11 July 2023
ESMA35-43-3861

Supervisory briefing

on understanding the definition of advice under MiFID II

Contents

1. Introduction

Overview

1. In accordance with the ESMA Regulation, one of ESMA's objectives is to actively foster supervisory convergence across the Union with the aim of establishing a common supervisory culture.

2. In April 2010, CESR (ESMA's predecessor) published a Q&A entitled "Understanding the definition of advice under MiFID"[1] designed to clarify and illustrate situations where firms would, or would not, be considered as providing investment advice. The CESR document has proven to be a useful and valuable supervisory convergence tool over these years and is still applied by firms and national competent authorities (NCAs). Considering that the legal definition of investment advice has substantially remained unchanged from the MiFID I to the MiFID II[2] framework, ESMA has deemed beneficial to update the content of the CESR document, in particular in light of the evolution of business models and technology (for example, increased use of social medial and mobile apps by firms). ESMA has also deemed useful to transform the Q&As in a supervisory briefing for NCAs to use in their supervisory activities. This document is also intended to continue providing guidance to firms in this important area. The content of the above-mentioned CESR document remains largely unchanged but is supplemented or further specified on certain aspects by this briefing.

3. The content of this briefing is not exhaustive, does not constitute new policy, and does not promote any particular way of supervising the rules. It has been designed to be used in a manner which best fits with supervisors' methodologies (whether distributing the briefings internally, or passing them to external bodies, such as auditors, for example).

Scope

4. This supervisory briefing contains the supervisory expectations by ESMA and NCAs in relation to investment firms, including credit institutions, UCITS management companies and Alternative Investment Fund Managers (AIFMs), providing investment advice to clients.

5. The supervisory briefing covers the following aspects[3]:

[1] CESR/10-293.
[2] Directive 2009/65/EC.
[3] The contents of this Supervisory Briefing are based on the current MiFID II requirements. ESMA will monitor the evolution of the legislative framework (for example any changes stemming from the Retail Investment Package issued on 24 May 2023) and will update the Supervisory Briefing over time, where necessary.

- The provision of personal recommendations and whether other forms of presenting information such as “investment research‟, filtering, general recommendations, generic advice, presenting multiple products or access to model investment portfolios could constitute investment advice.

- The presentation of a recommendation as suitable for a client or based on the client’s circumstances, including making recommendations to become a client of a particular firm, making recommendations which are clearly unsuitable in light of knowledge about the client, definitions of a “person’s circumstances‟ and when recommendations will be viewed as based on a view of a person’s circumstances.

- Perimeter issues around the definition of personal recommendation, including disclaimers to the client and failing to use known client information in an attempt to try avoiding the qualification as investment advice.

- Issues around the form of communication, including whether the Internet or apps are always a “distribution channel”, use of social media posts, messages to multiple clients, distinguishing corporate finance and investment advice and whether these are mutually exclusive.

6. In this supervisory briefing “firms” means firms subject to the requirements set out in Articles 25(3) and (4) of MiFID II and include investment firms (as defined in Article 4(1)(1) of MiFID II), credit institutions when providing investment services and activities (within the meaning of Article 4(1)(2) of MiFID II), investment firms and credit institutions (when selling or advising clients in relation to structured deposits), external Alternative Investment Fund Managers (AIFMs) (as defined in Article 5(1)(a) of the AIFMD [4]) when providing investment advice under Article 6(4) (b) of the AIFMD and management companies (as defined in Article 2(1)(b) of the UCITS Directive[5]), when providing investment advice under Article 6(3) , first subparagraph, (b) (i), of the UCITS Directive.

7. This supervisory briefing might also be used to analyse whether a non-regulated person or entity is engaged in an activity that could be qualified as investment advice (as defined by MiFID II) and they may therefore require an authorisation.

Status of this document

8. The supervisory briefing is issued under Article 29(2) of the ESMA Regulation which enables ESMA to develop practical instruments and convergence tools such as supervisory briefings. The purpose of these tools is to promote common supervisory approaches and practices.

[4] Directive 2011/61/EU.
[5] Directive 2009/65/EC.

9. The content of this supervisory briefing is not subject to any ‘comply or explain’ mechanism for NCAs and it is not binding, though it provides a clear indication of the expectations around the understanding of investment advice by firms.

2. Background

Overview

10. The Markets in Financial Instruments Directive (Directive 2014/65/2014), or “MiFID II”, identifies investment advice as an investment service, the provision of which, on a professional basis, generally requires authorisation as an investment firm[6] unless an entity benefits from an appropriate exemption set out in Article 2(1) of MiFID II or from an optional exemption applied by some Member States in accordance with Article 3 of MiFID II.[7] Together, MiFID II and the MiFID II Delegated Regulation[8] place various requirements on firms when they provide investment advice that do not apply when providing many other investment services, notably including requirements to ensure that any personal recommendations made to clients and potential clients are suitable for them.

11. In the light of this distinction, it is important to, as much as possible, clarify issues related to the practical application of the definition of investment advice, to help ensure NCAs have a consistent approach in the supervision of the requirements on investment advice as well as to help investment firms to understand the requirements.

Examining the definition of investment advice

12. According to MiFID II, investment advice means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments (Article 4(4) of MiFID II). For the purposes of the definition of investment advice, that recommendation must be presented as suitable for that person or must be based on a consideration of the circumstances of that person (Article 9 of the MiFID II Delegated Regulation). The Directive also allows to set out a number of other tests for firms to consider in determining whether they are providing such personal recommendations, which are examined and discussed in this paper.

13. The diagram at the end of this Section of the briefing illustrates how the five key tests work together and hence the thought process that a firm will need to go through to determine whether its services

[6] Article 5(1) of MiFID II. Please refer to paragraph 16 for the reference to the mentioned MiFID II exemptions
[7] MiFID II substantially confirmed the definition of “investment advice” as first introduced by the MiFID I framework.
[8] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

constitute investment advice. All five tests shown in the diagram have to be met in order for a service to be considered investment advice under MiFID II.

14. The following pages of this document clarify and illustrate situations where firms will, or will not, be considered as meeting each of the tests and hence providing investment advice. Where this document describes a situation where a particular test is met, it is important to note that all four of the other tests would also have to be met for the service described to be considered as advice.

15. MiFID II has also introduced the notion of provision of investment advice "on an independent basis"[9]. When this document refers to investment advice, it should be read as both referring to situations of investment advice provided on an independent and on a non-independent basis. Whether investment advice is provided on an independent basis or not does not affect the application of the definition of investment advice.

Considering an investor's view of whether advice is being given

16. MiFID II identifies the importance of presentation in determining whether investment advice is being given: one of the tests that can be set out on the basis of Article 9 of the MiFID II Delegated Regulation is whether a recommendation is presented as suitable, rather than whether it is actually suitable for the client. It is, therefore, important to take into account whether it would be reasonable to think that a personal recommendation is being made in determining whether investment advice is being given. So, if a recommendation is put forward in such a way that a reasonable observer would view it as being based on a consideration of a client's circumstances or presented as suitable then – subject to the other four tests being met – this will amount to investment advice.

17. Some exemptions are provided in MiFID II, including exemptions for the "incidental" provision of an investment service (Article 2(1)(c) MiFID II and Article 4 of the Delegated Regulation) and the provision of such service in a way that it is not "specifically remunerated" (Article 2(1)(k)). These exemptions are not examined in detail in this supervisory briefing.

Advice given to professional clients

18. Many of the examples used in this document will be of most relevance to firms dealing with retail clients. This reflects the fact that, in many cases, services to professional clients are likely to include the provision of investment research, as well as other general recommendations that do not amount to investment advice. In practice, firms can often place greater reliance on the ability of professional clients to understand whether or not they are receiving investment advice. However, the overall concepts and analyses in this document will still be of relevance in relation

[9] See Articles 24(4) and 24(7) of MiFID II.

to services given to professional clients and, in particular, regarding the distinction between investment advice and corporate finance advice.

