COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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CONSULTATION PAPER

Understanding the definition of advice under MiFID

Deadline for contributions: CESR invites responses to this consultation paper by **14 December 2009**. All contributions should be submitted online via CESR's website under the heading 'Consultations' at www.cesr.eu. All contributions received will be published following the close of the consultation, unless the respondent requests its submission to be confidential.

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Executive Summary

This paper seeks to clarify and illustrate situations where firms will, or will not, be considered as providing investment advice. It does this using a question and answer format. Investment advice is an investment service under MiFID, which is why the distinction is important. The main questions for consideration are laid out in 'Diagram: the five key tests for investment advice' in the introduction, showing key tests for determining investment advice, with issues to consider in each case.

The main areas focus on topics including:

- The provision of personal recommendations and whether other forms of presenting information such as 'investment research', filtering, general recommendations, generic advice, presenting multiple products or access to model investment portfolios could constitute investment advice.

- The presentation of recommendations as suitable for clients and the presentation of recommendations based on the clients circumstances, including making recommendations to become a client of a particular firm, making recommendations which are clearly unsuitable in light of knowledge of the customer, definitions of a 'persons circumstances' and when recommendations will be viewed as based on a view of a person's circumstances.

- Perimeter issues around the definition of personal recommendation, including disclaimers to the client and failing to use known customer information

- Issues around the form of communication, including whether the internet is always a 'distribution channel', messages to multiple clients, distinguishing corporate finance and investment advice and whether these are mutually exclusive.

Stakeholders are being consulted on their views on CESR's stance for determining whether information constitutes investment advice, and whether there are other areas where they would like CESR to conduct further work or provide clarifications.

II. Introduction

1. The Markets in Financial Instruments Directive (2004/39/EC), or 'MiFID', identifies investment advice as an investment service, the provision of which, on a professional basis, generally requires authorisation as an investment firm[1]. Together, MiFID and the MiFID Implementing Directive (2006/73/EC) place various requirements on firms when they provide investment advice that do not apply when providing many other investment services, notably including requirements to ensure that any personal recommendations made to clients and potential clients are suitable for them.

2. In the light of this distinction, it is important 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.

Examining the definition of investment advice

3. According to MiFID, <u>investment advice means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments</u> (Article 4(4)). For the purposes of the definition of investment advice, that recommendation must be presented as suitable for that person or must be based on a consideration of the circumstances of that person (Article 52(1) of the MiFID Implementing Directive). The Directive also sets out a number of other tests for firms to consider in determining whether they are providing such personal recommendations, which we examine and discuss in this paper.

4. The diagram on the next page illustrates how the five key tests work together and hence the thought process that a firm will need to go through to determine whether its services constitute investment advice. <u>All five tests shown in the diagram have to be met in order for a service to be considered as investment advice under MiFID</u>. The following pages of this paper then use Questions and Answers to clarify and illustrate situations where firms will, or will not, be considered as meeting each of the tests and hence providing investment advice.

Considering an investor's view of whether advice is being given (Test 3)

5. Where the client reasonably believes that a personal recommendation is being provided, because it is reasonable to think either that the recommendation is being presented as suitable or that it is based on a consideration of his circumstances, it should be considered that investment advice is being provided, subject to the fulfilment of the four other tests.

6. Where the recommendation is in fact based on a consideration of the client's circumstances, however, this will constitute investment advice regardless of what the client believes or knows. In addition, where it is reasonable to think that a recommendation is being presented as suitable, this will constitute investment advice regardless of whether the recommendation is suitable for the client.

Assumptions made in preparing this paper

7. It is also taken as given throughout the following Questions and Answers that when a firm is providing investment advice under MiFID, it will be subject to all of the Directive requirements that apply in relation to investment advice (e.g. the suitability requirements in Article 19(4) of MiFID and Article 35 of the MiFID Implementing Directive), so this point is

[1] Some exemptions are provided in MiFID, including exemptions for the 'incidental' provision of the service (Article 2(1)(c)) and the provision of the service in such a way that it is not 'specifically remunerated' (Article 2(1)(j)). These exemptions are not examined in detail in this paper.

not reiterated for examples individually. References to ‘clients’ or ‘investors’ made throughout the rest of this paper can also be read as applying to potential clients or potential investors.

