

European Financial Planning Association (EFPA)

Response to CESR's Consultation Paper -

“Understanding the definition of advice under MiFID”

*Consultation Paper:
Understanding the definition of advice under MiFID (Ref: CESR/09-665)*

The CESR's consultation paper on the definition of advice under MiFID is timely and necessary. EFPA is deeply gratified for the opportunity to contribute to this important task.¹

The financial crisis has severely undermined public confidence in the financial sector and growing evidence of conflicts of interest has affected the relationship between financial providers and consumers. The acknowledgement of investment and other advisors' roles in the diminishing of consumer confidence in the financial sector may help to rebuild confidence in the financial markets.² A clear and broad definition of advice would reinforce the market efficiencies contributing to the protection of retail investors.

Motivated by inducements, in many countries, financial institutions present their services to clients as financial advice in order to better sell or distribute financial instruments or packaged retail investment products: although these same firms denied that they provided investment advice in order to avoid being subject to suitability rules in MiFID. The activities undertaken by providers, as juxtaposed with the services offered to consumers makes for an extremely confusing situation for clients who could find themselves, ultimately, unprotected.

The fact that a recommendation of a product breaches the rules on suitability does not imply that firms are not actually providing investment advice.

Under these circumstances it is very valuable that the consultation paper establishes unique guidelines of interpretation of the definition of advice under MiFID that will result in a greater protection of investors, improving financial services.

Preliminary remarks

The definition of (investment) advice is crucial for EFPA's members, employers and the consumers they serve. Financial advisors and planners need to know, as professionals in

¹ *EFPA is a European Association for setting the professional, ethical, competence and experience standards for Financial Advisors and Financial Planners both in Europe and internationally, through the design and/or accreditation of qualification programmes.*

² See: M. Gentile and G. Siciliano, *Le scelte di portafoglio degli investitori tetail e il ruolo dei servizi di consulenza finanziaria*, CONSOB, Quaderni di Finanza, N. 64, July, 2009.

the market, exactly how to define investment advice. In turn, clients need to know when investment advice is provided. A clear definition of investment advice could help to clarify when financial intermediaries offer advisory services under MiFID.

EFPA supports the CESR position which establishes the clients' perception as the decisive criterion when determining whether firms are delivering personal advice rather than general information.

Bearing in mind the asymmetric relation between consumers and providers of financial services, EFPA strongly support a broad and non-restrictive interpretation of (investment) advice: one that responds to the current needs of all market stakeholders and consumers alike.

Investment advice can be provided either as an autonomous service or together with other investment services, for example, execution of orders on behalf of clients.

EFPA sees a clear difference between providing technical product information to a client as might be provided in a KID and investment advice as a financial service which requires a far greater level competence and experience. As with other consumable products, the sale of financial instruments needs some technical information (type, price, liquidity, terms, etc). The provision of this type of technical information clearly does not rise to the level of investment advice. To meet the test of providing (investment) advice a firm must provide personalised recommendations based on specific information resulting in a financial solution specially produced for the client; such advice may include technical product information delivery.

EFPA supports CESR's five key test to identify (investment) advice, especially the indicators deriving from investors' perceptions. All advice based on the personal circumstances of the client is considered investment advice under MiFID but investment advice takes place when a firm offers services as suitable or tailored, even though, in practice the firm has not considered either personal circumstances nor suitability in the provision of the advice.

EFPA believes that investment advice exists when the client perceives that a recommendation has been made, whether based on suitability or personal circumstances. Client perception is not a subjective issue, it is an objective criteria based on specific elements and facts of the firm behaviour.

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

EFPA supports CESR's position that the provision of technical information may take the form of advice if the circumstances in which that information is provided takes on the force of a recommendation.

In fact, information involving statements of fact or figures can be an element of a multiple step recommendation process in investment advice.

We agree with the examples that illustrate how to provide a client with information as part of investment advice cited in the CESR's paper. It will be appropriate to apply general criteria such as: we will be in front of an investment advice when the recommendation is conditioned to a data that the firm would or could provide later.

If the information tends to influence a clients decision then investment advice can be assumed to have been provided under MiFID.

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”?

EFPA agrees. We would even take this a step further by saying that if information is filtered, then the firm has provided investment advice.

The Consultation Paper helps to clarify when investment advice is triggered. We thus have a general rule to clarify the difference between investment research and investment advice including cases where both services are provided at the same time. Filtering clearly triggers an investment advice scenario.

In line with the consultation paper we can answer two additional questions:

1) *Can ‘investment research’ amount to investment advice?*

Yes, investment research can be part of the investment advice process when it is used to create an opinion on clients in relation to transactions in financial instruments. More accurately, when research is conducted to tailor a financial solution for a particular client or to seek suitable products, that research meets the criteria for (investment) advice.

2) *Can a firm guide a client through a set of filtering questions about the investment products it offers without this constituting a recommendation?*

It would seem very unlikely. After all, why filter the information if it is already perfect for a particular client. Again, when the client perceives that a process involves a recommendation based on their private circumstances then investment advice is triggered.

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?

It is difficult to accurately determine the distinction between general recommendations and investment advice. The best approach to identify each situation is on a case-by-case analysis.

EFPA supports CESR's position that the clients' perception is the decisive criterion in determining whether firms are delivering personal advice or general information. The customer would often or maybe always perceive a recommendation or advice coming from a financial services firm as being investment advice.

If a firm gives investors access to model investment portfolios, which are composed of different financial instruments that it can sell them, is this investment advice?

Yes, because usually introducing model investment portfolios require investors to input personal information in order to determine their investment profile.

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?

EFPA believes that any implicit recommendation should be considered as investment advice. It seems very unlikely that clients would contract to buy any financial product without an explicit or implicit recommendation.

Can investment advice involve presenting several alternative financial instruments, rather than recommending just one?

Yes, it does not matter how many financial instruments are presented to the client in order to be considered a personal recommendation.

Does a firm give advice when it discusses the merits of different product types for the customer?

Yes, usually firms provide advisory services when discussing the merits or drawbacks of different products.

Is a recommendation to become a client of a particular investment firm investment advice?

Probably not. EFPA tends to agree with CESR's view that the recommendation should relate to one or more specific investment (products) in order to be considered as investment advice. But, where clear links between an investment firm and a particular product or investment solution exist, then again this recommendation should be considered investment advice.

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

An investment recommendation is usually a personal one. When investing, retail investors believe that they should get personalised information to meet their own financial expectations from a financial services’ provider. Information provided by firms is perceived by clients as personal recommendations and not as neutral sales information. EFPA sees few circumstances where a recommendation would not be considered as personal, and then be considered investment advice.

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

As we have mentioned before, the client’s perception is the litmus test. As a result, any means used by firms creating that perception to clients should be considered as investment advice. For instance the publication of a rating or ranking, coming from a non independent company (a firm involved in investment transactions is not independent) could also be perceived as investment advice.

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

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

EFPA supports CESR’s position that investment advice and corporate financial advice are not mutually exclusive. Sometimes corporate advisory customers seek financial advice in the consulting process and frequently, the firms themselves are frequently interested in providing investment advice to corporate advice clients: this is especially true where it is not easy or possible to isolate the corporate wealth from the private finances of an entrepreneur. In such cases, investment advice would almost always be triggered.

Identifying when investment advice is triggered is important to protect these types of corporate clients under MiFID. It would likely not be difficult to distinguish between investment advice and corporate finance advice when we take the clients perception into account.

Rotterdam, December 14th, 2009