Firms that do not wish to provide investment advice

19. A firm that does not intend to provide investment advice should ensure that its internal systems and controls, its staff training and its information to clients appropriately and consistently reflect the nature of the service it is providing. For instance, in the Appropriateness Guidelines it is stated that firms should inform clients on the service that is being provided.[10] ESMA notes that describing a service as non-advised in firm documentation will not be sufficient, on its own, to ensure that the services given do not amount to investment advice.

20. A key point for a firm to consider will be whether its client-facing staff understand that when they provide information to clients, they should not give their own views or recommendations about the suitability for the client of any particular financial instrument. By reflecting the firms' intention not to give advice in training and oversight of staff, firms can seek to manage the risk of individuals making personal recommendations. It is particularly difficult for a firm to manage the risk that a client will be given advice in a face-to-face situation, but the possibility of giving advice inadvertently also arises in relation to other distribution mechanisms. Firms that interact with clients on-line, for example, will need to make sure that staff involved in designing and operating web systems understand the nature of the service that they should, and should not, be providing.

Market abuse considerations

21. Where someone, based in or outside the EU, spreads information proposing an investment recommendation about EU financial instruments (e.g., stocks or bonds) aimed at a broad audience, Market Abuse requirements might apply. They require inter alia those making investment recommendations to disclose identities, present recommendations in an objective way, and disclose all relationships or circumstances that would impair objectivity. For experts, additional rules need to be followed. Market abuse requirements are however outside the scope of this briefing but are of course explained more in depth in the Market Abuse Regulation[11] and Delegated Regulation[12] as well as in point 8 of ESMA Questions and Answers on the Market Abuse Regulation (MAR)[13].

[10] Guideline 1 of the ESMA Guidelines on certain aspects of the MiFID appropriateness requirements ESMA35-43-2938
[11] Regulation (EU) No 596/2014
[12] Commission Delegated Regulation (EU) 2016/958
[13] ESMA70-145-111

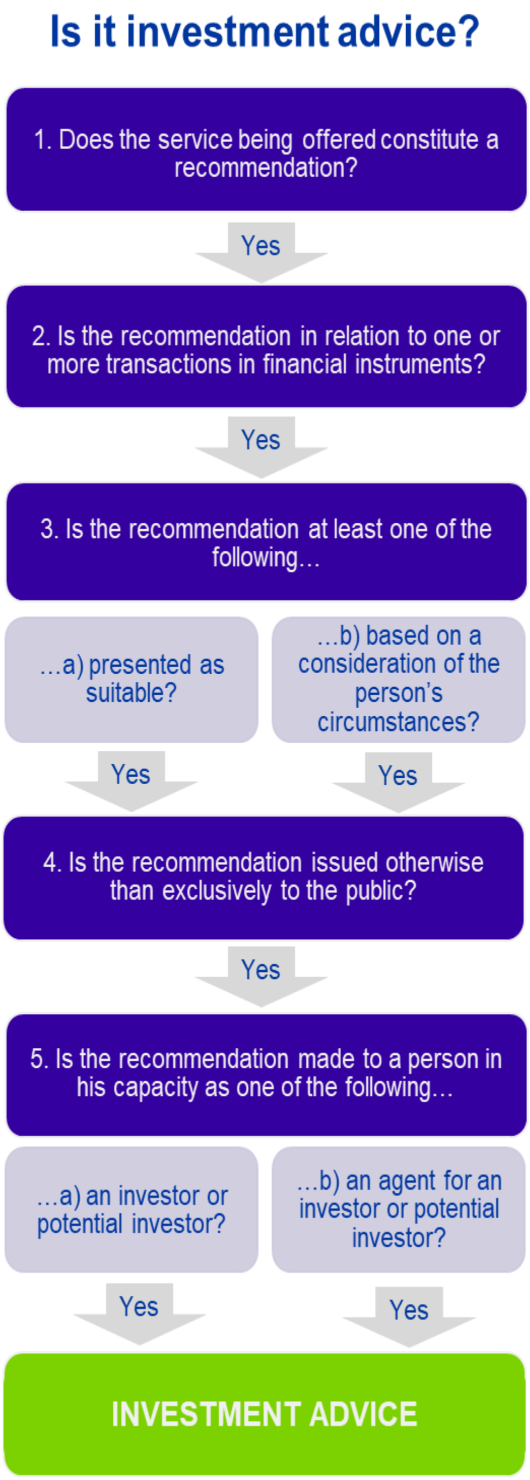
Assumptions made in this document

22. It is taken as given throughout this document that when a firm is providing investment advice under MiFID II, it will be subject to all of the Directive requirements that apply in relation to investment advice (e.g., the suitability requirements), so this point is not reiterated for examples individually.

23. Furthermore, references to “clients” or “investors” made throughout the rest of this document should also be read as applying to potential clients or potential investors.

24. References to “advisor” made throughout this document should be read as including situations where investment advice (in whole or in part) are provided through an automated or semi-automated system used as a client-facing tool.

Diagram: the five key tests for investment advice



Issues to consider	Chapter
• the difference between information and a recommendation • whether assisting a client to filter information amounts to a recommendation	• 3.1
• how to distinguish generic advice and general recommendations from investment advice • whether recommending a firm or a service can amount to investment advice	• 3.2
• how a financial instrument might implicitly be presented as suitable • the impact of disclaimers • what it means to consider a person's circumstances	• 3.3-3.4
• assessing recommendations delivered via the Internet • assessing recommendations given to multiple clients at once • distributing investment research	• 3.5
• identifying investors and their agents • the distinction between corporate finance advice and investment advice	• 3.6-3.7

3. Supervisory expectations

3.1 Does the service that is being offered constitute a recommendation?

What constitutes a personal recommendation?

25. As defined in Article 9 of MiFID II Delegated Regulation, a personal recommendation is a recommendation that is made to a person in his/her capacity as an investor or potential investor, or in his/her capacity as an agent for an investor or personal investor.

26. In specifying that a service will only amount to investment advice if it constitutes a personal recommendation, the Directive draws a distinction between providing advice and simply providing information. It should be noted that a recommendation may be made on the initiative of the firm or of the investor. The fact that a recommendation is being given does not have to be made explicit to the investor – and the investor does not have to act upon the recommendation – for it to be regarded as a recommendation.

What is the difference between providing information and providing a recommendation?

27. A recommendation requires an element of implicit or explicit suggestion on the part of the advisor. In effect, advice involves a recommendation as to a course of action, which may be, or is, presented to be in the interest of the client.

28. Information, on the other hand, involves statements of fact or figures. In general terms, simply giving objective information without making any comment, value judgement, or suggestion on its relevance to decisions which an investor may make, is not a recommendation.

When could the provision of information to a client constitute a recommendation?

29. Giving information may amount to giving a recommendation if the circumstances in which the information is provided give it the qualification of a recommendation. While a firm may not intend to provide a recommendation to a client the firm should be aware that a recommendation cannot be considered to be a mere explicit statement clearly indicating a type of investment behaviour (e.g., 'buy', 'sell', 'hold'), but may also include an indication of the suggested behaviour in an indirect, implicit manner. The firm may find that it does provide an implicit recommendation if it allows the information it provides to become subjective, such that it actually leads the client to one or more particular product(s) over others.

30. For example, if a firm (or person) places special emphasis on the advantages of one product compared to others to a client in a way that would tend to influence the decision of the recipient (client) to select that particular product over others presented, this could amount to a personal

recommendation rather than the mere provision of information. For instance, when a firm gives information on one (preselected) product to a client, mentioning that this particular product is a "best in class" in comparison with its peers, which has won several awards and has several high ratings provided by well-known data providers etc., then the context in which this information is presented could amount to a personal recommendation to a client.