Diagram: the five key tests for investment advice

Is it investment advice?	Examples of issues to consider:	Page
1. Does the service being offered constitute a recommendation?	• the difference between information and a recommendation • whether assisting a client to filter information amounts to a recommendation	6
YES		
2. Is the recommendation in relation to one or more transactions in financial instruments?	• how to distinguish generic advice and general recommendations from investment advice • whether recommending a firm or a service can amount to investment advice	9
YES		
3. Is the recommendation at least one of the following… …a) presented as suitable? …b) based on a consideration of the person’s circumstances?	• how a financial instrument might implicitly be presented as suitable • the impact of disclaimers • what it means to consider a person’s circumstances	11
YES / YES		
4. Is the recommendation issued otherwise than exclusively through distribution channels or to the public?	• assessing recommendations delivered via the Internet • assessing recommendations given to multiple clients at once	12
YES		
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?	• identifying investors and their agents • the distinction between corporate finance advice and investment advice	14
YES / YES		
INVESTMENT ADVICE		

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

What constitutes a (personal) recommendation?

8. Under MiFID, a personal recommendation is an implicit or explicit recommendation to the investor (whether as principal or agent) to:

- buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument; or

- exercise or not to exercise any right conferred by such an instrument to buy, sell, subscribe for, exchange or redeem a financial instrument.

9. The recommendation may be made on the initiative of the investment firm or of the investor.

10. 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.

11. A recommendation not to buy a financial instrument made to a person in his capacity as investor or potential investor, or in his capacity as an agent for an investor or potential investor that is presented as suitable for that person or is based on a consideration of the circumstances of that person can also constitute the provision of a personal recommendation for the purposes of MiFID.

What is the difference between providing information and providing a recommendation? When does the provision of information to a client constitute a personal recommendation?

12. Advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. The proposed action may be presented to be in the interest of the investor. However, the investor does not have to act upon the recommendation for it to be regarded as a recommendation. Information, on the other hand, involves statements of fact or figures.

13. In general terms, simply giving information without making any comment or value judgement on its relevance to decisions which an investor may make is not advice.

14. Examples of information that might be given include:

    - listings of share and unit prices;
    - company news or announcements;
    - an explanation of the terms and conditions of an investment;
    - a comparison of the benefits and risks of one investment as compared to another;
    - league tables showing the performance of investments of a particular kind against set published criteria;
    - alerts about the happening of certain events (for example, XYZ shares reaching a certain price);
    - details of directors' dealings in the shares of their own companies.

15. The mere provision of information to a client by an investment firm does not normally constitute investment advice. In general terms, giving objective information about a financial instrument without making any judgment on its relevance for decisions the investor may make is not advice. However, information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation.

16. For example, a person might provide information based on biased or leading criteria, rather than on a balanced basis (e.g. by placing special emphasis on the advantages of one product), which would tend to influence the decision of the recipient. This can also be thought of as an implicit recommendation. Similarly, the following examples illustrate how providing a client with information could involve giving a personal recommendation:

- a person may offer to tell a client when certain shares reach a certain value on the basis of a prior recommendation to purchase or to sell at that price; or
- a person may offer to provide information on directors' dealings on the basis that, in his opinion, were directors to buy or sell investors would do well to follow suit.

17. While the communication about the instrument reaching the target price, in the first example, could be viewed as mere information if it were considered in isolation, as this communication should be considered as part of a multiple step recommendation process, providing the information should be regarded as giving a personal recommendation to the client.

18. The question of whether a communication to a client constitutes a recommendation may be closely related to the question of whether a recommendation is presented as suitable (see Section 3a for related Questions & Answers).

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

Can 'investment research' amount to investment advice?

