorros) (CECA) Zentraler Kreditausschuss (ZKA)
Insurance, pensions and asset management	Association française de la gestion financière (AFG) Association of British Insurers Associazione del risparmio gestito (Assogestioni) Bundesverband Investment und Asset Management e.V. (BVI) European Fund and Asset Management Association (EFAMA) Investment and Life Assurance Group (ILAG) Verband unabhängiger Vermögensverwalter Deutschland e.V. (VuV)

Investment services	<p>Advisory Committee to the Comisión Nacional del Mercado de Valores (Advisory Committee to the CNMV)</p> <p>Association for Financial Markets in Europe / Futures and Options Association (AFME & FOA)</p> <p>Association française des marchés financiers (AMAFI)</p> <p>Association nationale des conseils financiers (ANACOFI)</p> <p>Associazione Italiana Intermediari Mobiliari (Assosim)</p> <p>Bloomberg</p> <p>Brewin Dolphin</p> <p>Chambre Nationale des Conseillers en Investissements Financiers (CNCIF)</p> <p>Compagnie des Conseillers en Investissements Financiers (CCIF)</p> <p>European Financial Planning Association (EFPA)</p> <p>Fédération Européenne des Conseils et Intermédiaires Financiers (Fecif)</p> <p>Financial Industry Regulatory Authority (Finra)</p> <p>National Association of Fee Only Planners (NAFOP)</p> <p>National Association of Promotori Finanziari (ANASF)</p> <p>Nordic Securities Association (NSA)</p> <p>Verband der Finanzdienstleistungsinstitute (German Association of Financial Service Firms)</p>
Legal	<p>Bonelli Erede Pappalardo (BEP)</p> <p>City of London Law Society</p>
Mixed financial services	<p>Belgian Financial Sector Federation (Febelfin)</p>
Other	<p>Danish Shareholders Association (DAF)</p> <p>Fondo General de Garantia de Inversiones (Fogain)</p> <p>Laurent Gauthier</p> <p>Society of Investment Professionals in Germany (DVFA)</p> <p>The Quoted Companies Alliance (QCA)</p>