31. Other examples of situations in which the information provided may constitute (indirect/implicit) personal recommendations due to the content and context of the communication, include, for example:

    - the information states that, given the client's objectives, they can be achieved by a financial instrument other than the one the client has chosen,
    - after a certain period of the investment, the client is informed that the financial product does not meet the client's investment objectives (due to e.g., issuer's underperformance); or
    - the client receives a message about a certain product which is being purchased by investors with similar characteristics and needs as the client.

32. There can also be situations where the wider context in which information is provided will determine whether or not advice is given. The first step will be to determine whether the provision of information amounts to a recommendation, if it does, the second step would be to determine whether the recommendation qualifies as a personal recommendation. The following are some examples of objective information that might be given to a client, without necessarily amounting to a (personal) recommendation (depending on the context):

    - listings of share and unit prices as long as they are presented in a general form and have no direct reference to an individual client;
    - company news or announcements;
    - an explanation of the terms and conditions of an investment;
    - a comparison of the benefits and risks of different types of financial instruments or asset classes (without making such comparison between specific products since that could result in a recommendation);
    - league tables showing the performance of investments of a particular kind against set published criteria;
    - alerts, including alerts created by software, about the happening of certain events (for example, certain shares reaching a certain price);

- details of directors' dealings in the shares of their own companies.

33. Taking the information in the last two bullet points above as examples, the following situations, where a firm provides a client with the information, could involve giving a personal recommendation when it includes:

    - an offer to tell a client when certain shares reach a certain value on the basis of a prior recommendation to purchase or to sell at that price; or

    - an offer to provide information on directors' dealings on the basis that, in their opinion, - were directors to buy or sell - investors would do well to follow suit.

34. The communication about the instrument reaching the target price, or the one about the directors' dealings, could be viewed as mere information if it were considered in isolation. But, as this communication should be considered as part of a multiple step recommendation process, providing the information should be regarded as giving a personal recommendation to the client. On the other hand, to meet the definition, personal recommendations do not need to contain all the transaction details involved, e.g., recommended purchase price or time of purchase, to meet all the recommendation conditions.

35. The question of whether a communication to a client constitutes a recommendation may be closely related to the question of whether a recommendation is presented as suitable (see Section 3.3 for related guidance on presenting a recommendation implicitly).

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

36. The fact that a firm enables a client to filter the information that they receive about different financial instruments – for example, by choosing from a set of options on a website or on an app, – does not automatically mean that a recommendation is being given by the firm that provides the information. But where a firm uses a mechanism to filter the information that it provides investors, the circumstances of such a case should be taken into account in determining whether a recommendation is being made.

37. Factors that may be relevant in deciding whether the process involves a recommendation may include:

    - any representations made by the questioner at the start of the questioning relating to the service they are to provide;

    - the context in which the questioning takes place;

- the stage in the questioning at which the opinion is offered and its significance; the role played by the questioner who guides a person through the questions;

- the type and content of questions;

- the outcome of the questioning (whether particular products are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and

- whether the questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the person understand what the questions or options are and how to determine which option applies to their particular circumstances.

38. A critical factor would be whether the process is limited to assisting the person to make their own choice of product which has particular features which the person regards as important: if this is the case then it is unlikely that the process will involve a personal recommendation.

39. As an example, price comparison websites commonly collect information from clients and about their circumstances and allow them to filter the information that they view as a result, without necessarily giving investment advice (depending on the circumstances such as the type of information collected on the clients from the website). The website may enable a client to enter information to generate a list of investment products that meet criteria they have chosen, without providing a recommendation. In such cases, the ability of the client to make their own choices about the features they are looking for, and the absence of apparent judgement about which features or products they should choose, would make it unlikely that the service offered would be viewed as 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?

40. Whether or not providing a client with access to a model investment portfolio amounts to investment advice will depend on the particular circumstances, just as was described in the question about other forms of filtering of information (above). Different factors would need to be assessed, on a case-by-case basis, to determine whether or not investment advice is being given.

41. In a situation where a firm provides, on its website or through another medium, the possibility for investors to determine their investment profile (e.g., dynamic, conservative, etc.) and for each profile discloses a related model portfolio, composed of different financial instruments, there can certainly be situations in which providing such a service is likely to amount to investment advice. If buying, or subscribing for, the financial instruments identified in the model portfolio is positioned as the appropriate action for the investor to take, the overall service might be viewed as a recommendation rather than merely the provision of information.

42. One way in which firms may give investors access to various (model) portfolios is by means of copy trading services. Through this service a firm can give (prospective) clients access to the portfolios of 'copied traders' whose trades can be copied. Depending on how the copy trading service is designed and provided, it can be the case that copied traders provide investment advice to the investors who are copying their trades. For a more in depth understanding of when copy trading services are qualified as portfolio management or investment advice and the MiFID II requirements that apply to copy trading, reference is made especially to the Supervisory Briefing on supervisory expectations in relation to firms offering copy trading services.[14]

43. The following sections of this briefing will clearly also be relevant in determining whether investment advice is being given when a firm gives clients access to model investment portfolios. For example, if a website provider collects information about a specific investor's circumstances; uses an element of suggestion in translating this into a risk profile and then to identify a particular set of products; and presents the portfolio using phrases such as "this might be appropriate for you", then when all the tests described in this paper are met the service provided would amount to investment advice.

[14] ESMA35-42-1428.

3.2 Is the recommendation in relation to one or more transactions in financial instruments?

What does it mean to make recommendations in relation to transactions in financial instruments?

44. MIFID II Delegated Regulation sets out the "transactions" that a recommendation could be in relation to:

- buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular financial instrument; or
- exercising or not exercising any right conferred by such an instrument to buy, sell, subscribe for, exchange or redeem a financial instrument.

45. This test means that, in general, any advice that relates to particular financial instruments – whether or not transactions ultimately go ahead – could be considered as investment advice under MiFID II. It is worth noting that investment advice can also involve recommending several transactions in one or more financial instruments.

46. Subject to also fulfilling the other four tests described in this supervisory briefing, a recommendation not to buy, to hold or to sell a financial instrument can also constitute the provision of a personal recommendation for the purposes of MiFID II.[15]

47. According to MIFID II, the definition of recommendations does not necessarily involve the advisor reviewing a wide range of financial instruments. Advice can also be based, for example, on a review of just a firm's own products or a restricted list of financial instruments.[16][17]

48. In contrast, generic advice about a type of financial instrument and general recommendations are not investment advice under the Directive, unless they are a part of the whole investment advice process (e.g., information on an asset allocation preceding the investment advice concerning a portfolio). Acts that are preparatory to the provision of an investment service or carrying out an investment activity should be considered as an integral part of that service or activity. This includes

[15] This is based on the clarification under Recital 87 of MiFID II Delegate Regulation, whereby "*investment firms should undertake a suitability assessment not only in relation to recommendations to buy a financial instrument are made but for all decisions whether to trade including whether or not to buy, hold or sell an investment*".

[16] In this context, the client can select the intermediary having regard to the features of the advice service that is going to be provided. To this extent, MiFID requires that investment firms provide clients before they are bound by any agreement for the provision of investment services with information about the terms of such agreement (Article 46(1)(a) of the MiFID II Delegated Regulation).

[17] According to Article 52 of the MiFID II Delegated Regulation, Investment firms providing investment advice, on an independent or non-independent basis, shall explain to the client the range of financial instruments that may be recommended, including the firm's relationship with the issuers or providers of the instruments.

the provision of generic advice to clients prior to or in the course of the provision of investment advice or any other investment service or activity.[18]

What is generic advice?

49. Advice that does not relate to a particular investment or investments should be regarded as generic advice. Examples of generic advice may include:

    - advice on the merits of investing in one geographical zone rather than another (for example, Japan rather than Europe); or

    - advice on the merits of investing in certain asset classes rather than in others (for example, bonds rather than shares).

50. Recital 15 of the MiFID II Delegated Regulation states that generic advice about a type of financial instrument is generally not considered investment advice for the purposes of MiFID II.