19. Investment research under MiFID is research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public. From this definition it results that investment research is separate from investment advice. Despite this, research can be an element that, when used in conjunction with other activities from the firm, could result in the provision of investment advice.

20. For example, if the sales force of a firm emails investment research to a number of clients and subsequently engages in telephone calls discussing the merits of the particular financial instrument that the research identifies, presenting it as suitable for the client, the firms' actions may amount to the provision of investment advice. Also, if investment research is sent to one or more clients and the accompanying material (letter, email, etc.) contains, for example, language or other elements that lead the recipient to reasonably believe that a personal recommendation is being made, then it should be considered that investment advice is being provided.

Can a firm guide a client through a set of filtering questions about the investment products it offers without this constituting a recommendation?

21. The fact that a firm enables clients to filter the information that they receive about different financial instruments – for example, by choosing from a set of options on a website, or even following a decision-tree process with a member of staff – does not automatically mean that a recommendation is being given by the firm that provides the information. But where a firm uses a mechanism to filter the information that it provides investors, the circumstances of such a case should be taken into account in determining whether a recommendation is being made. It is necessary to look at the process and outcome of the questions, or questionnaire, as a whole.

22. Factors that may be relevant in deciding whether the process involves a recommendation may include:

- any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- the context in which the questioning takes place;
- the stage in the questioning at which the opinion is offered and its significance;
- 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 judgment by the firm;
- the outcome of the questioning (whether particular products are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- whether the questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the person understand what the questions or options are and how to determine which option applies to his particular circumstances.

23. A critical factor would be whether the process is limited to, and 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.

24. As an example, price comparison websites commonly collect information from clients and about their circumstances and allow them to filter the information that they view as a result, without necessarily giving investment advice. The website may enable a client to enter information to generate a list of investment products for which they are eligible, or that meet criteria they have chosen, without providing a recommendation. In such cases, the ability of the clients to make their own choices about the features they are looking for, and the absence of apparent judgement about which features or products they should choose, would make it unlikely that the service offered would be viewed as investment advice.

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'?

If a firm gives investors access to model investment portfolios, which are composed of different financial instruments that it can sell them, is this investment advice?

25. Whether or not providing a client with access to a model investment portfolio amounts to investment advice will depend on the particular circumstances, just as was described in the question about other forms of filtering of information (above). Different factors would need to be assessed, on a case-by-case basis, to determine whether or not investment advice is being given.

26. If we consider a situation where a firm provides, on its website or through another medium, the possibility for investors to determine their investment profile (e.g. dynamic, conservative etc.) and for each profile discloses a related model portfolio, composed of different financial instruments, situations can certainly be envisaged in which providing such a service is likely to amount to investment advice. If buying, or subscribing for, the financial instruments identified in the model portfolio is positioned as the appropriate action for the investor to take, the overall service might be viewed as a recommendation rather than merely the provision of information.

27. The following sections of this paper will clearly also be relevant in determining whether investment advice is being given when a firm gives clients access to model investment portfolios. For example, if a website provider collects information about an investor's circumstances; uses an element of opinion to translate this into a risk profile and then to identify a particular set of products; and presents the portfolio using phrases such as "this might be appropriate for you", it is possible that the tests described in this paper might be met and the service provided would amount to investment advice.

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

What does it mean to make recommendations in relation to transactions in financial instruments?

28. As noted in Section 1, MIFID sets out the 'transactions' that a recommendation could be in relation to:

- buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular financial instrument; or

- exercising or not exercising any right conferred by such an instrument to buy, sell, subscribe for, exchange or redeem a financial instrument.

29. This test means that, in general, any advice that relates to particular financial instruments – whether or not transactions ultimately go ahead – could be considered as investment advice under MiFID.

30. According to MIFID, the definition of recommendations does not necessarily involve the adviser reviewing a wide range of financial instruments. Advice can also be based, for example, on a review of just a firm's own products or a restricted list of financial instruments.[2]

31. In contrast, generic advice about a type of financial instrument and general recommendations are not investment advice under the Directive.

