



QUESTIONS AND ANSWERS ON THE CONCEPT OF INVESTMENT SERVICE OF INVESTMENT ADVICE

References: Article D. 321-1 of the Monetary and Financial Code and Article 9 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016

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Investment advice is an investment service requiring a status¹ in order to provide it as a regular activity (investment service provider ["ISP"], tied agent, financial investment adviser ["FIA"] or crowdfunding investment adviser ["CIA"]²).

By convention, all these market participants are referred to as "service providers" in this document.

This document discusses the main features of the service of investment advice provided for by MiFID II. However, it does not discuss the boundary between investment advice and the related service of business consulting on capital structuring, industrial strategy, and corporate mergers and acquisitions, clarified in AMF Position DOC-2018-03.³ Moreover, the Position does not aim to discuss the obligations arising from the provision of a service of investment advice,⁴ for example when the service provider informs its client that its advice is provided independently.

Question 1. What is an investment advice service?

In accordance with Article D. 321-1 of the Monetary and Financial Code and pursuant to MiFID II,⁵ investment advice is an investment service defined as the provision of personalised recommendations to a client, either at his request or on the initiative of the firm which provides the advice, on one or more transactions in financial instruments.⁶

Pursuant to Article 9 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016, the scope of the personalised recommendation covers:

- a) *"The purchase, sale, subscription, exchange, reimbursement, holding or underwriting of a particular financial instrument;*
- b) *Exercising or not exercising a right attaching to a particular financial instrument to buy, sell, subscribe to, exchange or redeem a financial instrument."*

In particular, paragraphs 13, 14 and 15 of the CESR's Questions and Answers state on the concept of advice in accordance with MiFID⁷ that:

- The recommendation may be explicit or may result from an opinion or a value judgement on the appropriateness of purchasing, subscribing to or selling a particular financial instrument or exercising the rights attaching thereto;
- A recommendation is not the simple provision of information at the request of the client.

The practical consequence of this is that, whenever the service provider does not guide the client towards an investment decision and therefore does not make a recommendation regarding appropriateness, then it is not providing investment advice.

¹ Subject to the provisions of Articles L. 531-2 and L. 541-1 III of the Monetary and Financial Code.

² Crowdfunding investment advisers also perform an activity identical to that of investment advice concerning offers of minibons.

³ Position DOC-2018-03 Non-guaranteed placement, investment advice and business consulting regarding the capital structure, industrial strategy, and corporate mergers and acquisitions.

⁴ On this subject, refer in particular to Position DOC-2019-03 and ESMA's Questions and Answers on investor protection under MiFID II/MiFIR (ESMA35-43-349).

⁵ Article 4, paragraph 1, point 4) of the Markets in Financial Instruments Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014.

⁶ Or units mentioned in Article L. 229-7 of the Environment Code, in accordance with 5 of Article D. 321-1 of the Monetary and Financial Code. Methodically, in this guide the expression "financial instruments" refers to financial instruments within the meaning of Article L. 211-1 of the Monetary and Financial Code and the units mentioned in Article L. 229-7 of the Environment Code. Advice on structured deposits is subject to Article L. 511-105 of the Monetary and Financial Code and comes within the scope of competence of the ACPR. As a result, advice on structured deposits does not come within the scope of this Position.

⁷ Questions & Answers: Understanding the definition of advice under MiFID, CESR/10-293, published on 19 April 2010. The ESMA succeeded the CESR. Unless otherwise decided by ESMA, it should be considered that this document is still relevant, except for any conflicts with the new framework applicable since 3 January 2018.

A "**personalised**" recommendation (Article 9 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016) means a recommendation:

- "*addressed to a person in their capacity as investor or potential investor, or in their capacity as representative of an investor or potential investor*";
- which "*is presented as being adapted for that person or based on an examination of the specific circumstances of that person*".⁸

These clarifications are intended to distinguish a personalised recommendation, which is investment advice and may only be dispensed after checking that it is suitable for the client's profile, from a general recommendation⁹ which is addressed to the public or to a broader group or category of clients or potential clients.

Under no circumstances may these clarifications authorise an investment service provider (ISP) to propose, for example, to a given client that he purchase, subscribe to or exchange a financial instrument based solely on the intrinsic qualities of the product, without verifying that it is suited to the client's investment objectives, financial position, knowledge and experience.

Such behaviour would indeed be contrary to the more general obligation imposed on service providers¹⁰ of acting in an honest, loyal and professional manner serving the interests of the client as well as possible.

Moreover, if it does not have appropriate procedures and instructions, an investment service provider which does not wish to provide advisory services would run the risk that its line personnel might be led to make, implicitly or explicitly, recommendations that could legitimately be considered as personalised by the clients to whom they are directed.

Question 2. Practical examples of situations which are not personalised recommendations

Advice given to an issuer, most notably as part of security issuance or merger and acquisition operations, is not a personalised recommendation constituting investment advice, as the issuer is not an "investor", who is alone referred to in Section 2 of Chapter II of MiFID II.

