



UNDERSTANDING THE DEFINITION OF ADVICE UNDER MIFID

The ABI's response to CESR's consultation on the definition of advice

Introduction

1. The Association of British Insurers (ABI)¹ is the voice of the insurance and investment industry. Its members constitute over 90 per cent of the insurance market in the UK and 20 per cent across the EU. They control assets equivalent to a quarter of the UK's capital. They are the risk managers of the UK's economy and society. Through the ABI their voice is heard in Government and in public debate on insurance, savings, and investment matters. And through the ABI they come together to improve customers' experience of the industry, to raise standards of corporate governance in British business and to protect the public against crime. The ABI prides itself on thinking for tomorrow, providing solutions to policy challenges based on the industry's analysis and understanding of the risks we all face.
2. The ABI welcomes the opportunity to respond to CESR's consultation paper entitled *Understanding the definition of advice under MiFID*. As our members are a major provider of investment products that are sold to consumers with advice, we are keen to ensure that the regime for advice under MiFID improves clarity for product providers and advisers and improves outcomes for consumers. At a time when consumers need to be offered every encouragement to save as much as possible, it is important that additional prescriptive regulatory burdens are not placed on product providers as these can increase the cost of products and lead to counterproductive information burden on consumers. Similarly, the MiFID rules for advice need to ensure consumers will only pay for what advice they need.

Overview

3. We are broadly supportive of the clarity CESR has provided on the definition of advice under MiFID. This clarity is mostly in line with the ABI's own understanding of the definition of advice as well as that provided by the Financial Services Authority (FSA) as part of the Retail Distribution Review (RDR).² However, we do have two concerns about the details included in CESR's consultation which we believe requires further work and additional clarification. Our concerns fall into two areas:
 - A firm's ability to operate a simplified advice service which undertakes a limited assessment of a consumer's needs to deliver a suitable recommendation

¹ The ABI's registration number on the European Commission's Register of Interest Representatives is: **730137075-3**.

² See Annex 7 of Financial Services Authority, *Retail Distribution Review Feedback Statement 08/6*, November 2008 - http://www.fsa.gov.uk/pubs/discussion/fs08_06.pdf

- How firms should use existing information held on a consumer in both an advised and non-advised process
4. As we are broadly content with the clarity CESR has provided in the consultation, apart from the two areas mentioned above, we have not answered the specific questions raised. Instead we have outlined our two concerns in detail. The ABI is keen to work with CESR to achieve greater clarity in both these areas.

A firm's ability to operate a simplified advice service which undertakes a limited assessment of a consumer's needs to deliver a suitable recommendation

5. It is important to recognise that not all consumers require advice when purchasing investment products. However, when a consumer does require advice, they should be able to access a high-quality and affordable service that is suitable and proportionate for their needs.
6. We believe CESR should make it clear that firms are able to offer advice services which undertake a limited assessment of a consumer's needs to deliver a suitable recommendation. According to legal advice undertaken by Herbert Smith LLP on behalf of the ABI, when delivering advice, the information an advisory firm is required to obtain from their clients can be limited to take account of the nature and extent of the service being provided. To enable firms to develop new advice processes, we believe CESR should provide additional clarification on this issue as there could be consumer detriment if more economical advice services are not developed.
7. In the UK, the FSA has been undertaking a review of the distribution of retail investment policies. As part of this review, a number of changes will be introduced at the end of 2012 including increasing the minimum standard of qualification for financial advisers and banning commission payments. We believe these changes are essential to improve consumer confidence and trust in the financial services industry. However, these changes are widely expected to increase the cost of existing full advice services.³
8. To ensure that a larger number of consumers are able to access an appropriate advice service under the new regime envisaged by the review, the ABI has been developing a new distribution service known as "simplified advice". The ABI believes simplified advice would provide a consumer with a suitable personal recommendation based on a limited assessment of their financial needs. Simplified advice would be a process driven solution facilitated by the latest IT technology. This new way of providing advice is likely to benefit low and middle income consumers with more straightforward investment needs for whom a full advice process is either unnecessary or uneconomical. According to ABI analysis, there are at least 14 million people who could potentially benefit from a simplified advice service in the UK alone.

³ A full advice service undertakes a full assessment of a consumer's financial needs to deliver a suitable personal recommendation

9. To ensure that simplified advice processes can be delivered within MiFID, the ABI commissioned legal advice which concluded that the information an advisory firm is required to obtain from their clients can be limited to take account of the nature and extent of the service being provided. Therefore, a limited advice service, such as simplified advice, can be provided to consumers within MiFID regulations. MiFID requires firms delivering financial advice to obtain sufficient information from their clients for firms to understand the essential facts about their clients and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction recommended satisfies the various components of the suitability test. There is, therefore, flexibility for firms to determine the type of information they need to obtain from their client when delivering financial advice. This is a common sense approach. Identifying the information which is needed to provide suitable advice rather than insisting that information not relevant to the investment decision is obtained, ensures that the consumer does not incur unnecessary costs in obtaining advice. The MiFID connect guidelines state that:

“The nature of the Suitability Obligation and the range and level of detail of information required from clients will depend on the type of service provided and the nature of the client. Firms will therefore have flexibility in meeting the objectives of the rules on suitability, taking into account the nature and extent of the service being provided and the client”

10. This guideline is clear that the yardstick of suitability is a flexible one and varies according to the type of service being provided. According to our legal advice, the level of information that a firm is required to obtain from its clients can be limited. For example, when considering if an investment product, such as an equity-based regular savings policy, is suitable for a client, a firm would need to establish the length of time the investment will be held, the client's attitude to risk, their profile and purpose of the investment. They would not be required to collect additional information which is not relevant to determine whether an investment product is suitable for their client's needs.
11. In addition to this legal advice, the FSA has also recognised that there is sufficient flexibility within MiFID to enable simplified advice processes to be developed. In their Retail Distribution Review Feedback Statement 08/6, they stated:

“... suitability is a flexible standard, determined with reference to the nature and extent of the service provided. As such, there is scope for firms to design simplified advice processes that are capable of meeting the suitability requirement within the current regulatory framework...”

12. We believe CESR should provide further clarification that a service which undertakes a limited assessment of a consumer's needs to deliver a suitable recommendation can be delivered within MiFID. The ABI would welcome the opportunity to work with CESR towards this goal.

How firms should use existing information held on a consumer in both an advised and non-advised process

13. We believe CESR should provide further clarity on the use of existing information held on a consumer. We are concerned that CESR could unintentionally both restrict the development of simplified advice processes and reposition existing non-advised services as advice. We would also suggest that further clarity around the type and age of any existing information held on a consumer should be provided. We have addressed each of these issues individually.

Simplified advice

14. In paragraph 50 of the consultation, CESR has outlined how firms should be reasonably expected to use information it has about a client's circumstances "to create a picture of [their client's] needs and wants to form the basis of a recommendation". We believe this could undermine attempts to develop a limited advice service, such as simplified advice, which is designed to only undertake a limited assessment of a consumer's needs in order to deliver a suitable recommendation.
15. As previously outlined in paragraph 8, a simplified advice process is a new financial advice service that provides a consumer with a suitable personal recommendation based on a limited assessment of their financial needs. As part of this process, a consumer would answer a series of pre-determined questions which would enable the advice model to check whether they are suitable for one of the products delivered through the service. As a simplified advice process only undertakes a limited assessment of a consumer's needs, consumers would only answer questions which are relevant to ensure a suitable recommendation is given.
16. As currently worded, we believe CESR is suggesting that *any* information currently held on a consumer should be used as part of the advice process. Although pre-existing information could be used to determine whether a consumer's circumstances might mean a simplified advice process could meet their needs, any existing information would not be considered as part of the actual advice process. This is because any information about the client which is needed to ensure a suitable recommendation is given would be collected as part of a series of pre-determined questions. We recommend that CESR undertake further work to examine these issues and provide additional clarity on the use of pre-existing information a firm holds on the client when providing simplified or limited financial advice.

Non-advised services

17. In the UK, a range of non-advised services are available to consumers from several organisations, including product providers. These services provide consumers with the information they need to decide whether they wish to purchase a financial product. At no stage during the process do these services undertake an assessment of a consumer's needs or deliver a recommendation. These services are therefore not considered as advice under MiFID.

18. However, we are concerned that the clarity provided by CESR in paragraphs 51-52 suggests that any existing information held on a consumer should be considered as part of a non-advised service. We do not believe this is CESR's intention or an accurate reflection of MiFID rules. We believe CESR should provide greater clarity around the use of existing information in a non-advised sales service. As currently worded, this clarity could have several implications for non-advised sales:
- Firms would have to update all information held on a consumer and undertake an assessment of the consumer's needs before allowing products to be delivered through a non-advised service. This would add to the complexity of the service, increasing the cost of the process for consumers
 - Firms could stop offering non-advised sales services due to uncertainty over their responsibility to take account of existing information they hold on consumers. This would prevent consumers from accessing information about products and determining for themselves whether purchasing a product is appropriate
19. We believe CESR should provide additional clarification around the use of existing information in a non-advised service so firms offering these services can be certain of their responsibility to consumers. We would welcome the opportunity to work with CESR to help develop this clarification.

Age and type of existing information

20. Although we believe firms should not be required to consider pre-existing information they hold on their client when offering simplified advice or a non-advised service, we do agree that this information should be considered as part of a full advice process. However, we believe CESR should undertake additional work to clarify the type and age of pre-existing information which should be considered as part of a full advice service. For example, firms could hold information on a consumer which could become out-of-date even after a relatively short period. This information could include a consumer's attitude to risk or their income and expenditure. This compares to other information a firm might hold on their client, such as address details and marital status, which is unlikely to regularly change.