What is generic advice?

32. Advice that does not relate to a particular financial instrument or instruments should be regarded as generic advice. Examples of generic advice may include:

- advice on the merits of investing in one geographical zone rather than another (for example, Japan rather than Europe); or

- advice on the merits of investing in certain asset classes rather than in others (for example, bonds rather than shares).

33. See Recital 81 of the MiFID Implementing Directive for further information of the definition of generic advice and the rules applying when generic advice is being provided.

What is a general recommendation?

34. A general recommendation is a recommendation about a transaction in a financial instrument or a type of financial instrument which is intended for distribution channels or the public (see Recital 83 of the MiFID Implementing Directive). General recommendations include investment research and financial analysis, and are an ancillary service under Section B(5) of Annex I of MiFID.

35. Being addressed to the public in general, a general recommendation is not, by definition, based on an evaluation of the personal circumstances of a particular person, nor does it

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[2] In this context, the client can select the intermediary having regard to the features of the advice service that is going to be provided. To this extent, MiFID requires that investment firms provide clients before they are bound by any agreement for the provision of investment services with information about the terms of such agreement (Article 29(1)(a) of the Implementing Directive).

appear to be presented as suitable for that person. Further information about when an recommendation is issued exclusively through distribution channels or to the public can be found in Section 4.

36. For more details regarding the definition of investment research, financial analysis or other forms of general recommendation relating to transactions in financial instruments, reference should be made to Article 24 of the MiFID Implementing Directive.

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?

Can investment advice involve presenting several alternative financial instruments, rather than recommending just one?

37. Yes, a recommendation can involve the presentation of several specific financial instruments that are, together, recommended over other possible choices. The fact that more than one financial instrument is being recommended does not stop the service being offered from being advice.

38. For instance, where a firm giving advice recommends that an investor takes a particular action in relation to any one of a group of specific financial instruments, which are presented as equally suitable (e.g. the firm might state that "share A, share B or share C are equally suitable for your needs") this will constitute investment advice.

Does a firm give advice when it discusses the merits of different product types for the customer?

39. It is possible for a client to ask for and receive information about different types of financial instruments without advice being given on one or more specific financial instruments. For example, advice about whether it would be best for a client to invest directly in shares or through a collective investment scheme (CIS) could be given without investment advice being given.

40. Advice looking only at which asset class would be better for an investor would normally qualify as generic advice rather than as investment advice. If, further to advice regarding an asset class being given, the firm also indicates a particular instrument within that asset class this would be regarded as investment advice.

Is a recommendation to become a client of a particular investment firm investment advice?

41. Advice to become the client of a particular investment firm (e.g. a particular portfolio manager), or to use its services in a certain way, would need to relate to one or more specific financial instruments in order to be considered as investment advice under MiFID.

42. Recital 60 of the MiFID Implementing Directive notes that advice given by a portfolio manager to a client to the effect that the client should give or alter a mandate to the portfolio manager that defines the limits of the portfolio manager's discretion should be considered a recommendation within the meaning of Article 19(4) of MiFID. This Recital makes clear that advice in relation to a portfolio management mandate is subject to the requirements on assessing suitability (although it is not necessarily a personal recommendation).

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

Can an implicit recommendation be considered as investment advice?

43. Yes. A financial instrument might be presented as suitable for the investor in an explicit or implicit form. In both cases the firm will be providing investment advice, if the other tests are also met. For instance, a financial instrument might be explicitly presented as suitable using words such as "this product would be the best option for you". Alternatively, the recommendation could be implicit, but have the potential to influence the client to take action in relation to a specific financial instrument (for example, it might involve a phrase such as "people like you tend to buy this product").

44. An example of a product being implicitly presented as suitable would be when only selective information is provided about the advantages for an investor of one specific product compared to others. If the presentation of the information seeks to influence the client's choice then the firm might be making an implied personal recommendation, and thus providing investment advice.

45. 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.

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?

Could the presentation of a financial instrument as suitable for an investor constitute advice even if the firm is aware that it is not suitable for that investor?

