

Madrid, 10th May 2010

Professor Eddy Wymeersch
Chairman
Committee of European Securities Regulators
11-13 avenue de Friedland
FR-75008 Paris
(France)

Dear Professor Wymeersch,

We address you with regards to the CESR target “Work to ensure more consistent and timely day-to-day implementation of community legislation in the Member States” to raise awareness that such important objective is currently at stake by the statement launched by the Bank of Spain and the National Committee of Market Values (which, in Spanish, stands for CNMV) issued on April 20th 2010.¹ Such statement deals with the Delimitation of Competences between the CNMV and the Bank of Spain regarding the supervision and settlement of claims about coverage derivative financial instruments or products, which is already attached in the present letter (in Spanish and its English translation).

According to such statement, the CNMV, member of the CESR, together with the Bank of Spain applied article 19.9 of the MiFID² which has been implemented into the Spanish regulation in article 78 quater of the Securities Market Act³ to conclude that “In all cases where a derivate is linked to a banking product, the only requirement to be commercialized is the compliance of the requirements stated by the banking regulation”.

¹ Available at: <http://www.cnmv.es/portal/verDoc.axd?t={7862a09a-9cab-4d37-a8c4-8a2cd02b671b}>

² “In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of clients and/or information requirements, this service shall not be additionally subject to the obligations set out in this Article” (article 9 MiFID).

³ “What it has been set forth in the two previous articles will not be applicable when an investment service is offered as part of a financial product which falls within the scope of other European regulations or common European standards for credit institutions and consumer credit activity, related to the clients risks valuation or the information requirements” (article 79 quater of Securities Market Act).

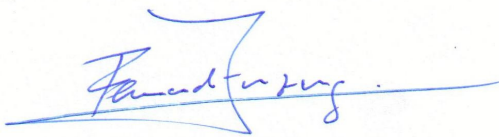
Such point of view, assumed by the CNMV together with the Bank of Spain, makes all investors who have subscribed derivatives linked to banking products in Spain fall outside the scope of MiFID.

The so mentioned interpretation of the CNMV is clearly against the views of the European Commission and damages the application of the MiFID within the European Union.⁴


Therefore, as a University Professor, Former FIN-USE Chairman as well as Lawyers specialised in the defence of retail clients, we would like to draw your attention to the facts mentioned above in order to have a clear interpretation of article 19.9 of MiFID and assure its consistent application throughout the European Union.

Should you need further information or have any doubts on the matter, do not hesitate to contact us.

Yours sincerely,



Professor Dr Fernando Zunzunegui,
Former FIN-USE Chairman
Lawyer



D. Jordi Ruiz de Villa,
Lawyer

cc

Jörgen Holmquist – Director General
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⁴ ID 842. Definitions (Internal reference 269) financial instrument- IRS related to mortgage loan:

Question: In Spain, banks have the obligation to offer an instrument for hedging interest rate risk when offering mortgage loans. This instrument usually take the form of an interest rate swap (IRS) formalised in a separate contract, which leads to an assessments independent of the main mortgage contract. The cancellation of the loan does not necessarily lead to liquidation of the IRS. Is an IRS in this context a financial instrument under MIFID? In the answer to question 118, certain derivatives embedded in a deposit do not change the status of the deposit to become a financial instrument under MIFID.

Answer: An interest rate swap is defined as a financial instrument in Section C, Annex I of Directive 2004/39/EC (MIFID). The circumstance that the interest rate swap is formalised in a separate contract and exists independently of the mortgage loan indicates that the classification of the instrument should be independent of the loan. The interest rate swap cannot be considered an embedded derivative and the circumstances are not comparable to those described in relation to question 118.