



Date: 19 April 2010  
Ref.: CESR/10-293

## **Question & Answers**

### **Understanding the definition of advice under MiFID**



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## Executive Summary

On 14 October 2009, CESR published a consultation paper (CP) entitled “Understanding the definition of advice under MiFID” (Ref. CESR/09-665). In that CP, CESR consulted on Questions and Answers designed to clarify and illustrate situations where firms will, or will not, be considered as providing investment advice. Investment advice is an investment service under MiFID, which is why the distinction is important.

This set of Questions and Answers reflects CESR’s statement of its policy following its consultation paper. In parallel to this Q&A, CESR also publishes its Feedback Statement (Ref. CESR/10-294) responding to comments it received in response to the CP and would recommend that these documents be read in conjunction.

The main questions for consideration, when determining whether a particular service amounts to investment advice, are laid out in ‘Diagram: the five key tests for investment advice’ in the Introduction (see page 6). This diagram illustrates the five key tests that are set out in MiFID, with issues to consider in relation to each test. CESR wishes to stress that all five of these tests have to be met for a service to be considered as investment advice.

Key subjects covered in this Q&A include:

- 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 customer information.
- Issues around the form of communication, including whether the Internet is always a ‘distribution channel’, messages to multiple clients, distinguishing corporate finance and investment advice and whether these are mutually exclusive.

## II. Introduction

1. The Markets in Financial Instruments Directive (2004/39/EC), or 'MiFID', identifies investment advice as an investment service, the provision of which, on a professional basis, generally requires authorisation as an investment firm<sup>1</sup>. Together, MiFID and the MiFID Implementing Directive (2006/73/EC) 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.
2. In the light of this distinction, it is important to provide as much clarity as possible about the definition of investment advice, to help firms to ascertain whether or not the services that they provide are subject to the requirements on investment advice.
3. This document does not form part of the MiFID review. It is a Level 3 paper designed to further harmonisation in the interpretation of the EU rules on the definition of investment advice as it currently stands under MiFID

### Examining the definition of investment advice

4. According to MiFID, investment advice means the provision of personal recommendations to a client, either upon his request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments (Article 4(4)). 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 52 of the MiFID Implementing Directive). The Directive also sets out a number of other tests for firms to consider in determining whether they are providing such personal recommendations, which we examine and discuss in this paper.
5. The diagram on page 6 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 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. The following pages of this paper then use Questions and Answers to clarify and illustrate situations where firms will, or will not, be considered as meeting each of the tests and hence providing investment advice. Where the Questions and Answers describe a situation where a particular test is met, the reader should bear in mind that all four of the other tests would also have to be met for the service described to be considered as advice.

### Considering an investor's view of whether advice is being given (Test 3)

6. MiFID identifies the importance of presentation in determining whether investment advice is being given: one of the tests that the Directive sets out is whether a recommendation is *presented* as suitable, rather than whether it is *actually* suitable for the client. CESR believes that it is, therefore, important to take account of 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.

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<sup>1</sup> Some exemptions are provided in MiFID, including exemptions for the 'incidental' provision of the service (Article 2(1)(c)) and the provision of the service in such a way that it is not 'specifically remunerated' (Article 2(1)(j)). These exemptions are not examined in detail in this paper.



7. Despite the fact that MiFID requires that all information addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading, CESR recognises that a particular client's understanding of the nature of the service he is receiving will not always be accurate. For this reason, whether or not a particular client feels that he is receiving a personal recommendation will not determine, on its own, whether or not investment advice is actually being given.

### **Advice given to professional clients**

8. Many of the examples used in this paper 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 paper will still be of relevance in relation to services given to professional clients and, in particular, regarding the distinction between investment advice and corporate finance advice.

### **Information for firms that do not wish to provide investment advice**

9. If a firm wishes to verify that the service it is providing is not investment advice, it can do so by considering whether or not its service meets the five tests illustrated on the next page. A firm that does not intend to give advice can seek to avoid doing so inadvertently by making sure 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. (Firms should bear in mind that describing a service as non-advised in their documentation will not be sufficient, on its own to ensure that the services given do not amount to advice – this is reflected in the Questions and Answers in this paper.)
10. In reviewing its training, a key point for a firm to consider will be whether its customer-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 firm's 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.

