Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

30 May 2013 *

(Directive 2004/39/EC — Markets in financial instruments — Article 19 — Conduct of business obligations when providing investment services to clients — Investment advice — Other investment services — Obligation to assess the suitability or appropriateness of the service to be provided — Contractual consequences of non-compliance with that obligation — Investment service offered as part of a financial product — Interest-rate swap agreements to protect against the risk of variations of interest rates on financial products)

In Case C-604/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia No 12 de Madrid (Spain), made by decision of 14 November 2011, received at the Court on 28 November 2011, in the proceedings

Genil 48 SL,

Comercial Hostelera de Grandes Vinos SL

v

Bankinter SA,

Banco Bilbao Vizcaya Argentaria SA,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 January 2013,

after considering the observations submitted on behalf of:

— Genil 48 SL, by P. Rico Cadenas, procuradora,

— Comercial Hostelera de Grandes Vinos SL, by B. Grande Pesquero, procuradora, and by E. Zato Tajada and C. Navarro García, abogados,

* Language of the case: Spanish.

— Bankinter SA and Banco Bilbao Vizcaya Argentaria SA, by J. Massaguer Fuentes and J. Iglesias Rodríguez, abogados,

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

— the Czech Government, by M. Smolek and T. Müller, acting as Agents,

— the Estonian Government, by M. Linntam, acting as Agent,

— the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,

— the European Commission, by J. Baquero Cruz, E. Traversa and R. Vasileva, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4(1)(4) and 19(4), (5) and (9) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

2 The request has been made in two sets of proceedings between Genil 48 SL ('Genil 48') and Bankinter SA and between Comercial Hostelera de Grandes Vinos SL ('CHGV') and Banco Bilbao Vizcaya Argentaria SA concerning swap agreements to protect Genil 48 and CHGV against the risk of variations of interest rates on financial products for which they subscribed with those two banks.

Legal context

European Union legislation

Directive 2004/39

3 Recitals 2 and 31 in the preamble to Directive 2004/39 read as follows:

'(2) … it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection …

…

(31) One of the objectives of this Directive is to protect investors. …'

4 Article 4(1)(2), (4) and (17) of that directive contains the following definitions:

'(2) "[i]nvestment services and activities" means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;

…

(4) "[i]nvestment 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;

…

(17) "financial instrument" means those instruments specified in Section C of Annex I.'

5 The services and investment activities listed in Section A include investment advice. Moreover, Section C(4) lists '[o]ptions, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments …'.

6 Title II, Chapter II of that directive includes Section 2, entitled 'Provisions to ensure investor protection', which in turn comprises Article 19, entitled 'Conduct of business obligations when providing investment services to clients'. According to Article 19(4) to (6) and (9):

'4. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.

5. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

In case the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format.

In cases where the client or potential client elects not to provide the information referred to under the first subparagraph, or where he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client or potential client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him. This warning may be provided in a standardised format.

6. Member States shall allow investment firms when providing investment services that only consist of execution and/or the reception and transmission of client orders with or without ancillary services to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 5 where all the following conditions are met:

— the services referred to in the introductory part relate to shares admitted to trading on a regulated market or in an equivalent third-country market, money market instruments, bonds or other forms of securitised debt (excluding those bonds or securitised debt that embed a derivative), UCITS and other non-complex financial instruments. …

…

9. 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.'

7 Article 51(1) of Directive 2004/39 provides that Member States are to ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of that directive have not been complied with; those measures are to be effective, proportionate and dissuasive.

Directive 2006/73/EC

8 Articles 35 to 37 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39 as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2006 L 241, p. 26) provide further details about the suitability and appropriateness assessments provided for in Article 19(4) and (5) respectively of Directive 2004/39.

9 Article 38 of Directive 2006/73 provides that a financial instrument which is not specified in the first indent of Article 19(6) of Directive 2004/39 is to be deemed non-complex if, inter alia, it does not fall within Article 4(1)(18)(c) of, or points (4) to (10) of Section C of Annex I to, that directive.

10 Article 52 of Directive 2006/73/EC is worded as follows:

'For the purposes of the definition of "investment advice" in Article 4(1)(4) of Directive 2004/39/EC, a personal recommendation is a recommendation that 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.