46. Yes, a financial instrument can be presented as suitable for an investor without this actually being the case. In such a case, before making the recommendation the firm should have obtained the necessary information regarding the client's knowledge and experience, his financial situation and his investment objectives so as to recommend a financial instrument that is suitable for him. While a recommendation of a product that is not suitable for the investor would constitute a breach of the rules on suitability (in Article 19(4) of MiFID and Article 35 of the MiFID Implementing Directive) it would not stop the recommendation from being presented as suitable or constituting investment advice.

Can a firm avoid providing investment advice using a disclaimer in its communications?

47. Even if a clear, prominent and understandable disclaimer is provided stating that no advice or recommendation is being given, a firm could still be viewed as having presented a recommendation as suitable for the client. If the 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.

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

What do we mean when we talk about a person's circumstances?

48. Information about persons' circumstances could include both factual information (e.g. their address, income or marital status) and more subjective information about their wants and needs (e.g. their overall risk appetite, short- and long-term investment objectives or their desire for protection from particular risks). Any such information could be considered as part of a person's circumstances.

When will a firm be viewed as basing a recommendation on a consideration of a person's circumstances?

49. Whether or not a firm will be viewed as providing a recommendation based on a consideration of person's circumstances is likely to depend on factors such as:
    - the nature of the information it collects; and
    - the way that it presents its questions.
50. For example, 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 this information is being used to create a picture of his needs and wants to form the basis of a recommendation.

Can a firm avoid being viewed as making a personal recommendation by failing to use information about a person's circumstances?

51. No, not if a firm has accumulated information on a person's circumstances – either during a single interview or during the course of an ongoing relationship – and it might reasonably be expected that this information is being taken into account. In this case, any recommendation made will be treated as being based on a consideration of the person's circumstances.
52. In this situation, the firm will be held responsible for directly or indirectly giving the impression that it is basing its recommendation on information about the person's circumstances.

Can a firm avoid making a personal recommendation by telling the client that its recommendation is not based on any information collected from him?

53. No, not if the firm has information on the person's circumstances and – in all other ways – created a reasonable expectation that this information will be taken into account in making a recommendation.
54. For example, adding a disclaimer to a client agreement noting that information collected will not be used to make a recommendation will not be sufficient to prevent the firm from being treated as having given a personal recommendation, if it is clear from the circumstances that a firm is making a personal recommendation.

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

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

What does it mean to make a recommendation exclusively through distribution channels or to the public?

55. A recommendation concerning financial instruments made exclusively through newspapers, magazines or in any other publication addressed to the public (including a public webpage on the Internet), or during a television or a radio programme should be regarded as a recommendation made through a distribution channel or to the public. The same would apply to marketing campaigns, such as those made through posters or folders that can be seen in places accessible to the public (e.g. on public transport or at a firm's agencies).
56. Newspapers, magazines or any other publication addressed to the public, as well as television or radio are examples of distribution channels. A distribution channel is a channel through which information is, or is likely to become, publicly available – i.e. a large number of persons have access to it (see Article 1(7) of Commission Directive 2003/125/EC, to which the MiFID Implementing Directive refers).

57. According to Article 52 of the MiFID Implementing Directive, a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.

Does publishing a list of "best products" or "funds of the month" on a public page of a website or in a newspaper count as investment advice?

58. Publishing a list of "best products" or "funds of the month" would not, in itself, normally be regarded as investment advice. Assuming that such a communication is not addressed to a person as such but rather to the public in general, it would normally not be presented as suitable for a particular person; be based on a consideration of the circumstances of that person; or, indeed, involve a recommendation. Furthermore, if the information is provided on a public page of a website or in a newspaper, for example, this can also be considered as a distribution channel (within the meaning of Article 2(1) of the MiFID Implementing Directive).

59. Of course, if a list of best products was provided to an individual client, rather than distributed through a distribution channel or to the public, it is possible that such a communication could meet the different tests described in this paper and amount to investment advice.

