

**CESR CONSULTATION – UNDERSTANDING THE DEFINITION
OF ADVICE UNDER
MiFID (CESR/09-665)**

A response by the British Bankers Association

December 2009

Introduction

The BBA is the leading association for the UK banking and financial services sector, speaking for 223 banking members from 60 countries on the full range of UK or international banking issues and engaging with 37 associated professional firms. Collectively providing the full range of services, our member banks make up the world's largest international banking centre, operating some 150 million accounts and contributing £50 billion annually to the UK economy

General Remarks

Largely, investment advice will be given where an adviser makes an assessment of information provided by a client concerning his individual financial circumstances, knowledge and experience, and investment objectives, in order to make a recommendation tailored specifically to match the client's circumstances. This is in contrast to a general recommendation where either the adviser makes no assessment of an investor's financial circumstances before a recommendation is given or where the advice given is generic in nature (e.g. sell equities, buy bonds).

It is agreed that the definition of 'investment advice' should be clear and that clients should fully understand when they are receiving investment advice and when they are receiving generic information. Execution only transactions initiated by clients will not receive the benefit of advice. Similarly information of a general nature or covering research or a broad range of products which steps back from giving personalised direction should not be considered to be investment advice.

So, in the professional context, it is important that the definition of "investment advice" should adequately distinguish between regulated investment advice and other advisory activities. Examples of such advisory activities which should not fall within the definition would be technical advice on, for example, sales & trading notes or taking up Straight Through Processing (STP). The definition should be limited to personal recommendations to one or more persons with respect to the merits of whether or not they should enter into one or more transactions in financial instruments.

Where a firm is classified as eligible counterparty or professional client, FSA have stated that a statement in the firm's terms of business to the effect that unless otherwise agreed with the client the firm will not be providing personal recommendations and therefore no communication to a client is to be taken as a personal recommendation, combined with systems and controls to give effect to that policy, should be able to avoid bringing the firm within the scope of the suitability obligations other than on an exceptional basis.

Where a firm does on occasion provide personal recommendations to professional clients, FSA's have recognized that this would often take place in the context of a client relationship where advice was not normally given, and where the client does not necessarily reveal to the firm its broader investment objectives beyond those which are specifically relevant to the investment advice it is seeking. The concept of an overarching set of client objectives is typically not appropriate in these circumstances, except at such a general level as to be meaningless. In this context, firms should therefore judge the information about client objectives that it is "necessary" for firms to

obtain, and thus the assessment of suitability of the transaction, proportionately to the nature of the advice given in the specific circumstances. Firms typically do this anyway as a commercial matter.

The provision of investment advice can also be contrasted to a direct offer financial promotion where the financial promotion contains an offer by a firm to enter into an investment agreement with anyone who responds to the financial promotion. And more broadly, a financial promotion which is essentially an invitation to engage in investment activity but contains no offer.

Para 5 & 6 : The definition of investment advice must be outlined in a coherent objective framework of rules. CESR suggests in *Para 5* that:

“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.”

And in *Para 6*:

“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.”

This is placing a concept of interpretation on the part of the client about whether something is investment advice. This is not a workable proposition for our members because this clause will quickly dissolve into any information being given by the bank to an investor being considered investment advice. In the event of the client making a loss, having invested on an execution only basis, they are likely to consider it opportune to make a claim against the bank on the basis that they thought they were being given investment advice.

Para 11: CESR suggests in *Para 11* that a recommendation not to buy a financial instrument can be construed as giving investment advice.

“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.”

The implication being investors could seek redress against the bank for any profit they could have made had they invested in a particular product. There must be robust limits on how far this provision can be stretched. This could potentially shift the investor risk to the bank, which would effectively be providing a guaranteed return for the client.

i.e. if the client suggests taking up a rights issue and the bank advises against it; in the event that the shares drop significantly in value (creating a loss), the client has avoided a loss. However if the shares continue to rise in price (creating a potential profit) the client could claim against the bank for recommending not to take up the rights. In a

situation where the suitability of the investment is not black & white, how far does the liability as the bank extend for missed client profits?

Claims for an opportunity cost should be strictly limited to circumstances where an investor can clearly demonstrate that they reasonably relied on the recommendation. Otherwise it would open up for claims that are constructed post-event when an investment happened to lose money.

Para 12 to 18: CESR discusses the differences between providing information and providing a recommendation and in what circumstances the provision of information to a client constitutes a personal recommendation.

It is important when making a distinction between the giving of information and making a recommendation that sales staff are not so constrained as to inhibit their ability to provide clients with sufficient generic information for them to make considered choices. There is a danger that taking too wide a definition of what constitutes a recommendation will prevent clients being given proportionate information and that the firm will be potentially not 'Treating Customers Fairly' by excessively limiting the client's options.