That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:

(a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;

(b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.'

Spanish legislation

11 Directive 2004/39 was transposed in Spanish law by Law No 24/1988 on the securities market (Ley 24/1988 del Mercado de Valores) of 28 July 1988 (BOE No 181 of 29 July 1988, p. 23405), as amended by Law No 47/2007 of 19 December 2007 (BOE No 304 of 20 December 2007, p. 52335 ('Law No 24/1988'). Article 19(4), (5) and (9) of that directive was implemented by Article 79a(6) and (7) and Article 79c of that law.

12 The more detailed rules for the assessment obligations provided for in Article 19(4) and (5) are laid down in Articles 72 and 73 of Royal Decree No 217/2008 on the legal scheme governing investment service firms and other establishments providing investment services (Real Decreto 217/2008 sobre el régimen jurídico de las empresas de servicios de inversión y de las demás entidades que prestan servicios de inversión) of 15 February 2008 (BOE No 41 of 16 February 2008, p. 8706).

The actions in the main proceedings and the questions referred for a preliminary ruling

13 It is apparent from the order for reference that the swap agreements concluded by Genil 48 and CHGV, on the one hand, and the defendant banks in the main proceedings, on the other, were intended to protect Genil 48 and CHGV against changes in variable interest rates, in this case the Euro interbank offered rates (Euribor), on the financial products for which they subscribed with those banks.

14 Under those agreements, the parties each agree to pay the other party the difference in the amounts resulting from the application of the interest rates agreed for different scenarios. As a result of those agreements, if the monthly Euribor remains below the agreed fixed rate, it is the client who must pay the difference to the bank, whereas if the Euribor rises above the agreed fixed rate, it is the bank that must pay that difference to its client.

15 According to the information provided by the referring court, on 16 September 2008 Genil 48 concluded its swap agreement, whilst CHGV agreed by telephone to conclude such an agreement. The question arises, however, as to whether the latter agreement was in fact concluded at that time or subsequently.

16 The referring court states that none of the assessments was made of Genil 48 under Article 19(4) and (5) of Directive 2004/39, as transposed by Article 79a(6) and (7) of Law No 24/1988; nor is it apparent from the case-file that any such assessments were made of CHGV.

17 Through their actions brought before the referring court, the applicants seek to have those agreements held to be void *ab initio*, on the ground that no assessments were made.

18 In order to rule on the actions in the main proceedings, the referring court considers that it must be determined, firstly, which obligations the banking establishments have when they offer financial instruments such as a swap agreement on interest rate variations; next, whether those obligations were complied with in the present case by the defendants in the main proceedings; and, lastly, what the consequences are in the event of any non-compliance.

19 The referring court observes that swap agreements come within the scope of Directive 2004/39 by virtue of Article 4(1)(17) and Section C(4) of Annex I to that directive. It takes the view that, in order to determine whether the service offered by the defendants in the main proceedings when they offered the disputed swap agreements to Genil 48 and CHGV comes under Article 19(4) of that directive, it is necessary to consider whether that service constitutes 'investment advice' as referred to in that provision and defined in Article 4(1)(4) of that same directive.

20 If it does not, the defendants in the main proceedings ought to have carried out the assessment referred to in Article 19(5) of Directive 2004/39, since swap agreements are complex financial instruments. In either case, the referring court observes that it is not clear from that directive whether non-compliance with the obligations under Article 19(4) or (5) causes the relevant agreements to be void *ab initio* or whether it vitiates the client's consent in a manner which may be rectified.

21 Lastly, the referring court seeks to know whether Article 19(9) of Directive 2004/39 exempted the defendants in the main proceedings from the obligation to carry out the assessments referred to in Article 19(4) and (5).

22 In those circumstances, the Juzgado de Primera Instancia No 12 de Madrid (Court of First Instance No 12, Madrid) (Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must the offering to a client of an interest-rate swap agreement to cover the risk of variations of interest rates on other financial products be regarded as investment advice within the meaning of [Article 4(1)(4)] of [Directive 2004/39]?

2. Must omission of the suitability test provided for in Article 19(4) of that directive for a retail investor cause the contract entered into between the investor and the investment institution to be void *ab initio*?