Would a medium such as the Internet always be seen as a distribution channel?

60. According to Article 52 of the MiFID Implementing Directive, "a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public". CESR is of the opinion that this exemption only applies when the recommendation issued through distribution channels or to the public *is addressed to the public in general*.

61. When a recommendation is addressed to a particular person and is presented as suitable for that person or based on a consideration of the circumstances of that person, CESR believes that it does not fill in the conditions to benefit from the exemption under Article 52 of the MiFID Implementing Directive. This includes situations where a webpage, or indeed e-mail correspondence, is used to provide personalised information, rather than to address information to the public in general.

62. By way of example, Section 1 of this paper also describes how providing a model portfolio to client, such as through the Internet, could amount to investment advice.

Can a message sent to several clients, for example through emails or letters, be considered as investment advice?

63. Depending on the circumstances, even when sent to several clients, a message (by email, or letter, for example) could be regarded as investment advice under MiFID. The medium used does not automatically determine whether a communication amounts or not to investment advice. For example, advice can be provided in many ways, including: face to face; orally to a group; by telephone; by correspondence (including email); on a website; or through the provision of an interactive software system.

64. In order to assess whether a message sent to several clients amounts to investment advice, different elements should be taken into account: the target audience, the content of the message and the language used:

- Target audience: the way the firm selects the clients to whom the message will be sent can have an incidence on the qualification of that message as investment advice. For example, when the internal procedures of a firm specify that a financial instrument may only be sold to a sample of clients selected on the basis of certain factors, such as clients under a certain age or who hold no similar products, the selection of the target audience will not automatically mean that the firm is providing investment advice. However, highlighting the particular personal circumstances that led the individual to be contacted, for example, could mean that the product is being presented as suitable for the particular investor.

- Content of the message: if the message contains a solicitation, a recommendation, an opinion or a judgment, for example, regarding the advisability of a transaction, this could mean that it is regarded as investment advice.
- Language: if the language is such that it strongly suggests an instrument, or is such that the client could reasonably perceive the message as being investment advice, this will have an impact. Thus, the tone of the message and the way it could be understood by the client are important elements when determining if a message amounts to investment advice.

65. In the sorts of situations described above, messages addressed to clients would be unlikely to be considered as issued exclusively through distribution channels or to the public (within the meaning of Article 52 of the MiFID Implementing Directive).

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

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

What does it mean to make a recommendation to a person in his capacity as an investor?

66. Article 52 of the Implementing Directive indicates that a personal recommendation may be provided either to a person acting in his capacity as an investor or potential investor, or to a person acting in his capacity as an agent for an investor or potential investor. It follows that where a recommendation is provided to a person acting in another capacity (neither investor nor agent for an investor), it is not a personal recommendation and consequently does not constitute investment advice.

67. The concept of a person acting in his capacity as an investor (or potential investor) will almost always be perfectly clear, both to the investment firm and to the client. Where an investment firm makes a recommendation to a person to buy or sell a financial instrument, it should be assumed that the person is an investor or potential investor unless particular circumstances clearly demonstrate otherwise.

68. Under MIFID, it is not relevant for the purposes of advice definition whether a client is specifically paying for the advice or if advice is provided as part of a wider package of investment services (for which the investment firm might even be remunerated via a third party).

Compared to investment advice, what is the ancillary service of corporate finance advice?

69. Whilst investment advice is an investment service the provision of which on a professional basis generally requires authorisation as an investment firm, “corporate finance advice” is an ancillary service for which MiFID does not require authorisation. Unlike investment advice, “corporate finance advice” provided by an investment firm (as for any other ancillary service) is only subject, as appropriate, to various conduct of business obligations under Article 19 of MiFID. This includes the general requirement to act honestly, fairly and professionally in accordance with the best interests of the client.

70. The service often called “corporate finance advice” is described in Section B(3) of Annex I of MiFID as the provision of “advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings”.

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

71. ***T***he only provisions of MiFID capable of assisting investment firms and their clients in drawing a line between these two categories of advice are the definition of investment advice and the above description of the ancillary service (in Section B(3) of Annex I of MiFID).