Pursuant to the last paragraph of Article 9 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016, recommendations addressed exclusively to the public are not personalised recommendations either. This category includes general recommendations disseminated impersonally in a newspaper, a magazine or any other publication intended for the general public (including via internet) or as part of a television or radio programme. However, using, for example, email correspondence to provide personalised recommendations to a specific person, rather than to send information to the general public "*could be considered as investment advice*"¹¹.

The mere act of providing information to the client at his request is not normally in itself investment advice. Practical examples of this include:

- informing the client about how to complete a form;
- passing on information published by companies or announcements;
- merely explaining the risks and potential benefits of one or more given financial instruments; and

⁸ Regarding the concept of representative, refer to points 88 and 89 of the Questions & Answers: Understanding the definition of advice under MiFID, CESR/10-293, published on 19 April 2010.

⁹ See Recital 17 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.

¹⁰ Pursuant to Article L. 533-11 of the Monetary and Financial Code for ISPs, Article L. 533-22-2-1 of said code for asset management companies, Article L. 541-8-1 of said code for FIAs, and Article L. 547-9 of said code for CIAs.

¹¹ Recital 14 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.

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- producing financial instrument performance ranking tables for comparison with published reference indicators.

However, it should be borne in mind that when a person provides a client with selective information,¹² for example by comparing one financial instrument with another and giving an opinion on which of these products is preferable, or when a client has indicated what he expects of the investment and a particular financial instrument is then recommended to him, this could constitute a “personalised” recommendation and thus fall within the scope of investment advice within the meaning of MiFID II.

When a service provider supplies a client, at their request, with the result of investment research, a financial analysis or any other form of general recommendation concerning transactions in financial instruments, this does not constitute a service of investment advice. However, it would be different if the general recommendation were presented as being appropriate for the client.

Question 3. Does general advice on a type of financial instrument fall within the scope of an investment service of investment advice?

General advice on a type of financial instrument does not constitute investment advice within the meaning of MiFID II,¹³ since said directive stipulates that investment advice must be restricted to advice on particular financial instruments.

However, if a service provider gives a client advice on a type of financial instrument that it presents as being appropriate for the client or as being based on an examination of their personal situation, it could be held liable under the provisions of Articles L. 533-11 and L. 533-12 of the Monetary and Financial Code.¹⁴ For example, if the service provider recommends to a client investing in bonds rather than in equities to obtain a regular income, and if it proves in fact that this advice is neither appropriate for this client nor based on an examination of their personal situation, it could be held liable under its obligations to act in an honest, loyal and professional manner serving the interests of the client as well as possible, and under its obligations to provide clients with information that is accurate, clear and non-misleading.

Question 4. Do persons who provide asset management advice in the normal course of their business have to be accredited to provide investment advice services?

Asset management advice¹⁵ is a generic, non-regulated activity without any legal definition, which those who regard themselves as involved in it generally consider requires dual expertise, serving individuals and legal entities: advice on asset management strategy and advice on investment, financial and real estate strategy. Investment advice is an investment service defined by the Monetary and Financial Code and the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016; one of its components which distinguish it from asset management advice is its scope, i.e. investment advice must necessarily relate to particular financial instruments. Therefore, an asset management adviser who only recommends an asset strategy or an allocation of assets to his clients without recommending transactions in particular financial instruments would not be considered as providing an investment advice service.

¹² Points 16 and 17 of the Questions & Answers: Understanding the definition of advice under MiFID, CESR/10-293, published on 19 April 2010.

¹³ Recital 15 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.

¹⁴ For asset management companies, Article L. 533-22-2-1 of the Monetary and Financial Code, for FIAs, Article L. 541-8-1 of said code, for CIAs, Article L. 547-9 of said code.

¹⁵ Regarding the rules by which financial investment advisers are bound, refer to Question 1.8 of Position-Recommendation DOC-2006-23 (Questions and answers on the rules that apply to financial investment advisers).

Question 5. Can a “mail shot”, in other words the sending of bulk emails to given persons (hereafter, “sending of bulk emails”), constitute a personalised recommendation?

As stated by the CESR,¹⁶ although mail sent to groups of clients should probably not be likened to investment advice, *“the fact that a recommendation is sent to several clients does not automatically mean that it cannot be deemed to be personalised”*.

Accordingly, the sending of bulk emails by securities services to holders of securities to inform them of financial transactions affecting those securities does not constitute a personalised recommendation, provided that the email is not accompanied by any solicitation, recommendation, opinion or value judgement on the appropriateness of the transaction.

However, when the email contains a recommendation that meets the conditions defined in 1 above, the sending of bulk emails constitutes investment advice in the same way as that given in person, by telephone or by letter.¹⁷ In such cases, for sending bulk emails the investment service provider must check beforehand that the proposed product or service is appropriate and suitable in light of the clients' investment knowledge and experience relating to the specific type of financial instrument or service proposed, the clients' financial position, including their ability to bear losses, and their investment objectives, including their risk tolerance.¹⁸

Question 6. Does qualification of the provision of an investment advice service to a client depend on the categorisation of that client?

No. The fact that clients are all “professionals” within the meaning of MiFID II, including legal entities, does not disqualify the advice as investment advice. In other words, individuals, i.e. natural persons categorised as “retail” clients, are not the only ones that can benefit from an investment advice service.