3. In the event that the service provided in the terms described is not regarded as investment advice, does the mere fact of purchasing a complex financial instrument, into which category falls an interest-rate swap agreement, without the appropriateness test provided for in Article 19(5) of [Directive 2004/39] being carried out, for reasons imputable to the investment institution, cause the contract to be void *ab initio*?

4. Does the fact that a credit institution offers a complex financial instrument linked to other financial products constitute sufficient cause to preclude application of the obligations to carry out the suitability and appropriateness tests provided for by Article 19 of [Directive 2004/39] which the investment institution must undertake in the case of a retail investor?

5. In order to enable the obligations laid down in Article 19 … of [Directive 2004/39] to be precluded, is it necessary for the financial product to which the financial instrument offered is linked to be subject to investor-protection standards similar to those laid down in that directive?'

The questions referred for a preliminary ruling

Admissibility

23 Genil 48 submits, firstly, that the interpretation of Directive 2004/39 requested by the referring court is not necessary to enable it to give judgment within the meaning of the second paragraph of Article 267 TFEU, as that directive is not directly applicable in Spain and since the two sets of main proceedings involve the effects of non-compliance with obligations arising from Articles 79a of Law No 24/1988 and Article 72 of Royal Decree No 217/2008.

24 Genil 48 submits, secondly, that the Court of Justice does not have jurisdiction to rule on whether the swap agreements at issue in the main proceedings are void *ab initio* because, where no express provision is made in that regard in Directive 2004/39, it is for the national courts to determine the contractual consequences of such non-compliance.

25 At the hearing, moreover, the defendants in the main proceedings expressed doubts as to the admissibility of the questions referred on the ground that they call for answers on matters of fact.

26 As regards Genil 48's first objection, it should be remembered that, according to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a

matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 33 and the case-law cited).

27 In the present case, it is apparent from the order for reference that Article 79a of Law No 24/1988 transposes Article 19(4) and (5) of Directive 2004/39 into Spanish law and that the detailed rules for the suitability test referred to in Article 19(4) are laid down in Article 72 of Royal Decree No 217/2008. Consequently, the questions referred, which concern the interpretation, inter alia, of those provisions of that directive, are not unrelated to the actual facts or purpose of the disputes in the main proceedings.

28 Genil 48's second objection concerns more specifically the second and third questions referred. Read in the light of the reasons set out in the order for reference, those questions are intended to seek clarification as to which consequences may ensue under Directive 2004/39 for contracts concluded in disregard of the obligations arising under Article 19(4) and (5) thereof. Genil 48's observation on this point is thus intended more as an answer to those questions and therefore addresses their substance and not their admissibility.

29 The defendants in the main proceedings have put forward an objection of inadmissibility. However, it is clear from their very wording that the questions referred seek the interpretation of certain provisions of Directive 2004/39.

30 It follows that the questions referred for a preliminary ruling are admissible.

Substance

Preliminary observations

31 It follows from the scheme of Article 19 of Directive 2004/39 that, as a rule, the provision of an investment service, as defined in Article 4(1)(2) of that directive, to a client or potential client gives rise to the obligation for the investment firm to conduct the assessment provided for either in Article 19(4) or Article 19(5), depending on whether it is a question of investment advice, portfolio management services or other investment services listed in Section A of Annex I to that directive. Those assessments are referred to as suitability and appropriateness assessments in Articles 35 to 37 of Directive 2006/73 respectively.

32 Article 19 of Directive 2004/39 provides for two situations where exceptions may be made, however.

33 The first situation is described in Article 19(6) of Directive 2004/39. Under that provision, no assessment is required for the provision, in certain circumstances, of certain investment services in respect of non-complex financial instruments.

34 Moreover, swap agreements relating to interest rates, such as those at issue in the main proceedings, are covered by Section C(4) of Annex I to that directive, which, under Article 38 of Directive 2006/73, precludes them from being deemed to be non-complex. It follows that Article 19(6) of Directive 2004/39 is not applicable to the facts of the disputes in the main proceedings.

35 The second exception comes under Article 19(9) of Directive 2004/39. The fourth and fifth questions referred seek clarification as to the possible applicability of that provision to the two sets of main proceedings. Those questions should therefore be considered first.

