

Response to CESR Consultation Paper dated 14th October 2009

Reference Number CESR/09-665

Understanding the definition of advice under MiFID

Q1 Do you have any comments on the distinction between the provision of personal recommendations and general information?

We agree that the provision of generic information does not constitute a personal recommendation/ investment advice but there are circumstances where the information may take on the nature of advice if surrounding circumstances give it the force of a recommendation.

However, we feel that the example in paragraph 16 may, as currently drafted, be overly restrictive. The example refers to the provision of information based on biased or leading criteria, rather than on a balanced basis (e.g. by placing special emphasis on the advantages of one product) which could tend to influence the recipient. As a product provider we do 'promote' the benefits of our products in marketing material; subject to the UK financial promotion regulations which require any such communications to be clear ,fair and not misleading. However, we would not promote the benefits of one substitutable product over another. We are of the view that financial promotions, by their very nature, will provide comment on a product's potential value and relevance and the information provided in a marketing communication is rarely objective in the traditional factual sense. In its current format paragraph 16 implies that putting special emphasis on the advantages of one product may influence the decision of the recipient and be classed as implicit advice. We believe, for the reasons stated above that the example should be qualified. We therefore suggest that the example refers specifically to the promotion of one substitutional product over another, rather than the robust marketing of one product.

Paragraph 12 notes that advice requires an element of opinion and is a recommendation to a course of action. However, we believe that this example requires a degree of qualification. As a product provider we express our 'opinion' on the relative risk of our funds and we offer this opinion to the public; and this may or may not be taken into account by the investor in making his or her decision. Taken in isolation and without any consideration of personal circumstances or suitability criteria for a specific investor, we consider this to be general information and not investment advice. Accordingly we would suggest some further level of detail/ consideration should be given to what constitutes 'opinion' in this context.

Q2 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’?

We agree that it is acceptable to provide ‘thought provoking’ questions to customers to assist the person to make an investment choice; provided that there is no further influence or direction given which leads the customer to a particular/desired outcome.

We note that the example provided in paragraph 24 specifically refers to price comparison websites but we believe that this example could be extended as the concept is capable of wider application. For example, we believe that it is possible to develop a filtered information process that is not necessarily price driven but centred on product features and function. Within the UK firms are working on non-advised propositions where customers work through a decision tree, and consider their risk profile and model portfolios en route. We believe that this type of service is potentially capable of being provided in a way that does not constitute investment advice, providing that any filter questions are not customer specific, but provide the very same outcome for every customer who answers them in the same way. However, we also recognise that, in all cases, the process as a whole will be critical in determining whether investment advice has or has not been given.

Q3 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?

We agree in principle but, as already stated in question 2 above, we believe that a tool which applies a ‘general’ recommendation to a limited group of people is capable of falling outside of the definition of investment advice; providing that all those answering questions in the same way, get the same response and can make their own informed choice. We would ask that any examples are clarified and/or extended to make this clear.

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The timing of generic advice can also be of significance and can lead to confusion as to the designation of the type of advice being given. For example, if an adviser provides what is essentially generic advice in the course of a sales process that could lead to a personal recommendation being made, then it is going to be almost impossible for a client to appreciate the difference between the nature of the types of advice. There is an argument that, to avoid the potential for any confusion, there should always be a clear separation between generic and regulated advice.

Q4 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?

We agree in principle but we believe that some of the examples are not sufficiently clear. In particular, paragraph 39 appears to suggest that if an adviser recommends a specific asset class based on a customer's circumstances that this would not constitute investment advice. We believe that this could in fact amount to investment advice and that the example must be better defined according to context. If advice is given that is based on a client's circumstances then we believe that this is, to all intents and purposes, investment advice, notwithstanding that it does not relate to a particular product or instrument. If a customer talks to an adviser and discusses their personal circumstances in detail and subsequently the adviser recommends investment in equities, this is investment advice. Any reasonable customer would perceive it to be so. However general information on the merits of different types of investment that is not based on any explicit or implied consideration of a clients' circumstances will not amount to investment advice. As always, it is the consideration of the circumstances surrounding how the information is provided that is crucial to the outcome.

Q5 Are the circumstances where 'it is clear the firm is making a personal recommendation' sufficiently clear? Would further clarification be helpful?

We disagree with paragraph 53 as currently drafted. The example goes against current practice as in the majority of cases the fact that a firm holds information on a person's circumstances does not mean that it will be used or referred to in subsequent transactions. More likely each transaction or customer event is dealt with on its own merits. The implied burden of proof seems to lie with the firm in this example and we are also concerned with reliance on a test that relies on a 'reasonable expectation' as to the nature of the service. This phraseology is vague as to context and level of objectivity to be employed.

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It also raises a more general concern that, throughout the paper, wherever reliance is placed on a reasonableness test, then this should be qualified to ensure that it is clear that the test is an objective one.

In circumstances where an adviser collects information from a customer to be used in an advised process and subsequently switches to a non advised process then we would agree that this cannot be used a way to circumvent the giving of advice. Similarly, we agree that mere disclaimers cannot be used to avoid the provision of a personal recommendation and each case needs to be assessed according consideration of all the relevant circumstances.

Q6 Are there other criteria you believe should be considered when determining whether messages to multiple clients constitute investment advice?

We agree that to constitute the making of a personal recommendation, all 3 elements have to apply, i.e. Target, Content and Language i.e. we do not believe that targeting a group of customers with an investment mailing is 'making a personal recommendation', providing that the content and language in the investment does not suggest that it is.

Q7 What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?

No response

Q8 Are there specific examples of situations you would like considered, where it is difficult to determine the nature of the advice?

No response