51. However, if a firm provides generic advice to a client about a type of financial instrument which it presents as suitable for, or based on a consideration of the circumstances of, that client, and that advice is not in fact suitable for the client, or it is not based on a consideration of his/her circumstances, the firm is likely to be acting in contravention of Article 24(1) or (3) of MiFID II. In particular, a firm which gives a client such advice would be likely to contravene the requirement of Article 24(1) of MiFID II to act honestly, fairly and professionally in accordance with the best interests of its clients. Similarly, or alternatively, such advice would be likely to contravene the requirement of Article 24(3) of MiFID II that information addressed by a firm to a client should be fair, clear and not misleading.[19]

What is a general recommendation?

52. A general recommendation is a suggestion about a transaction in a financial instrument or a type of financial instrument which is intended for the public (see Recital 17 of the MiFID II Delegated Regulation). General recommendations include investment research and financial analysis, and are an ancillary service under Section B(5) of Annex I of MiFID II.

53. Being addressed to the public in general, a general recommendation is not, by definition, based on an evaluation of the personal circumstances of a particular person, nor does it appear to be presented as suitable for that person. Further information about when a recommendation is issued exclusively to the public can be found in Section 3.5.

[18] As stated in Recital 16 of MiFID II Delegated Regulation.
[19] Recital 15 of the MiFID II Delegated Regulation.

54. For more details regarding the definition of investment research, financial analysis or other forms of investment recommendation, including those covered by point (35) of Article 3(1) of Regulation (EU) No 596/2014 relating to transactions in financial instruments, reference is made to Article 36 of the MiFID II Delegated Regulation.

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

55. Yes, a recommendation can involve the presentation of several specific financial instruments that are, together, recommended over other possible choices. The fact that more than one financial instrument is being recommended does not prevent the service being offered from being advice.

56. For instance, where a firm giving advice recommends that an investor takes a particular action in relation to any one of a group of specific financial instruments, which are presented as equally suitable or as an equal alternative (e.g., the firm might state that "share A, share B or share C are equally suitable for your needs") this will constitute investment advice.

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

57. It is possible for a client to ask for and receive information about different types of financial instruments without advice being given on one or more specific financial instruments. For example, information 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 it constituting investment advice.

58. Advice covering which asset class would be better for an investor would normally qualify as generic advice rather than as investment advice. If, further to advice regarding an asset class being given, the firm also indicates a particular instrument within that asset class then this would be regarded as investment advice.

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

59. Advice to become the client of a particular firm (e.g., a particular portfolio manager), or to use its services in a certain way, would need to relate to one or more specific financial instruments in order to be considered as investment advice under MiFID II. Therefore, if the recommendation only includes the suggestion to become a client of a particular firm, then this is not considered investment advice.

60. A slightly different situation is described in Recital 89 of the MiFID II Delegated Regulation. The recital notes that 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(2) of MiFID II. This Recital makes clear that advice in relation to a portfolio management mandate is subject to the requirements on assessing suitability (although it is not necessarily a personal recommendation).

3.3 Is the recommendation presented as suitable?

Can a financial instrument be implicitly presented as suitable?

61. Yes. A financial instrument might be presented as suitable for the investor in an explicit or implicit form. In both cases the firm will be providing investment advice if the other tests are also met. For instance, a financial instrument might be explicitly presented as suitable using words such as “this product would be the best option for you”. Alternatively, the recommendation could be implicit, but clearly influence the client to take action in relation to a specific financial instrument over others presented. For example, several products might be presented, with one of them highlighted for the client by a phrase such as “people like you tend to buy this product”.

62. As already noted, if a person or software places special emphasis on the advantages of one product over others for a client in a way that would tend to influence the decision of the recipient to select that particular product over others presented, this could amount to a personal recommendation. It is not necessary for a firm to tell a client that a recommendation it is making is suitable for him in order for its recommendation to be viewed as being presented as suitable. For example, a firm might contact clients who hold units in a particular fund and present to them as suitable the idea of selling those assets and purchasing units in another particular fund. In this context, there could be an implicit recommendation being given through a form of words such as “Our research indicates that Fund X is no longer performing as our clients would wish. We have identified Fund Y as a replacement investment, which can be used to achieve the same investment outcomes”.

Could the presentation of a financial instrument as suitable for an investor constitute advice even if the firm is aware that it is not suitable for that investor?

63. Yes, a financial instrument can be presented as suitable and is perceived as being so for an investor without this actually being the case. In such a case, before making the recommendation the firm should have obtained the necessary information regarding the client’s knowledge and experience, his/her financial situation including the ability to bear losses, and investment objectives including risk tolerance and sustainability preferences so as to recommend a financial instrument that is suitable for him. While a recommendation of a product that is not suitable for the investor would constitute a breach of the rules on suitability (in Article 25(2) of MiFID II and Article 54 of the MiFID II Delegated Regulation) it would not prevent the recommendation from being presented as suitable or constituting investment advice.

Can a firm avoid providing investment advice using a disclaimer in its communications?

64. It is important that firms provide clients with appropriate information about their services in a comprehensible form (see Article 24(4) of MiFID II and paragraph 13 of the Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements[20]) and ESMA recognises that disclaimers can be of some use. For example, if a firm has been asked to provide an existing client with information but is aware that the client has received recommendations from the firm in the past, it might make use of a disclaimer to confirm the nature of the service being provided when it presents the information.

65. It is important to remember, though, that even if a clear, prominent and understandable disclaimer is provided stating that no advice or recommendation is being given, a firm could still be viewed as having presented a recommendation as suitable for the client. For example, if a firm stated that its product would suit a particular client's needs, the inclusion of a disclaimer saying that this was not advice would be unlikely to change the nature of the communication. If the other tests are also met, the firm would be viewed as providing investment advice, the disclaimers used by the firm therefore cannot prevent this qualification. Any disclaimers (or other similar types of statements) aimed at limiting the firm's responsibility with regard to the provision of advice would not in any way impact the characterisation of the service provided in practice to clients. Furthermore, as clarified in the ESMA guidelines on certain aspects of the MiFID II suitability requirements[21] "Any disclaimers (or other similar types of statements) aimed at limiting the firm's responsibility for the suitability assessment would not in any way impact the characterisation of the service provided in practice to clients nor the assessment of the firm's compliance to the corresponding requirements. For example, when collecting clients' information required to conduct a suitability assessment (such as their investment horizon/holding period or information related to risk tolerance), firms should not claim that they do not assess the suitability."

66. While disclaimers may be of some use to firms seeking to ensure that they do not inadvertently present financial instruments as suitable for particular clients, they will also need to take other steps to achieve this. As noted earlier, a firm that does not intend to give advice will need to ensure that, for example, its internal systems and controls and staff training appropriately reflect this.

[20] ESMA35-43-2938, paragraph 13 states that firms are to provide "A short explanation of the main differences between advised and non-advised investment services taking into account the applicable requirements, to avoid any confusion between the two."
[21] ESMA35-43-3172.

3.4 Is the recommendation based on a consideration of the person's circumstances?

What is meant by a person's "circumstances"?

67. Information about a person's circumstances could include both factual information (e.g., his/her address, income or marital status) and more subjective information about his/her wants and needs (e.g., his/her overall risk appetite, short- and long-term investment objectives, including sustainability preferences, or his/her desire for protection from particular risks). Any such information could be considered as part of a person's circumstances.

When will a firm be viewed as basing a recommendation on a consideration of a person's circumstances?

68. Whether or not a firm will be viewed as providing a recommendation based on a consideration of person's circumstances is likely to depend on factors such as:

- the nature and scope of the information it collects; and
- the way it presents its questions.

69. For example, if a firm has collected information from a client on his/her investment objectives and/or financial situation (or elements of his/her investment objectives or financial situation), if they return to the firm through the same channel for a follow-on service, it could reasonably be expected that this information is being used to create a picture of his/her needs and wants to form the basis of a recommendation. Other elements, such as the following, could lead to consider that it is reasonable to expect that the information previously given is being used: the contact point with the firm is the same and the nature of the service is similar to that given in the past.