The fourth and fifth questions

36 By its fourth and fifth questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 19(9) of Directive 2004/39 must be interpreted as meaning, firstly, that an investment service is offered as part of a financial product where it is linked to that product and, secondly, the provisions of EU legislation and the common European standards referred to in Article 19(9) must include requirements similar to the obligations provided for in Article 19(4) and (5).

37 As regards, firstly, the condition of applicability of Article 19(9) of Directive 2004/39, under which 'an investment service is offered as part of a financial product', it should be noted that, among the language versions of that directive in existence at the time of its adoption, only the French and Portuguese versions use an expression equating to 'within the framework of' in that provision, whereas the Spanish, Danish, German, Greek, English, Italian, Dutch, Finnish and Swedish versions employ terms equivalent to 'as part of', which suggests a closer, more specific link than that connoted by the expression 'within the framework of'.

38 According to settled case-law, the various language versions of a text of EU law must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see Case C-19/11 *Geltl* [2012] ECR, paragraph 43 and the case-law cited).

39 Article 19(9) of Directive 2004/39 constitutes a derogation from the assessment scheme provided for elsewhere in that article where investment services are offered by investment firms and it must therefore be interpreted strictly. That is all the more so because according to the wording of the title of Section 2 of Chapter II of Title II of that directive, of which Article 19 forms a part, those assessments are measures aimed at guaranteeing investor protection which, as stated in recitals 2 and 31 in the preamble thereto, is one of its objectives (see, to that effect, Case C-248/11 *Nilaş and Others* [2012] ECR, paragraph 48).

40 Moreover, Article 19(9) of Directive 2004/39 states that the investment service 'is offered' as part of a financial product.

41 That provision further states that, where an investment service is offered as part of a financial product which is already subject to other legal provisions or standards such as those referred to in that provision, 'this service shall not be additionally subject to the obligations set out' in Article 19 of Directive 2004/39. The use of the term 'additionally' implies that that service has already been subject to other legal provisions or standards governing the risk assessment of clients and/or information requirements. This will be the case only where it formed an integral part of a financial product at the time when that assessment was conducted and/or those requirements were fulfilled in respect of that product.

42 In those circumstances, it is clear that an investment service is offered as part of a financial product within the meaning of Article 19(9) of Directive 2004/39 only if it forms an integral part of that financial product at the time it is offered to the client.

43 The question whether the main proceedings involve an investment service offered as part of a financial product within the meaning of that provision, as interpreted by the Court in the preceding paragraphs, entails an assessment of the facts which, under the division of jurisdiction between the European Union judicature and national courts, must be conducted by the referring court. However, the Court of Justice, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation (see, to that effect, Case C-135/10 *SCF* [2012] ECR, paragraph 67 and the case-law cited).

44 In that regard, the fact that the duration of the financial instrument to which that service relates is greater than that of the product, that a single financial instrument applies to different financial products offered to the same client or that the instrument and the product are offered in different contracts are indicia that that service does not form an integral part of the financial product in question. It is for the national court, however, to take account of all the circumstances of the case in its assessment of the link between the service and the financial product.

45 Secondly, regarding the question whether the provisions or standards relating to assessment or information, referred to in Article 19(9) of Directive 2004/39, to which the financial product concerned is already subject must be similar to the obligations provided in Article 19(4) and (5), it is clear that Article 19(9) does not state that such a similarity is a requirement.

46 It should be noted that the nature of the financial instrument to which the investment service concerned relates may differ considerably from that of the financial product offered. Consequently, the assessments to be conducted and the information to be gathered or provided by the establishment offering that product for the purposes of protecting its client may not be the same as those referred to in Article 19(4) and (5) of Directive 2004/39.

47 However, even if Article 19(9) of Directive 2004/39 does not require the provisions or standards referred to in that provision to have identical requirements for the obligations referred to therein, those provisions or standards must nevertheless, as is clear from the wording of Article 19(9) of Directive 2004/39, relate to risk assessment of clients and/or information requirements. Moreover, given the objective of Article 19 of Directive 2004/39, which is, as evidenced by paragraph 39 of this judgment, inter alia to protect investors, those provisions or standards must enable there to be a risk assessment of clients and/or include information requirements, which also encompass the investment service which forms an integral part of the financial product in question, in order for that service no longer to be subject to the obligations laid down in Article 19 of Directive 2004/39.