Para 15:

"However, information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation."

Paragraph 15 We agree with CESR that the mere provision of information to a client by an investment firm does not constitute investment advice unless the party providing the information expressly indicates that such information has been provided as a recommendation to a client either upon its request or at the initiative of the investment firm, in respect of one or more transaction relating to financial instruments.

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

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

There are some significant difficulties with the CESR approach as it does not just capture obvious personal recommendations but also captures ostensibly general recommendations if they would implicitly amount to a personal recommendation e.g. recommending a client to buy UCITS when the firm only sells one UCIT. This has the impact of requiring firms to consider whether any form of generic advice might be capable of being implicitly a personal recommendation – effectively extending the scope to generic advice.

In relation to investment research, CESR should ensure that there remains the distinction between research and informal short-term investment recommendations originating from inside sales or trading departments. In the non-retail market, there is demand from buy side clients for these kind of brief sales notes / execution ideas from within the trading units of banks which are not purporting to be 'suitable' investment advice, neither are they taken as such. In practice, much sales and trading material, such as "sales notes", execution ideas, market or trader commentary and other short term recommendations, will in any event ordinarily fall outside the definition of investment research, not least because they are not labelled as investment research and are not otherwise held out or presented as being objective and independent. These kind of sales notes should not be considered 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?

CESR must consider the implications of terming filtered information on websites as *Investment Advice under MiFID*. There are very many price comparison websites that request information from the client then carry out a filtering function and suggest products. Those sites will often be paid a fee if the client then 'clicks through' to the product provider. There is no difference between this and the filtering options provided on bank websites.

As such if CESR is to term filtering decision trees on bank's websites as *investment advice*, then in order to maintain a level playing field, regulation should be extended to such price comparison websites. It should certainly cover those websites that are receiving payment (an inducement), they are effectively acting as tied agents.

The distinction between advice and non-advice in relation to decision tree / filtering methods seems very vague. It is good that CESR indicates that representations made about the service are relevant but (para 24) suggesting that it is important that there is "absence of apparent judgement about which features.." customers should choose

seems to go too far. There is still a TCF requirement in a non-advised sale, this type of comment is inconsistent with a customer focussed approach.

The bank should be able to provide their client with a selection of product information on client request. That information should be of sufficient usefulness and depth to allow the investor to make a fair and valued judgement on what possible options to pursue. Without some form of selection by the bank there is a danger that the investor will be bombarded with irrelevant and unwanted information.

To remove uncertainty sales staff should only give clear and direct messages when presenting information to their clients; only personalised recommendations should be seen as investment advice.

The key to ensuring that customers don't perceive filtering mechanisms as advice should be clear disclosure and that the customer is making their own assessment about risk and life choice issues. If firms have to construct information to be unhelpful in order to ensure that it is not perceived as advice, this is in nobody's interest.

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

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?

In principle we welcome a number of aspects of CESR's articulation of personal recommendation, in particular the fact that it has to be held out as being suited to, or based on a consideration of, the client's personal situation. We do, however, have some specific concerns in respect of the scope of the definition. For example, we do not believe that the mere fact of a bilateral communication taking place between client and investment firm constitutes an assumption that advice has been provided. Furthermore, we do not believe that the definition of a personal recommendation includes implicit as well as explicit recommendations. This could catch information provided to customers where no personal recommendation is intended. This applies particularly in view of the fact the CESR states that firms cannot rely on disclaimers to make it clear to clients that recommendations are not personal to the client.

There are a number of cases where investment firms provide information on particular products to clients on a non-advisory basis both orally or in writing. In such cases investment firms would make it clear that such information does not constitute a personal recommendation and the customer is advised to seek professional advice where required. If investment firms cannot rely on such disclaimers it could be alleged that information on specific products were tailored to customer needs and therefore were personal recommendations. Ultimately this would have a negative impact on investment firms' ability to provide relevant information to customers in the absence of a prior suitability assessment. Moreover it is also likely to increase the cost of providing such products which ultimately results in more cost and less choice for the consumer.

Re Para 43 - This comparison to the Amazon style - "people like you bought" - needs to be considered carefully. Stating that people like you bought is in itself a piece of information that customers may be interested in. It is important that this information is not used as a reason for a specific customer buying a specific investment but beyond that it is relevant information that customers may want to consider.

Part 3a: Is the recommendation 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?

Firms should be able to provide selective information without being deemed to be making a personal recommendation, in circumstances where they are doing so to take into account the requirements specified by the client. There may be a process of elimination of products to arrive at the client's desired product because the client is specifying particular attributes that they are not interested in (for example, they do not wish to pay an upfront premium). Firms should not be constrained in assisting the client to arrive at their desired product in this way, where they are holding themselves out as not providing investment advice.

