

CONSOB  
Divisione Meracti  
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Italy

18 July 2016

**AFME Response to CONSOB consultation paper 'Criteri per la Pubblicazione delle Raccomandazioni di Investimento e Caratteristiche del Nuovo Sistema di Trasmissione delle Stesse alla CONSOB'**

Dear Sir / Madam,

We understand the above- referenced CONSOB consultation ("CONSOB Consultation") makes two proposals:

1. Clarification of criteria for when CONSOB may request publication of an investment recommendation on the Borsa Italiana website; and
2. A new system for transmitting investment recommendations to CONSOB's own internal research database.

AFME<sup>1</sup> has had the benefit of reading in draft an English summary of the response of Assosim to the CONSOB Consultation. AFME broadly agrees with the points made by Assosim, but has the following additional points from a pan-European perspective on these two proposals.

**Sales and Trading communications**

First, it is important to make a distinction between those investment recommendations which are produced by the independent research department of a firm and which constitute 'investment research' under the Markets in Financial Instruments Directive (MiFID) (2004/39/EC) and those investment recommendations which are produced by the sales and trading department of a firm and which must be treated as 'marketing communications' under MiFID. As you will be aware, following the implementation of the EU Market Abuse Regulation (MAR) (596/2014), certain National Competent Authorities

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<sup>1</sup> AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

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(NCAs) have indicated that they consider certain communications produced by sales and trading departments to constitute investment recommendations under MAR (although the guidance given by different NCAs has varied on this point).

We believe that it is neither appropriate nor proportionate to apply the existing additional CONSOB requirements regarding investment recommendations, or the two proposals set out in the CONSOB Consultation, to investment recommendations which are produced by sales and trading personnel in accordance with the requirements of MAR, an EU Regulation directly applicable in member states.

### **Clarification of criteria for when CONSOB may request publication of an investment recommendation on the Borsa Italiana website**

As regards investment recommendations produced by the independent research department of a firm, we are generally supportive of CONSOB providing further clarification to the criteria for when CONSOB may request publication of an investment recommendation on the Borsa Italiana website; however, our members continue to have the following general concerns in connection with publication of any investment research on the Borsa Italiana or other public website.

- (i) Our member firms consider their research (whether in its entirety or in respect of any of the elements which constitute it, such as the investment recommendation) as proprietary information, available only for the use of clients who in some cases are paying for this service. Investment research constitutes a valuable product which is generated after significant investment of resources by our member firms. Therefore, the availability of such information to the world at large will destroy any commercial value inherent in the research.
- (ii) Publication of aspects of the investment research on the Borsa Italiana website will expose our member firms to potential liability towards third parties (including retail investors) who may access this information and rely on it to make investment decisions. Our member firms will be unable to rely on the customary protection provided to them by the terms and conditions they have entered into with their clients, or the disclaimers which normally accompany such investment research. This is a particular concern to our members as it could lead to: (i) the risk of enforcement actions being brought by authorities in other EU countries, the US, Canada and other countries for triggering inadvertent public offers in their respective countries or permitting unauthorised investment advertisements to reach the public in their jurisdictions; and/or (ii) a disproportionate increase in the risk of individual or class actions being brought by retail and unsophisticated investors for misunderstanding the purpose and use to be made of investment research, or alleging (often with no basis) incorrect, misleading or incomplete statements in the opinions, projections or assumptions in the research. Any such action could result in significant economic losses and reputational damage to our members' firms, whether or not ultimately the actions are found to have any substance.

- (iii) The posting on the Borsa Italiana website of aspects of investment research which is not intended for retail investors and not revised, updated or confirmed on a regular basis, nor removed when out of date, may create a false impression in the market and the general investing public of the recommendations of our member firms. This exposes our member firms to regulatory risk, including that of breaching other regulators' rules on distribution to retail investors.
- (iv) A further concern is raised by the fact that much foreign-published research, as well as being not intended for retail investors, is written in English and therefore may not be properly understood by an Italian retail investor. This would appear to negate the aim of CONSOB's objective to achieving an equality of information across the market in the situations requiring publication on the Borsa Italia website.

In addition, our members have the following practical concerns:

- Publication the day after dissemination of investment research to paying clients may in due course be viewed as inconsistent with MiFID2, which is likely to require research to be paid for as an inducement, unless it is a minor non-monetary benefit.
- How can it be ascertained that a rumour originates in an investment recommendation published that day and not other sources? (e.g. research published some days ago, or a leak of unpublished research)?
- What is meant by "the only *relevant* information on the issuer"?
- The proposal appears to penalise firms who have stringent controls around the publication and distribution of investment research, including not spreading unsubstantiated information, rather than those who spread the rumour.
- What type of variation in stock price would be required for CONSOB to force publication?

### **New system for transmitting investment recommendations to CONSOB's own internal research database**

This proposal would place an inappropriate and significant administrative and financial burden on firms with regard to extracting and presenting the specified information from investment recommendations in the format and on the timetable proposed by CONSOB. Our member firms do not generally have the required infrastructure to do this on an automated basis, so the process would be a manual one.

Our members believe they already provide timely access to investment recommendations on Italian listed companies to CONSOB pursuant to the existing requirement to provide a copy of such investment recommendations to CONSOB at the same time as dissemination is made to the firm's clients. Our members strongly believe that the administrative and financial burden of any further requirements made for the purpose of improving the internal data management systems of CONSOB should not be borne by firms producing investment recommendations.

### **Extraterritoriality**

Lastly, we would welcome confirmation (a) that the CONSOB Consultation is not intended to apply to investment firms which are based outside Italy; and (b) that the financial instruments scope is limited to those issued by Italian legal entities only.

Please do not hesitate to contact us if you have any questions regarding our response.

Yours faithfully,



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