70. In other cases, it would not be reasonable to expect that a firm will access and use all of the information that it may happen to hold about a client's circumstances. For example, if a client gave the firm information when purchasing a mortgage, they could not reasonably assume that the information was being accessed and made use of when they make use of the execution only service provided by the firm through its online channel.

71. On certain occasions a firm will be forbidden from using information it holds about clients as a consequence of the operation of information barriers to manage conflicts of interest. For example, certain information held by a corporate finance team providing investment services related to securities offering by the firm's client will not be able to be used by the sales and trading part of the firm. Even if such confidential information cannot be used, the sales and trading staff of the

firm will be considered as providing investment advice to the client if all the relevant conditions are satisfied.

Can a firm avoid being viewed as making a personal recommendation by failing to use information about a person's circumstances?

72. If a firm has accumulated relevant information on a person's circumstances – either during a single interview or during the course of an ongoing relationship – and it can reasonably be expected that this information is being taken into account (as discussed in the question above) it cannot avoid being viewed as making a personal recommendation. In this case, any recommendation made will be treated as being based on a consideration of the person's circumstances.

73. This situation is perhaps most likely to arise if a firm collects potentially relevant information from a client through one contact point, as part of an established relationship. In this situation, the firm could be held responsible for giving the impression that it is basing its later recommendations on information about the person's circumstances collected earlier.

74. In the same way as was described earlier, disclaimers may be of some use in providing clients with information about their services. However, adding a disclaimer to a client agreement or order noting that information collected will not be used to make a recommendation will not be sufficient to prevent the firm from being treated as having given a personal recommendation, if it is clear that the client could reasonably have expected that the recommendation was based on a consideration of his/her circumstances. If the other tests are also met, in such a situation, the service will amount to investment advice.

3.5 Is the recommendation issued otherwise than exclusively to the public?

What does it mean to make a recommendation exclusively to the public?

75. The last subparagraph of Article 9 of the MiFID II Delegated Regulation clarifies that a recommendation shall not be considered a personal recommendation if it is issued exclusively to the public.

76. A recommendation concerning financial instruments addressed exclusively to the public is for example one made through newspapers or magazines; during a television or a radio programme; or through posters that can be seen in places accessible to the public (such as on public transport or at a firm's branches).

Should recommendations made through the internet, social media, etc. be considered as made exclusively to the public?

77. Recital 14 of the MiFID II Delegated Regulation states "In view of the growing number of intermediaries providing personal recommendations through the use of distribution channels, it should be clarified that a recommendation issued, even exclusively, through distribution channels, such as internet, could qualify as a personal recommendation. Therefore, situations in which, for instance, email correspondence is used to provide personal recommendations to a specific person, rather than to address information to the public in general, may amount to investment advice."

78. Therefore, a recommendation concerning financial instruments made through internet websites, investment apps, and/or social media (including through (f)influencers) could, in certain instances, be regarded as a personal recommendation and not as issued exclusively to the public.

79. When a recommendation is addressed to a particular person or is presented as suitable for that person (or a group of persons to which that person belongs) or based on a consideration of the circumstances of that particular person, ESMA believes that it does not fulfil the conditions to benefit from the exemption under the last subparagraph of Article 9 of the MiFID II Delegated Regulation. This includes situations where a webpage, or indeed e-mail correspondence, or private message[22], is used to provide personalised information, rather than to address information to the public in general (see paragraph 82 and following for further details). The use of targeted

[22] 'Private messages', which are also referred to as 'personal messages' or 'direct messages' refer to a private communication sent or received by a user of a private communication channel on any given platform (e.g., social media platforms; internet forums; instant messaging platforms). Unlike public posts, private messages are only viewable by the participants.

messaging[23] to address a recommendation to a particular person (personalisation)[24], instead of addressing it to a group of persons, that includes personalised information could also be considered a personal recommendation rather than addressing information to the public.

80. By way of example, Section 3.1 of this supervisory briefing also describes how providing a model portfolio to clients, such as through the Internet, could amount to investment advice.

Does publishing a list of "best products" or "funds of the month" or pooling recommendations on a public page of a website, on social media, or in a newspaper count as investment advice?

81. Publishing a list of "best products" or "funds of the month" would not, in itself, normally be regarded as investment advice. Assuming that such a communication is not addressed to a person as such but rather to the public in general (for example because it is publicly accessible on a website), it would normally not be presented as suitable for a particular person; be based on a consideration of the circumstances of that person; or, indeed, involve a recommendation. This would also apply to the websites available to the public, pooling recommendations for a given instrument from different firms.

82. Of course, if a list of best products or recommendations was provided to one or more individual clients, rather than distributed to the public, it is possible that such a communication could meet the different tests described in this Supervisory Briefing and amount to investment advice.

83. It is however important to underline that regardless of whether the information published qualifies as investment advice, the publication of such information by the firm when providing investment or ancillary activities must meet the requirement on fair, clear, and not-misleading information (Article 24(3) of MiFID II).

Can a message sent to several clients, for example through emails, private message or letters, be considered as investment advice?

84. While many messages that are sent to batches of clients are unlikely to amount to investment advice, the fact that a recommendation is made to multiple clients would not automatically mean that it could not be a personal recommendation. Advice can be provided in many ways, including: face to face; orally to a group; by telephone or any other form of electronic communication (ex. video conferencing); by correspondence (including email); using a website; through investment

[23] Targeting messages refer to the creation of content for a specific target audience. This will usually involve positioning the message for a group of similar people. In the context of this briefing, the message will be positioned for the particular group of persons addressed.

[24] Personalisation refers to the use of targeting messaging, but where targeting usually involves positioning the message to a group of similar people, personalisation refers to positioning the message to an identified individual.

apps; through social media private messages or through the provision of an interactive software system (e.g., robo-advice).

85. In order to assess whether a message sent to several clients amounts to investment advice, different elements should be taken into account: the target audience, the content of the message and the language used:

- Target audience: the way the firm selects the clients to whom the message will be sent can have an incidence on the qualification of that message as investment advice. For example, when the internal procedures of a firm specify that a financial instrument may only be sold to a sample of clients selected on the basis of certain factors, such as clients under a certain age or who hold no similar products, the selection of the target audience will not automatically mean that the firm is providing investment advice. However, highlighting the particular personal circumstances that led the individual to be contacted, for example, is very likely to mean that the product is being presented as suitable for the particular investor.

- Content of the message: if the message contains a solicitation, a recommendation, an opinion or a judgment, for example, regarding the advisability of a transaction, this could mean that it is regarded as investment advice.

- Language: if the language is such that it strongly suggests an instrument, this will have an impact. Thus, the tone of the message and the way it could be understood by the client are important elements when determining if a message amounts to investment advice.

86. In the sorts of situations described above, messages addressed to clients would unlikely be considered as issued exclusively to the public.

Can providing training or courses on financial matters amount to investment advice?

87. If during courses/trainings, including provided online, a firm gathers information on a person's circumstances and uses it as a basis for a recommendation or to present a recommendation as suitable, this would fall within the definition of investment advice.

Does distributing investment research amount to investment advice?

88. Investment research under MiFID II is research or other information recommending or suggesting an investment strategy concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments,

intended for the public[25].From this definition it results that investment research is separate from investment advice and that firms can use distribution channels to provide their clients with investment research without this amounting to a personal recommendation.[26]

89. Sending research to a client may not commonly amount to giving investment advice but as illustrated in Section 3.1 with other examples, information can be provided in such a way that this amounts to a personal recommendation. For example, if the sales force of a firm emails investment research to a number of clients and subsequently engages in telephone calls to discuss the merits of a particular financial instrument that the research identifies for the client in question, then this will amount to a personal recommendation.

Can the distribution of a financial instrument complying exactly with precise information provided by a professional client constitute an investment advice?