### **Assumptions made in preparing this paper**

11. It is taken as given throughout the following Questions and Answers that when a firm is providing investment advice under MiFID, it will be subject to all of the Directive requirements that apply in relation to investment advice (e.g. the suitability requirements in Article 19(4) of MiFID and Article 35 of the MiFID Implementing Directive), so this point is not reiterated for examples individually. References to 'clients' or 'investors' made throughout the rest of this paper can also be read as applying to potential clients or potential investors.



**Diagram: the five key tests for investment advice**

<u>Is it investment advice?</u>	<u>Examples of issues to consider:</u>	<u>Page</u>		
<p>1. Does the service being offered constitute a recommendation?</p> <p style="text-align: center;"><b>YES</b> ↓</p>	<ul style="list-style-type: none"> <li>the difference between information and a recommendation</li> <li>whether assisting a client to filter information amounts to a recommendation</li> </ul>	7		
<p>2. Is the recommendation in relation to one or more transactions in financial instruments?</p> <p style="text-align: center;"><b>YES</b> ↓</p>	<ul style="list-style-type: none"> <li>how to distinguish generic advice and general recommendations from investment advice</li> <li>whether recommending a firm or a service can amount to investment advice</li> </ul>	9		
<p>3. Is the recommendation at least one of the following...</p> <table border="1" style="width: 100%;"> <tr> <td style="width: 50%;">...a) presented as suitable?</td> <td style="width: 50%;">...b) based on a consideration of the person's circumstances?</td> </tr> </table> <p style="text-align: center;"><b>YES</b>      <b>YES</b> ↓                      ↓</p>	...a) presented as suitable?	...b) based on a consideration of the person's circumstances?	<ul style="list-style-type: none"> <li>how a financial instrument might implicitly be presented as suitable</li> <li>the impact of disclaimers</li> <li>what it means to consider a person's circumstances</li> </ul>	11
...a) presented as suitable?	...b) based on a consideration of the person's circumstances?			
<p>4. Is the recommendation issued otherwise than exclusively through distribution channels or to the public?</p> <p style="text-align: center;"><b>YES</b> ↓</p>	<ul style="list-style-type: none"> <li>assessing recommendations delivered via the Internet</li> <li>assessing recommendations given to multiple clients at once</li> <li>distributing investment research</li> </ul>	13		
<p>5. Is the recommendation made to a person in his capacity as one of the following...</p> <table border="1" style="width: 100%;"> <tr> <td style="width: 50%;">...a) an investor or potential investor?</td> <td style="width: 50%;">...b) an agent for an investor or potential investor?</td> </tr> </table> <p style="text-align: center;"><b>YES</b>      <b>YES</b> ↓                      ↓</p>	...a) an investor or potential investor?	...b) an agent for an investor or potential investor?	<ul style="list-style-type: none"> <li>identifying investors and their agents</li> <li>the distinction between corporate finance advice and investment advice</li> </ul>	15
...a) an investor or potential investor?	...b) an agent for an investor or potential investor?			
<b><u>INVESTMENT ADVICE</u></b>				



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

#### ***What constitutes a recommendation?***

12. Under MiFID, a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or personal investor.
13. In specifying that a service will only amount to investment advice if it constitutes a 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 investment 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?***

14. A recommendation requires an element of opinion on the part of the adviser. In effect, advice involves a recommendation as to a course of action, which may be presented to be in the interest of the investor.
15. Information, on the other hand, involves statements of fact or figures. In general terms, simply giving objective information without making any comment or value judgement 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?***

16. Giving information may amount to giving a recommendation if the circumstances in which the information is provided give it the force of a recommendation. While a firm may not intend to provide a recommendation to a client, it may find that it does so if it allows the information it provides to become subjective, such that it actually leads the customer to one particular product over others.
17. For example, if a person 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 rather than the mere provision of information.
18. We can also think of situations where the wider context in which information is provided will determine whether or not advice is given. The following are some examples of objective information that might be given to a client, without amounting to a personal recommendation:
  - listings of share and unit prices;
  - company news or announcements;
  - an explanation of the terms and conditions of an investment;
  - a comparison of the benefits and risks of one investment as compared to another;
  - league tables showing the performance of investments of a particular kind against set published criteria;
  - alerts 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.