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

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

A distinction should be drawn between those clients classified as retail and those who are professional clients or eligible counterparties. For a retail client we would largely agree with CESR's interpretation when a firm is making a personal recommendation. However we would note that a retail client may have an existing relationship with a bank, where the bank holds significant information on the client. But the client might wish to elicit information on various products from the bank, that they may wish to invest in at some point in the future, without going through the full time consuming advisory process. The bank must not be prohibited from servicing client demands for basic product information to their clients on demand.

For professional clients the fact that a bank has an existing relationship with a firm for instance providing services as a broker, should not immediately imply that any and all initial bilateral communications with another part of the bank to provide different products or services should immediately imply full knowledge of the clients trading history / objectives / assets, and that this information is therefore '*investment advice*'.

Where a bank has an existing relationship with a client, whatever their capacity or client categorisation, it is only reasonable that investment information is gathered and researched against their client's need and expectations without this being seen as

indicative of making a recommendation or giving advice. The bank must not be prohibited from servicing client demands for basic product information.

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

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

We agree with CESR that websites should be considered a public distribution channel; and as such should be excluded from the investment advice provisions.

When considering emails to clients with information, key criteria will be what constitutes a large number of persons. 10,000? 1,000? 100? 10? If such information contained in an email contains only standardised information about a product(s) and suggests investors get further (MiFID) advice before investing in such a product, this would be unlikely to constitute advice on a stand alone basis. Certainly if the product is only available on a full advisory basis from that bank, then an email to clients should not constitute investment advice.

Paragraph 64 (Target Audience) should be expanded to make clear that the critical issue is the way firms select clients to whom the message is sent. This would determine if the message should be deemed to be advice. Therefore, if a firm has various information about clients that could lead them to determine suitability but do not chose to use information but only selects clients, for example, on a wealth basis this would not constitute a investment advice.

The definition of information should also include financial promotions where no recommendation or suitability is expressed. Where firms send out direct offers to clients, such offers should not be considered as advice because they do not fall within the list set out in paragraph 14. Article 52 of MiFID makes it clear that a recommendation is not a personal recommendation if it is issued exclusively through a distribution channels or to the public.

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

Q.7. What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?

We accept that there is some overlap between corporate finance advice and investment advice. However, “advice and services relating to mergers and the purchase of undertakings” is a distinct ancillary service under MiFID, which would strongly suggest that the original aim of the directive was not to automatically capture all corporate finance advice under the ‘investment advice’ umbrella. We therefore propose that advice relating to mergers and acquisitions should not be treated as investment advice where there is evidence to show that the client is not acting as an ‘investor’. This

should be evidenced by considering the client's motive in addition to their overall circumstances.

We believe that the client's motive for wishing to become involved in merger or acquisition activity is critical to deciding whether or not 'investment advice' has been provided by an advisor. Whilst we accept that a client in these circumstances will always be concerned with gaining a return from involvement in such activity, our view is that this should not be enough to automatically classify the advice as a regulated activity - instead the primary motive should be considered. Where the client's primary motive is to gain a direct commercial benefit, any advice provided should not be classified as investment advice.

The following circumstances should therefore not be considered to be the provision of investment advice:

- a. The client wishes to acquire a business with the intention of making it ancillary to its own business. For example, where a large pharmaceutical company acquires part of a business which makes and distributes medicines;
- b. The client wishes to build alliances. For example, the same situation as (a) where the motive of the pharmaceutical company is to jointly sell its products with the targeted business;
- c. The client is looking to expand their business. For example, the client intends to expand their business in Europe by buying all or part of a company which already has a large presence in Europe;
- d. A clear argument can be made that although the customer wants to buy shares, their plans could be achieved thorough other methods such as putting in place a joint marketing agreement.

It is our view that investment advice would be provided where the client's intention is to play a more passive role in order to gain an investment type return (e.g. where the client wishes to invest remotely in a target company and relies upon the management of that company to make returns for the client who merely acts as a shareholder). Further, where the nature of the target is such that it is hard to demonstrate the commercial benefit motive, it would be difficult to argue that investment advice has not been provided (e.g. where the corporate is a holding company for other entities or is a special purpose vehicle or is otherwise not an operating company).

It is our view that investment advice might be provided where a client is seeking to acquire a stake within a company for a non-commercial purpose, but not in the following circumstances where we believe the giving of investment advice is unlikely:

1. The client is seeking control/ownership as opposed to just requiring a small stake in the target; or
2. The client is a sophisticated corporate (a profit threshold could be set internally by firms to demonstrate this).

With regards to documenting the motive, we would suggest that firms, especially when dealing with large corporate clients, be allowed some flexibility in documenting an assessment as to whether investment advice is provided.

Q.8. Are there specific examples of situations you would like considered, where it is difficult to determine the nature of the advice?

We have no comments on this question.