90. When a professional client asks a firm directly to find a product by giving the firm precise information regarding the product's characteristics (for example, on the occasion of an invitation to tender), if then the firm merely responds to this request, the service provided would not qualify as investment advice, unless the firm has expressed an opinion on the product's suitability for the client's profile.

[25] Article 36(1) of the MiFID II Delegated Regulation

[26] This results more specifically from Article 36(1)(b) of the MiFID II Delegated Regulation which reads as follows: *if the recommendation in question were made by an investment firm to a client, it would not constitute the provision of investment advice for the purposes of Directive 2014/65/EU*

3.6 Is the recommendation made to a person in his/her capacity as an investor or potential investor?

What does it mean to make a recommendation to a person in his/her capacity as an investor?

91. Article 9 of the MiFID II Delegated Regulation states that a personal recommendation may be provided either to a person acting in his/her capacity as an investor or potential investor, or to a person acting in their capacity as an agent for an investor or potential investor. It follows that where a recommendation is provided to a person acting in another capacity (neither investor nor agent for an investor), it is not a personal recommendation and consequently does not constitute investment advice.

92. The concept of a person acting in his/her capacity as an investor (or potential investor) will almost always be perfectly clear, both to the firm and to the client. Where a firm makes a recommendation to a person to buy, sell, or hold a financial instrument, it should be assumed that the person is an investor or potential investor unless particular circumstances clearly demonstrate otherwise. Where the primary motivation behind a recommendation is, for example, to hedge a risk such as the loss in value of the client's portfolio or the client's interest rate exposure (rather than more common investment aims of achieving income growth or capital accumulation) the client will still be acting in his/her capacity as an investor. Whether the client is an (potential) investor should therefore not be assessed on the basis of the client's intention but on their engagement in the investment activity.

93. Furthermore, Article 54(6) of the MiFID II Delegated Regulation and the ESMA guidelines on certain aspects of the MiFID II suitability requirements[27] provide clarifications on how firms should deal when providing advice to a legal entity or a group of two or more natural persons or where one or more natural persons are represented by another natural person.

94. Under MIFID II, it is not relevant for the purposes of the definition of advice whether a client is specifically paying for the advice, the advice is provided for free or presumably for free, or if the advice is provided as part of a wider package of investment services (for which the firm might even be remunerated via a third party).

Compared to investment advice, what is the ancillary service of corporate finance advice?

95. Whilst investment advice is an investment service the provision of which on a professional basis generally requires authorisation as an investment firm, "corporate finance advice" is an ancillary service for which MiFID II does not require authorisation. Unlike investment

[27] ESMA35-43-3172.

advice, “corporate finance advice” provided by an investment firm (as for any other ancillary service) is only subject, as appropriate, to certain conduct of business obligations under Article 24 of MiFID II. This includes the general requirement to act honestly, fairly and professionally in accordance with the best interests of the client.

96. The service often called “corporate finance advice” is described in Section B(3) of Annex I of MiFID II as the provision of “advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings”.

In practice, how should corporate finance advice be distinguished from investment advice?

97. The only provisions of MiFID capable of assisting investment firms and their clients in drawing a line between these two categories of advice are the definition of investment advice and the above description of the ancillary service (in Section B(3) of Annex I of MiFID).

98. It is important to consider that investment advice will be provided only where a recommendation is made to a person in his/her capacity as an investor or potential investor (or in his/her capacity as an agent for an investor or potential investor). It follows from this that advice to an undertaking to issue securities is not investment advice. It is also clear from the MiFID provisions that corporate finance advice will be provided when advice is given with regard to “capital structure, industrial strategy and related matters”.

99. ESMA acknowledges that beyond these two conclusions that result clearly from the MiFID II requirements, firms may face some uncertainty trying to determine whether or not they are providing investment advice when providing corporate finance services. To assist in determining the type of advice to provide, firms should consider the objective pursued by the client when seeking advice from a firm.

100. Where the client’s primary purpose for seeking advice is to generate a financial return on an investment or to hedge a risk, the client’s objective is patrimonial in nature and the advice provided would be investment advice. Moreover, it is important to assess the scope of the investment advice the client expects from the firm. Conversely, where the client’s primary purpose for requesting the advice is for an industrial, strategic or entrepreneurial purpose (i.e., a company wants to buy shares of another company because it wants to take over its assets or expand its production to include new branches) rather than to receive a financial return or hedge a risk, the advice provided would be corporate finance advice. The context relative to the request for advice may be used to determine the primary purpose for the request.

101. In situations where it is impossible to identify the primary purpose because both a patrimonial and a strategic/industrial/entrepreneurial purpose are present as well as the firm's scope of activities covers both types of services and neither purpose outweighs the other in importance, ESMA understands that the client would receive investment advice, perhaps simultaneously with corporate finance advice. This is notwithstanding the situations where a firm (such as a law firm or accounting firm) is providing investment advice in an incidental manner in the course of another professional activity not covered by MiFID II provided that this activity is regulated and/or the provision of the advice is not remunerated, in accordance with Articles 2(1)(c) and (k) of MiFID II. However, such entities may act within the capacity of corporate finance advise without the abovementioned restrictions because it constitutes the ancillary activity referred to in Section B(3) of Annex I to MiFID II.

102. When an undertaking approaches a firm for advice, through an individual authorised to act on behalf of the undertaking, for instance the Chief Executive Officer or the Chief Finance Officer, for the purpose of capital raising, a merger or acquisition, the disposal of a subsidiary or a management buyout, the advice provided to the client will fall under the corporate finance advice category, because the primary purpose of soliciting the advice relates to the present or future strategy of the undertaking.

103. In the context of private equity and venture capital, the industrial purpose of the firms providing these services is purely financial. Where individuals authorised to act on behalf of these firms seek advice, their primary objective is likely to be mainly entrepreneurial, and also aligned to the industrial purpose of the private equity or venture capital firms i.e., to generate a return and the scope of firm's activity is different from the typical investment advice activity. That is why, where such clients seek advice in this context, ESMA considers it to be corporate finance advice.

104. Where an undertaking is family-owned, advice on whether to sell shares in the undertaking may involve the provision of both corporate finance advice and investment advice, perhaps for different members of the family. In this situation, the firm will have to look at the reasons for the clients request for advice. For instance, one member of the family may be the controlling shareholder and heavily involved in the running of the business and their request for advice on whether and/or under what conditions to sell their shares is likely to primarily involve a future decision to continue or not to continue to pursue his/her strategic or entrepreneurial objective. Therefore, the advice given is likely to be corporate finance advice, provided however that the consideration for the sale of his/her shares is cash only and does not include securities and the advice does not include any other investment decisions which may trigger the investment advice regime (such as a proposal to invest in another company purely for a financial reason). On the other hand, another family member who may or may not be involved in the running of the undertaking but whose primary concern is the investment in the undertaking may need to decide

whether or not to sell his/her shares and in this case the purpose of the decision is primarily to generate a financial return. Therefore the client would be the recipient of investment advice.

105. ESMA understands that the "primary purpose test" as described above is not definitive. Rather it is a tool that firms can use to help them determine whether they are likely to be providing investment advice. It is every firm's responsibility to establish and analyse all relevant factors that enable them to assess whether they are providing investment advice.

Are investment advice and corporate finance advice mutually exclusive?

106. As illustrated above, the provision of "corporate finance advice" and the provision of investment advice, can, in certain situations, overlap and this may occur with respect to the same client in circumstances where both the strategic and patrimonial purposes are equally important for the client. However, ESMA understands that it is possible for a firm to structure itself as a specialist corporate finance firm and fall outside of the remit of MiFID. When a firm wishes to do so, it must ensure that its documentation, internal structure, organisation, training and personnel are very clear as to what services the firm can and cannot perform.

3.7 Is the recommendation made to a person in his/her capacity as an agent for an investor or potential investor?

What does it mean to make a recommendation to a person in his capacity as agent for an investor?