48 It follows from the foregoing considerations that Article 19(9) of Directive 2004/39 must be interpreted as meaning, firstly, that an investment service is offered as part of a financial product only when it forms an integral part thereof at the time when that financial product is offered to the client and, secondly, that the provisions of EU legislation and the common European standards referred to by that provision must enable there to be a risk assessment of clients and/or include information requirements, which also encompass the investment service which forms an integral part of the financial product in question, in order for that service no longer to be subject to the obligations laid down in Article 19.

The first question

49 By its first question, the referring court asks whether Article 4(1)(4) of Directive 2004/39 must be interpreted as meaning that the fact of offering a swap agreement to a client in order to cover the risk of variation of interest rates of a financial product for which that client has subscribed constitutes investment advice as defined in that provision.

50 It should be remembered at the outset that when an investment firm provides investment advice to a client it must conduct the assessment provided for in Article 19(4) of Directive 2004/39.

51 Article 4(1)(4) of Directive 2004/39 states that investment advice consists in the provision of personal recommendations to a client, either at its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments.

52 The concept of 'personal recommendations' in that provision is defined in more detail in Article 52 of Directive 2006/73, which states, inter alia, that a recommendation is deemed to be 'personal' if it is made to a person in his capacity as an investor or potential investor and if it is presented as suitable for that person or based on a consideration of the circumstances of that person. The concept does not include recommendations which are disseminated solely through distribution channels or intended for the public.

53 It follows from the provisions referred to in the two preceding paragraphs that the question whether an investment service constitutes investment advice is contingent not on the nature of the financial instrument to which it relates, but on the manner in which the financial instrument is offered to the client or potential client.

54 In the absence of further clarification in the order for reference as to the manner in which the swap agreements at issue in the main proceedings were offered to Genil 48 and CHGV, it is for the referring court to determine whether the relevant recommendations were personal in the light of the criteria laid down in Article 52 of Directive 2006/73 and, therefore, whether or not the investment firm concerned had to conduct the assessment provided for in Article 19(4) of Directive 2004/39.

55 The answer to the first question is therefore that Article 4(1)(4) of Directive 2004/39 must be interpreted as meaning that the offering of a swap agreement to a client in order to cover the risk of variation of interest rates on a financial product for which that client has subscribed constitutes investment advice, as defined in that provision, provided that the recommendation to subscribe to such a swap agreement is made to that client in his capacity as an investor, it is presented as suitable for that person or based on a consideration of the circumstances of that person and it is not made solely through distribution channels or intended for the public.

The second and third questions

56 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, what the contractual consequences are when an investment firm which offers an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39.

57 It should be noted that, although Article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that directive, it does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness (see, to that effect, Case C-591/10 *Littlewoods Retail and Others* [2012] ECR, paragraph 27 and the case-law cited).

58 The answer to the second and third questions is therefore that it is for the internal legal order of each Member State to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39, subject to observance of the principles of equivalence and effectiveness.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 19(9) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC must be interpreted as meaning, firstly, that an investment service is offered as part of a financial product only when it forms an integral part thereof at the time when that financial product is offered to the client and, secondly, that the provisions of European Union legislation and the common European standards referred to by that provision must enable there to be a risk assessment of clients and/or include information requirements, which also encompass the investment service which forms an integral part of the financial product in question, in order for that service no longer to be subject to the obligations laid down in Article 19.**

2. **Article 4(1)(4) of Directive 2004/39 must be interpreted as meaning that the offering of a swap agreement to a client in order to cover the risk of variation of interest rates on a financial product for which that client has subscribed constitutes investment advice, as defined in that provision, provided that the recommendation to subscribe to such a swap agreement is made to that client in his capacity as an investor, it is presented as suitable for that person or based on a consideration of the circumstances of that person and it is not made solely through distribution channels or intended for the public.**

3. **It is for the internal legal order of each Member State to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39, subject to observance of the principles of equivalence and effectiveness.**

[Signatures]