

Madrid, 09<sup>th</sup> February 2010

**Mr. Carlo Comporti**  
**Acting Secretary General**  
European Securities and Markets Authority (ESMA)  
11-13 avenue de Friedland  
FR-75008 Paris  
(France)

Dear Mr. Comporti,

We address you with regards to a case of breach of Union law, where a competent authority has not applied the MiFID, or has applied it in a way which appears to be a breach of Union law, asking you, on your own initiative to investigate the alleged breach of Union law,<sup>1</sup> according to ESMA task: “to contribute to the consistent application of legally binding Union acts”, by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the Directive 2004/39/EC (MiFID) preventing regulatory arbitrage.<sup>2</sup>

We consider that a case of breach of Union law takes place by the statement launched by the Bank of Spain and the Securities Market National Committee (which, in Spanish, stands for CNMV) issued on April 20th 2010, attached to the present letter (in Spanish and its English translation). 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.

According to such statement, the CNMV, member of ESMA, together with the Bank of Spain applied article 19.9 of the MiFID, implemented into the Spanish regulation in article 78 quater of the Securities Market Act, 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”.

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 view of the European Commission and undermines the application of the MiFID within the European Union.<sup>3</sup>

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<sup>1</sup> Article 17 of Regulation (EU) No 1095/2010.

<sup>2</sup> Article 8(b) and, by reference, Article 1(2) of Regulation(EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

<sup>3</sup> **ID 842. Definitions (Internal reference 269) financial instrument- IRS related to mortgage loan:**

This case put forward to CESR on May 6<sup>th</sup>, 2010 is introduced to you through this letter, considering your new competences.<sup>4</sup>


Therefore, as a university professor and former FIN-USE Chairman, and as lawyers specialized in the defense 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, considering these facts as a breach of Union law case on your own initiative.<sup>5</sup>

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

c.c.

**Mr. Jonathan Faull**  
Director General Internal Market and Services  
European Commission  
1049 Brussels  
Belgium

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**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.

<sup>4</sup> Following the e-mail received from Ms Eija Holttinen (CESR), on December 31<sup>st</sup>, 2010 about the convenience of forwarding the denounce to ESMA.

<sup>5</sup> A motion on this issue was presented to the Spanish Parliament by all political parties, demanding information to the CNMV and the Bank of Spain on the application of CESR criteria's on these matter. We attach the Parliamentary Motion published on *Diario de Sesiones del Senado*, 6 October 2010).