107. In most cases the concept of a person acting in his/her capacity as agent for an investor or potential investor will be perfectly clear, for example where a person holds a power of attorney to act in the name of his/her spouse or child.

108. There are circumstances, however, where it will not always be clear that an agency relationship within the meaning of Article 9 of the MiFID II Delegated Regulation exists. For example, where a firm provides a recommendation to a portfolio manager, it will usually be the case that the investment firm is not giving investment advice to the portfolio manager's client but is simply providing a general recommendation, such as an investment tip. However, there may be cases where a firm such as a portfolio manager does commission advice for a client from a third party – such as from a specialist advisor on a particular subject area – and in doing so acts as an agent. In such cases, it will be important for the firms involved to be clear about the fact that the portfolio manager is acting for a particular client (or a particular group of clients) and to ensure that the firm commissioned possesses the necessary information about the clients involved.

109. In ESMA's view, the reference in Article 9 of the MiFID II Delegated Regulation to the recommendation being presented as suitable "for that person" or based on a consideration of the circumstances "of that person" should, by inference, be read as meaning for that person (or where the person in question is an agent, for the person for whom (s)he is the agent).

4. Practical cases

The cases included below are simplified examples that serve merely as an illustration. Any concrete situations remain subject to a case-by-case assessment, based on the specific real circumstances[28].

4.1 Practical case 1

Description

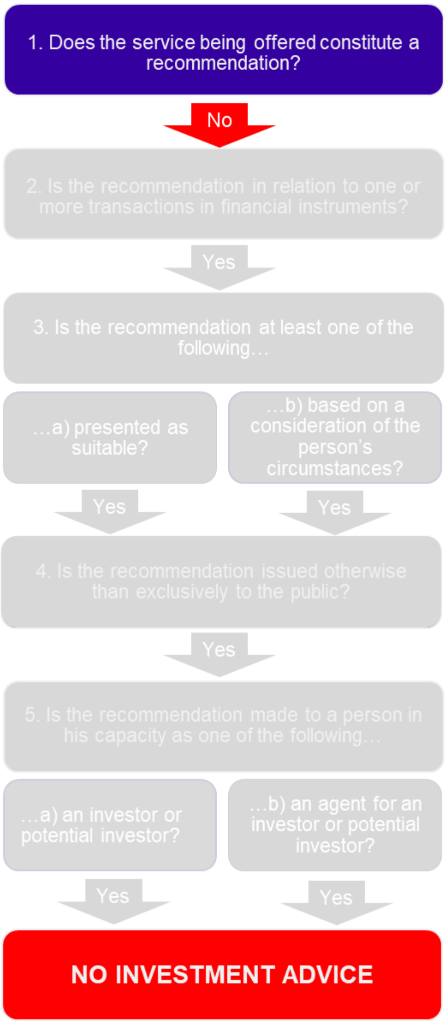
An investment firm offers the possibility to invest in just five global asset allocation UCITS funds, with different risk/return levels (very defensive, defensive, neutral, offensive, very offensive). The service is only offered online. The target audience for this service consists of investors that do not want investment advice, but who do wish to have access to tools and help in selecting and comparing the individual investments they want to invest in.

During the first step in the onboarding process, the investment firm checks whether the investors are aware of the consequences of not receiving investment advice in terms of investor protection. The investment firm also checks whether the investors understand the risks related to investing in financial instruments.

If these checks lead to a positive result, the investment firm presents the five funds, including information on the characteristics and the level of risk and return related to each fund. For each fund a PRIIPs KID is available. The ranking of the funds on the web page is neutral, there is no fund that is presented more prominently than another, and it is made clear to clients that they have to choose a fund by themselves.

On the webpage with the different funds, a simulation tool is also available. Clients are free to use this tool if they want to. The simulation tool shows a graph with the possible future performance based on different scenarios. This is based on the information in the PRIIPs KID. Clients could also fill in their planned end date and target capital and explore the effects of the different UCITS funds on their situation. This way, investors gain more insight into the possible risk/return scenarios of the funds and the effects on the simulated investment amount. The tool only presents scenarios, it doesn't favour one fund over another.

[28] There may be instances where the models/approaches adopted in practice could result in the provision of investment advice, thus requiring a proper authorisation.



Analysis

The investment firm does not give the client a recommendation regarding the UCITS funds and also in the presentation all options are presented equally. Also, the investment firm makes clear the client has to make his/her own choice. Therefore, the answer to the first key test 'Does the service being offered constitute a recommendation' is 'No', and the service does not qualify as investment advice, but as an execution service at the moment a client buys a fund.

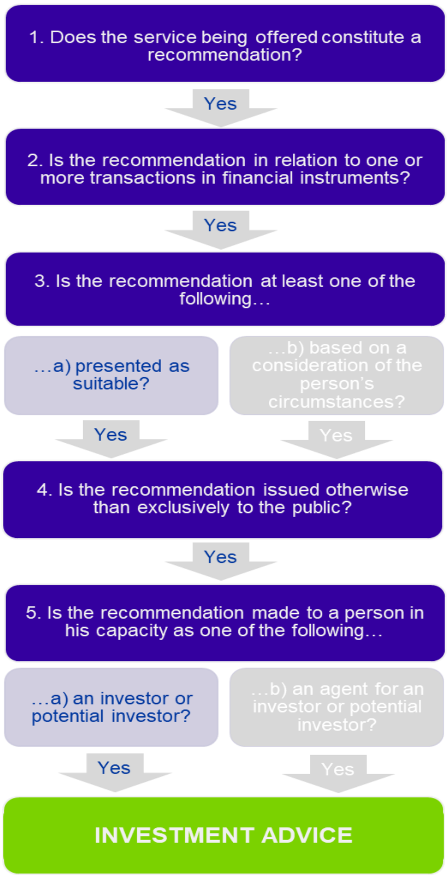
4.2 Practical case 2

Description

An investment firm offers the possibility to invest in five global asset allocation UCITS funds, with different risk/return levels (very defensive, defensive, neutral, offensive, very offensive). The service is offered online. The target audience for this service consists of investors that do not want financial advice, but who do wish to have access to tools and help in selecting and comparing the individual investments they want to invest in.

During the first step in the onboarding process, the investment firm checks whether investors are aware that they do not receive investment advice and what the consequences are of not receiving advice in terms of investor protection. The investment firm also checks whether investors understand the risks related to investing in financial instruments. If these checks lead to a positive result, the investment firm presents the five funds, including information on the characteristics and the level of risk and return related to each fund. For each fund a PRIIPs KID is available.

There is also a button that says: ‘Find out which fund is suitable for you’. This button links to a few questions about the client’s investment goal, investment horizon, risk tolerance and sustainability related preferences. When completing this questionnaire one or more funds are highlighted in the overview, with the accompanying text ‘these funds might be suitable for you’.



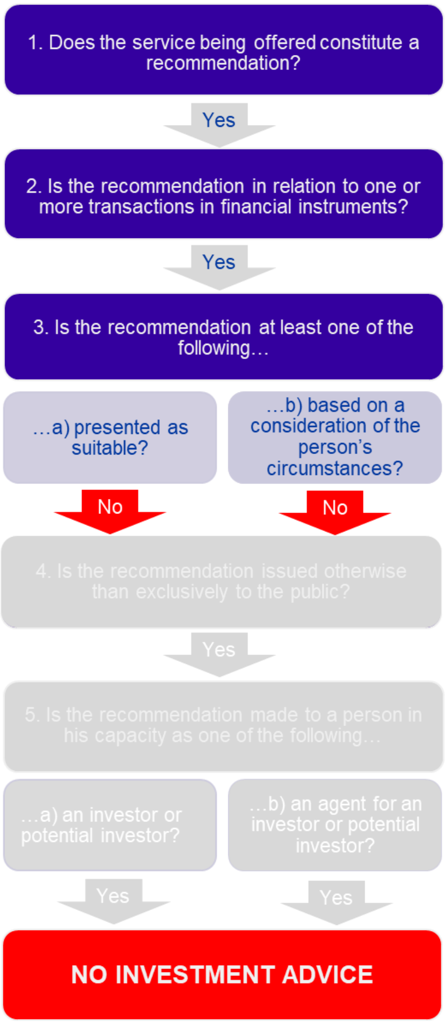
Analysis

Overall, all five key tests can be answered with 'Yes'. After using the button, the information on the funds is no longer presented in a neutral way but involves an element of opinion on behalf of the investment firm. Therefore, in such case the service offered constitutes a recommendation. This recommendation is in relation to a transaction in financial instruments (the investment fund(s)and the recommendation is both presented as suitable and based on the person's circumstances. Since the recommendation is specifically addressed to the client, the recommendation is not issued exclusively to the public. Finally, the recommendation is made to a person in his capacity as a (potential) investor. The conclusion is therefore that the service offered qualifies as investment advice.