Question 7. Does the absence of specific remuneration disqualify an investment advice service?

The absence of specific remuneration for this service is not sufficient to demonstrate that an investment advice service has not been provided.

Question 8. Can the investment advice service only be provided at the initiative of the client?

In accordance with Article D. 321-1 of the Monetary and Financial Code, the direction of the relationship – a service provided at the request of the client or at the initiative of the service provider – is not a criterion for qualifying or disqualifying an investment advice service.

Question 9. Can the way derivative products are structured lead service providers to provide an investment advice service?

¹⁶ Point 68 of the Questions & Answers: Understanding the definition of advice under MiFID, CESR/10-293, published on 19 April 2010.

¹⁷ Recital 14 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 states that distribution channels such as the internet or email can also be vehicles for personalised recommendations.

¹⁸ In accordance with I of Article L. 533-13 of the Monetary and Financial Code.

Because sales of “customised” OTC derivatives to clients, particularly professional clients, are performed in a personalised context where the aim is to meet clients' needs as well as possible, such sales are in many cases an investment advice service.

However, when the product is structured by complying exactly with the precise information provided by the professional client regarding the product's characteristics (for example, on the occasion of an invitation to tender), the service of investment advice is not characterised, unless the service provider has expressed an opinion on the product's appropriateness for the client's profile.

Question 10. Does the wording of documents sent to clients qualify an investment advice service?

The insertion in documents sent to clients, especially marketing material, of specific wording indicating that no advice will be given to them and that the appropriateness of the product proposed to them has not been verified is not sufficient to conclude that an advice service has not been provided.¹⁹ Such a service is provided if a personalised recommendation is made by the service provider, for example in a telephone conversation with its client.

Question 11. Does the internet channel disqualify the provision of an investment advice service?

The investment advice service can be provided via an internet site or by email when there is actually a personalised recommendation to an investor or a potential investor regarding particular financial instruments, and when this recommendation is based on the examination of his specific situation or presented as being appropriate for his profile.²⁰

Question 12. Which advised transactions in financial instruments are likely to constitute investment advice?

The categories of transactions likely to be covered by the definition of a personal recommendation pursuant to Article 9 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 are the purchase, sale, subscription, exchange, redeeming, underwriting or holding of financial instruments or the exercise or non-exercise of a right attaching to a particular financial instrument to buy, sell, subscribe to, exchange or redeem a financial instrument. The term “hold” in the English version of the Delegated Regulation (EU) 2017/565 should be understood in the sense of “keep”, so that giving a client a personalised recommendation to keep a financial instrument constitutes an investment advice service.²¹

Question 13. Can the “indirect” marketing of financial instruments lead the producer of said financial instruments to provide the end client with an investment advice service?

This is a situation in which a service provider (producer) designs a financial instrument intended to be marketed by another service provider (distributor) to its own clients. In this situation, the producer of the financial instrument marketed by the distributor is not in a direct business relationship with the end clients and is not deemed to have provided them with an advice service, even if it has drafted some of the materials used to market said financial instrument.

¹⁹ See the ESMA-35-43-1163 guidelines of 6 November 2018 on suitability requirements, replicated in Position DOC-2019-03 and ESMA's Questions and Answers on investor protection under MiFID II/MiFIR (ESMA35-43-349).

²⁰ Recital 14 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.

²¹ Regarding this point, see also Recital 87 of the Delegated Regulation (EU) 2017/565 of 25 April 2016.

Question 14. Can the discussions that occur between the investment service provider and the client in the phase prior to the signing or modification of a portfolio management mandate be considered a personalised recommendation?

Yes. Recital 89 of the Delegated Regulation (EU) 2017/565 of 25 April 2016 stipulates that *"A recommendation or request made, or advice given, by a portfolio manager to a client to the effect that the client should give or alter a mandate to the portfolio manager that defines the limits of the portfolio manager's discretion should be considered a recommendation within the meaning of Article 25, paragraph 2, of Directive 2014/65/EU"*. As mentioned by the CESR,²² commenting on Recital 60 of the MiFID I Directive, the wording of which is similar, *"this Recital makes it clear that advice in relation to a portfolio management mandate is subject to the requirements on assessing the suitability of the service to be provided"*.

Question 15. Does qualification of investment advice require the personalised recommendation to be followed by a transaction?

No. The performance of a transaction is not a criterion used in the definition of an advice service pursuant to Article D 321-1 of the Monetary and Financial Code;²³ it should therefore be considered that even when it is not followed by a transaction, a personalised recommendation within the meaning of Article 9 of the Commission Delegated Regulation (EU) 2017/565 of 25 April constitutes an investment advice service. As a reminder, the advice service may consist in recommending that a client keep the financial instruments that he holds (see question 13).

²² CESR document, Questions & Answers, Understanding the definition of advice under MiFID (19 April 2010, Ref. c/10-293).

²³ As also indicated by the CESR in Point 30 of the Questions & Answers: Understanding the definition of advice under MiFID, CESR/10-293, published on 19 April 2010.