19. Taking the information in the last two bullet points above as examples we can, however, imagine the following situations where providing a client with the information could involve giving a personal recommendation:
  - a person may 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
  - a person may offer to provide information on directors' dealings on the basis that, in his opinion, were directors to buy or sell investors would do well to follow suit.
20. 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.
21. 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 3a for related Questions and Answers 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?***

22. The fact that a firm enables a client to filter the information that he receives about different financial instruments – for example, by choosing from a set of options on a website, or even following a decision-tree process with a member of staff – 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.
23. 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 he is 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 of questions and whether they infer the use of opinion or judgment by the firm;
  - 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 his particular circumstances.
24. A critical factor would be whether the process is limited to assisting the person to make his 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.
25. 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. The website may enable a client to enter information to generate a list of investment products for which they are eligible, or 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?***

26. 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.
27. If we consider 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, we can certainly envisage 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.
28. The following sections of this paper 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 opinion 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", it is possible that all the tests described in this paper might be met and the service provided would amount to investment advice.

#### **IV. Part 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?***

29. MIFID 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.
30. 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.
31. Subject to also fulfilling the other four tests described in this paper, a recommendation not to buy a financial instrument can also constitute the provision of a personal recommendation for the purposes of MiFID.
32. According to MIFID, the definition of recommendations does not necessarily involve the adviser 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.<sup>2</sup>

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<sup>2</sup> 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 29(1)(a) of the Implementing Directive).



33. In contrast, generic advice about a type of financial instrument and general recommendations are not investment advice under the Directive.

***What is generic advice?***

34. Advice that does not relate 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).

35. See Recital 81 of the MiFID Implementing Directive for further information of the definition of generic advice and the rules applying when generic advice is being provided.

***What is a general recommendation?***

36. A general recommendation is a recommendation about a transaction in a financial instrument or a type of financial instrument which is intended for distribution channels or the public (see Recital 83 of the MiFID Implementing Directive). General recommendations include investment research and financial analysis, and are an ancillary service under Section B(5) of Annex I of MiFID.

37. 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 an instrument is issued exclusively through distribution channels or to the public can be found in Section 4.

38. For more details regarding the definition of investment research, financial analysis or other forms of general recommendation relating to transactions in financial instruments, reference should be made to Article 24 of the MiFID Implementing Directive.

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

39. 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 stop the service being offered from being advice.

40. 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 (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 customer?***

41. 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, advice about whether it would be best for a client to invest directly in shares or through a collective investment scheme (CIS) could be given without investment advice being given.

42. Advice looking only at 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 this would be regarded as investment advice.

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

43. Advice to become the client of a particular investment 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.
44. Recital 60 of the MiFID Implementing Directive 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 19(4) of MiFID. 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).

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

***Can a financial instrument be implicitly presented as suitable?***

45. 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").
46. As noted earlier, if a person 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.
47. For example, an investment firm might contact clients that 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 such a context, we could imagine an implicit recommendation being given through a form of words like "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?***

48. Yes, a financial instrument can be presented as suitable 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 financial situation and his investment objectives 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 19(4) of MiFID and Article 35 of the MiFID Implementing Directive) it would not stop the recommendation from being presented as suitable or constituting investment advice.

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



49. It is important that firms provide clients with appropriate information in a comprehensible form about their services (see Article 19(3) of the MiFID Implementing Directive) and CESR 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.
50. 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.
51. 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 (see paragraphs 9 and 10), 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.

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

### ***What do we mean when we talk about a person's circumstances?***

52. Information about a person's circumstances could include both factual information (e.g. their address, income or marital status) and more subjective information about their wants and needs (e.g. their overall risk appetite, short- and long-term investment objectives or their 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?***

53. 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 of the information it collects; and
  - the way that it presents its questions.
54. For example, if a firm has collected information from a client on his investment objectives or financial situation, if he returns 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 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.
55. 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, he could not reasonably assume that the information was being accessed and made use of when he makes use of the execution only service provided by the firm through its online channel.
56. 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. Despite the lack of such confidential information, the sales and trading staff of the firm will be considered to provide 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?***

57. No, not 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). In this case, any recommendation made will be treated as being based on a consideration of the person's circumstances.
58. 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.
59. In the same way as was described earlier (see paragraphs 49 to 51) 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 or her circumstances. If the other tests are also met, in such a situation, the service will amount to investment advice.

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

***What does it mean to make a recommendation exclusively through distribution channels or to the public?***

60. A recommendation concerning financial instruments made exclusively through newspapers, magazines or in any other publication addressed to the public (including a public webpage on the Internet), or during a television or a radio programme should be regarded as a recommendation made through a distribution channel or to the public. The same would apply to marketing campaigns, such as those made through posters or folders that can be seen in places accessible to the public (e.g. on public transport or at a firm's agencies).
61. Newspapers, magazines or any other publication addressed to the public, as well as television or radio are examples of distribution channels. A distribution channel is a channel through which information is, or is likely to become, publicly available – i.e. a large number of persons have access to it (see Article 1(7) of Commission Directive 2003/125/EC, to which the MiFID Implementing Directive refers).
62. According to Article 52 of the MiFID Implementing Directive, a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.