4.3 Practical case 3

Description

Finfluencer John Doe[29] runs an Instagram channel and posts daily videos about reaching financial independence, investing and success in life. John has 120,000 followers. Every week, John holds a live Q&A event where his followers can ask him questions on all kinds of topics such as how and where to invest in next. These weekly Q&A events are attended by 2,000 participants on average.



Situation 1: the investment tips shared by John do not qualify as investment advice

John posts a video on his Instagram channel where he discusses different shares as possible interesting investments. On the share Standard EV, John explains why he is positive on the company's short term share price and expects a surge of ~20% on that day's price within a few weeks.

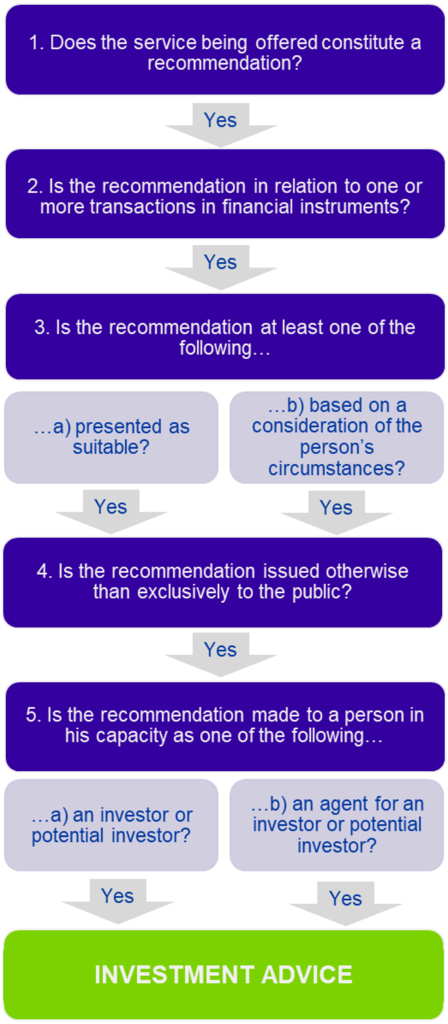
Analysis

John's investment tip on the expected price rally of Standard EV is clearly a recommendation related to a transaction in a financial instrument, so the answer to the first two key tests is 'Yes'. The recommendation is however not presented as suitable or based on the consideration of a person's circumstances, so the answer to the third key test is 'No'. The conclusion is therefore that John does not provide investment advice.[30]

[29] Fictional name used for the purpose of these examples.
[30] The recommendation John provides might qualify as an investment recommendation according to the Market Abuse Regulation, but that is outside the scope of this briefing.

Situation 2: one of the provided recommendations qualify as investment advice

In a weekly Q&A session, John starts off with reading a disclaimer to emphasize that viewers should and cannot consider the views expressed in the Q&A session as investment advice. He receives the following question from Andrea: “In one of your posts two weeks ago, you were positive on company Standard EV and predicted a rally to a price level up to $12, an increase of 20%. At the moment the price of Standard EV is down 15% since that post. Do you think I should buy more of Standard EV shares, now that I have some money readily available to invest?”



John responds to the question as follows: “Thanks for your question. For all those people who are already in Standard EV: Just be patient and hold on to your shares. Andrea, as you are a young investor, you still have some money left to invest and are able to take some risk, it makes sense to keep buying, because lower prices just mean you are buying with a discount every single time!”

Analysis

Regarding the answer to Andrea’s question, all five key tests can be answered with ‘Yes’. John provides a recommendation in relation to a transaction in a financial instrument. The recommendation is based on the personal circumstances of Andrea, presented as suitable, and specifically addressed at Andrea in her capacity as an investor. Therefore, the answer to Andrea qualifies as investment advice.[31]

The general recommendation to all people to hold the shares is aimed at the group of current investors. The recommendation is however not presented as suitable or based on the consideration of a person’s circumstances, so the answer to the third key test is ‘No’. With regard to the general recommendation, the conclusion is therefore that John does not provide investment advice.[32]

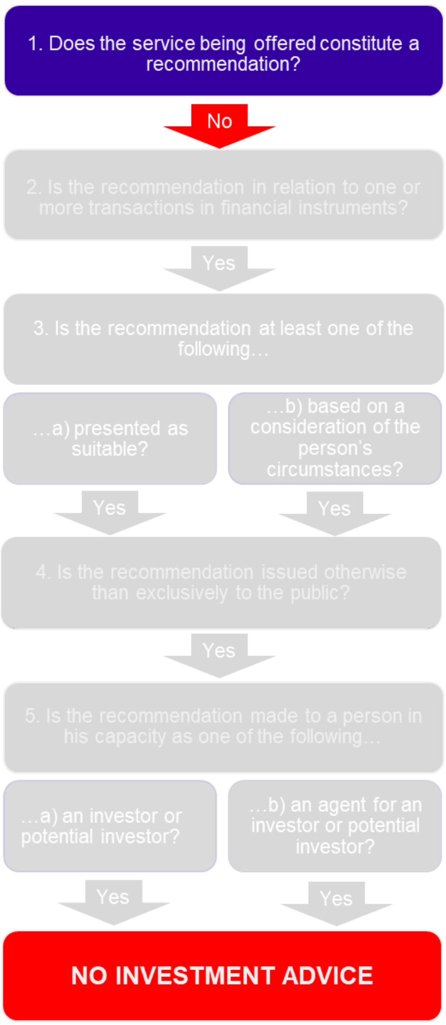
[31] In this case, it could mean that John is providing investment advice without the required authorisation, but that is outside the scope of this briefing.
[32] The recommendation John provides might qualify as an investment recommendation according to the Market Abuse Regulation, but that is outside the scope of this briefing.

4.4 Practical case 4

Description

An investment firm has hundreds of UCITS funds on offer. To help clients find the right fund for them, they offer a Fund Screener. Clients are free to use this tool if they want to. The tool enables them to filter out funds based on certain characteristics.

When the client opens the Fund Screener, all available funds are being shown in a neutral manner. For instance, in alphabetical order. Clients could choose to sort the funds in a different way, for example on the basis of the PRIIPs risk score, the average return over the last five years. Clients could also select some filters, for instance: the minimum and maximum risk score, the type of investments, the geographical focus, the manufacturer, and the currency.



By increasing the number of filters, the number of funds shown will decrease. Eventually, showing only a few or only one fund, depending on the characteristics selected. When the client, for instance, selects the following three filters: funds that invest in shares, in the tech sector, with a PRIIPS risk score of 7, only Tech Shares ETF will be shown in this case.

Analysis

The investment firm does not give the client a recommendation regarding a specific fund. It only allows and helps a client to search through hundreds of UCITS funds by letting clients filter on objective characteristics selected by the clients themselves. The investment firm does not steer in which criteria to apply. Thus, the answer to the first key test 'Does the service being offered constitute a recommendation' is 'No', and the service does not qualify as investment advice, but as an execution service.