



BREWIN DOLPHIN

## Understanding the definition of advice under MiFID (CESR/09-665)

Brewin Dolphin Limited response

Prepared by:  
Angela Teodorescu  
Divisional Director Compliance

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## General Remarks

We would like to express our thanks to CESR for undertaking this important and necessary debate on the nature of investment advice and commend them on the quality of the discussion. We found the paper to be thorough and well written and in general we agree with the outcomes and conclusions drawn. We are grateful to have received clarity on this topic because it is so fundamental to a firm's compliance with MiFID and the services a firm delivers to its clients.

Our specific comments on areas within the document are numbered below using the same numbering as the consultation paper.

## Section III. Part 1: Does the service being offered constitute a recommendation?

The discussion on the distinction between information and investment advice is critically important and we agree that advice requires an element of opinion on the part of the adviser. Paragraph 14 lists some examples of items that might be considered to be information and we agree with the majority of items included. However, we do not necessarily agree with the inclusion of the fourth bullet point 'a comparison of the benefits and risks of one investment as compared to another'. There is a danger here that this sort of information could easily become subjective.

Q2: We believe that where a filtering system is provided for an investor to use in order to assist them to choose products based on the investor's own selection criteria, this does not constitute a personal recommendation.

Regarding model portfolios, however, we believe it would be invaluable if this could be explored in greater detail as it is likely to be an area of growth in the industry and it is not quite so straightforward when determining whether or not advice is given. We believe that where a firm provides access to a model investment portfolio of different financial instruments, this probably does not constitute investment advice if the selection of the model is made by the client alone and it does not relate to a specific investment. However, we are unclear of the situation when the firm running the model portfolio makes switches within the fund. The switches relate to specific investments and therefore might constitute advice even though it is not a personal recommendation as the firm may not know anything about the individual circumstances of the client.

You have identified (paragraph 26) that if the model portfolio is 'positioned as an appropriate action' for the investor then this might be viewed as a recommendation rather than the provision of information and we would agree. Practically this might be evidenced where statements such as 'this portfolio is suitable for clients seeking capital protection' are made to potential investors. However, if information is not actually collected from a prospective client and analysed to determine a course of action then the positioning is a general recommendation and not a personal recommendation.

Overall we would like to see a continuing discussion on the different scenarios that are possible with model portfolios and the provision of advice as it is a thorny area and further clarity would be useful.

Q3: We believe it is useful for CESR to have made the distinction between generic advice, general recommendations and investment advice and believe some standardisation should be adopted across the EU. In the UK there are other definitions of advice which cause difficulty because they are poorly understood by both the industry and clients. These include FSA defined terms such as 'simplified advice' and 'basic advice' as well as other expressions such as 'focused advice' and 'limited advice'. If a Europe-wide standard could be adopted then these terms and associated rules could be removed and matters simplified.

We would disagree with your assertion in paragraph 39 that 'advice about whether it would be best for a client to invest directly in shares or through a collective investment scheme (CIS) could be given without investment advice being given.' Where an assertion is made that one course of action is better than another, this can only occur once consideration is given to (at least some) aspects of a client's individual circumstances. This therefore constitutes advice.

Similarly, in paragraph 40, the moment an opinion is given as to whether one asset class is better than another for an investor something must be known about the investor's circumstances. Any opinion given on that basis is therefore advice.



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Paragraph 41 touches on the area of introductions where one firm introduces a client to another firm. In the UK this typically occurs when an independent financial adviser introduces its client to an investment manager for investment management or stockbroking services. As the recommendation to use another firm does not relate to a specific investment or service then we understand that this introduction does not constitute investment advice. In the next step in the process the investment manager has the responsibility of advising the prospective client on which of its services would be the most appropriate. At this point we believe a personal recommendation is being made by the investment manager to the prospective client. It would be helpful if CESR could clarify our understanding of the various responsibilities in this chain of events.

## **Section V. Part 3a: Is the recommendation presented as suitable?**

Regarding the use of disclaimers we agree with CESR's view in paragraph 47 that in essence a firm cannot absolve itself of its responsibilities through the use of a disclaimer.

## **Section VI. Part 3b: Is the recommendation based on a consideration of the person's circumstances?**

Whilst we agree in principle with the arguments raised in paragraphs 49 – 54 that where a firm has knowledge of a client's circumstances the firm will be held responsible for directly or indirectly giving the impression that it is basing its recommendation on this information. We would, however, like further clarification on the situations where a client to whom a firm owes a duty of suitability requests that a firm undertake a transaction on an execution-only basis. Where possible investment advisers will provide information or counsel to the client regarding the investment or action proposed. At times clients may disregard this advice and insist the transaction goes ahead. In such circumstances it is customary for firms to put a clear disclaimer on the contract note and accompanying letter reaffirming that the client has undertaken the transaction on an execution-only basis. Does CESR consider this action to be sufficient and appropriate?

## **Section VII. Part 4: Is the recommendation issued otherwise than exclusively through distribution channels or to the public?**

We agree with CESR that where a recommendation is made to existing clients of a firm to whom a duty of suitability is owed then whether the message is sent via email or post to many simultaneously then this would constitute investment advice. The clients have provided information regarding their circumstances and so firms in possession of this information are duty bound to make use of it. Messages sent to clients cannot be considered to be issued to the public.

Paragraph 59: From time to time firms may direct clients to a particular published article or website, often because it might be a matter of specific interest to the client. Does CESR consider that this general information could be construed as being a recommendation?

## **Section IX. Part 5b: Is the recommendation made to a person in his capacity as an agent for an investor or potential investor?**

We would appreciate further clarification on a couple of specific circumstances:

- (a) Where an analyst makes a recommendation regarding a course of action in a corporate action, would this be considered to be investment advice?
- (b) Where a company has gone into administration and the shareholders have either been made an offer by the administrators or have an opportunity to enter into a class action against the company. Would any advice provided to clients in these circumstances be considered to be investment advice?

In conclusion, Brewin Dolphin welcomes this paper and congratulates CESR on an excellent piece of work. We look forward to further opportunities to debate such issues in the future and perhaps to be invited to take part in CESR surveys at an early stage.