72. First of all, it is clear that advice on "capital structure, industrial strategy and related matters" is not investment advice because such advice will not involve investment in financial instruments. Secondly, it is important to consider that investment advice will be provided only where a recommendation is made to a person in his capacity as an investor or potential investor (or in his capacity as an agent for an investor or potential investor). It follows from this that advice to an undertaking to issue securities is not investment advice.

73. Beyond these two conclusions that result clearly from the provisions of MiFID, 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.

74. On the one hand one may prefer to think that the scope of investment advice, since it is a core investment service subject to authorization and to which important standards are attached in the interest of investor protection, should, in the event of doubt, prevail. On this basis, advice given to an undertaking for example to acquire the control of another company by purchasing all or a substantial portion of its shares, or to dispose of a subsidiary, would, if the other elements of the definition of investment advice are satisfied, be investment advice and would need to be suitable for that undertaking. Proponents of such an approach may refer to the conflict of interest that often occurs in such transactions in order to justify a suitability requirement and, more broadly, the application of the relevant protections afforded by MiFID. Such an interpretation may be thought to be reasonable particularly where the undertaking or its decision-making representative or representatives are unsophisticated. The same would hold of course for the individual shareholders including those who are directors or senior officers of the undertaking, whose interests would be affected by such transactions, and it may be argued that it is necessary in any event, regardless of the relative sophistication of such individuals, to apply MiFID´s suitability requirements, since these take into account the investor experience and knowledge of the client.

75. On the other hand, one may be inclined instead to think that the scope on the ancillary service, since it appears to constitute a separate and specialized form of advice in particular circumstances, should prevail. On this basis, all "advice and services relating to mergers and the purchase of undertakings" would be corporate finance advice, subject neither to authorization nor to the suitability requirement. It may be argued that this is valid even with respect to the individual shareholders of the undertakings involved since Section B(3) does not distinguish between merger and acquisition advice provided to undertakings and such advice provided to individuals.

Are investment advice and corporate finance advice mutually exclusive?

76. No, the provision of "corporate finance advice" and the provision of investment advice are not mutually exclusive. Indeed, these two forms of advice appear to overlap to a very significant extent. For example, where a firm 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. To highlight an opposite example, where a firm's interest in buying or selling shares is purely related to a desire to achieve a particular industrial action, this will not involve investment advice,

77. CESR acknowledges that firms may face some uncertainty in trying to determine whether or not they are giving investment advice when providing corporate finance services. CESR recommends that such firms consider, on a case-by-case basis, whether the overall aims of investor protection that MiFID seeks to achieve are relevant – taking into account factors

such as: the investor's need for protection; his relative bargaining power; whether there are information asymmetries, and his knowledge and experience.

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?

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

What does it mean to make a recommendation to a person in his capacity as agent for an investor?

78. In most cases the concept of a person acting in his capacity as agent for an investor or potential investor will be perfectly clear, for example where a person holds a power of attorney to act in the name of his or her spouse or child.

79. There are circumstances, however, where it will not always be clear that an agency relationship within the meaning of Article 52 of the MiFID Implementing Directive exists. For example, where an investment firm provides a recommendation to a portfolio manager, it will usually be the case that the investment firm is not giving investment advice to the portfolio manager's client but is simply providing a general recommendation, such as an investment tip. However, there may be cases where a firm such as a portfolio manager *does* commission advice for a client from a third party – such as from a specialist adviser on a particular subject area – and in doing so acts as an agent. In such cases, it will be important for the firms involved to be clear about the fact that the portfolio manager is acting for a particular client (or a particular group of clients) and to ensure that the investment firm commissioned possesses the necessary information about the clients involved.

80. In CESR's view, the reference in Article 52 to the recommendation being presented as suitable "for that person" or based on a consideration of the circumstances "of that person" should, by inference, be read as meaning for that person (or where the person in question is an agent, for the person for whom they are the agent)