***Does publishing a list of "best products" or "funds of the month" on a public page of a website or in a newspaper count as investment advice?***

63. 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, 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. Furthermore, if the information is provided on a public page of a website or in a newspaper, for example, this can also be considered as a distribution channel (within the meaning of Article 2(1) of the MiFID Implementing Directive).

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

***Would a medium such as the Internet always be seen as a distribution channel?***

65. According to Article 52 of the MiFID Implementing Directive, "a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public". CESR is of the opinion that this exemption only applies when the recommendation issued through distribution channels or to the public *is addressed to the public in general*.
66. When a recommendation is addressed to a particular person and is presented as suitable for that person or based on a consideration of the circumstances of that person, CESR believes that it does not fulfil the conditions to benefit from the exemption under Article 52 of the MiFID Implementing Directive. This includes situations where a webpage, or indeed e-mail correspondence, is used to provide personalised information, rather than to address information to the public in general.
67. By way of example, Section 1 of this paper also describes how providing a model portfolio to client, such as through the Internet, could amount to investment advice.

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

68. 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; by correspondence (including email); using a website; or through the provision of an interactive software system.
69. 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 would it could be understood by the client are important elements when determining if a message amounts to investment advice.



70. In the sorts of situations described above, messages addressed to clients would be unlikely to be considered as issued exclusively through distribution channels or to the public (within the meaning of Article 52 of the MiFID Implementing Directive).

***Does distributing investment research amount to investment advice?***

71. Investment research under MiFID 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 distribution channels or for the public. 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.

72. Sending research to a client may not commonly amount to giving investment advice but, as we illustrated in Section 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.

**VIII. Part 5a: Is the recommendation made to a person in his capacity as an investor or potential investor?**

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

73. Article 52 of the implementing directive indicates that a personal recommendation may be provided either to a person acting in his capacity as an investor or potential investor, or to a person acting in his 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.

74. The concept of a person acting in his capacity as an investor (or potential investor) will almost always be perfectly clear, both to the investment firm and to the client. Where an investment firm makes a recommendation to a person to buy or sell 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 capacity as an investor.

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

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

76. 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 does not require authorisation. Unlike investment 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 19 of MiFID. This includes the general requirement to act honestly, fairly and professionally in accordance with the best interests of the client.



77. The service often called “corporate finance advice” is described in Section B(3) of Annex I of MiFID 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?***

78. 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).

79. It is important to consider that investment advice will be provided only where a recommendation is made to a person in his capacity as an investor or potential investor (or in his 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”.

80. CESR acknowledges that beyond these two conclusions that result clearly from the provisions of MiFID, 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, CESR recommends that firms consider the objective pursued by the client when seeking advice from a firm.

81. Where the client’s primary purpose for seeking advice is in order 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. Conversely, where the client’s primary purpose for requesting the advice is for an industrial, strategic or entrepreneurial purpose 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.

82. In situations where it is impossible to identify the primary purpose because both a patrimonial and a strategic/industrial/entrepreneurial purpose are present and neither purpose outweighs the other in importance, CESR 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 provided that this activity is regulated and/or the provision of the advice is not remunerated, in accordance with Articles 2 1(c) and (j) of Level 1 MiFID.

83. 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.

84. 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. That is, why, where such clients seek advice in this context CESR considers it to be corporate finance advice.

85. 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 client's 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 his request for advice on whether and/or under what conditions to sell his shares is likely to primarily involve a future decision to continue or not to continue to pursue his 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 shares is cash only and does not include securities. 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 shares and in this case the purpose of the decision is primarily to generate a financial return, and therefore the client would be the recipient of investment advice.

86. CESR 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?***

87. 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, CESR 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 has to ensure that its documentation, internal structure, organisation, training and personnel are very clear as to what services the firm can and cannot perform.

**IX. Part 5b: Is the recommendation made to a person in his 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?***

88. In most cases the concept of a person acting in his 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 or her spouse or child.
89. There are circumstances, however, where it will not always be clear that an agency relationship within the meaning of Article 52 of the MiFID Implementing Directive exists. For example, where an investment 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 adviser 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 investment firm commissioned possesses the necessary information about the clients involved.
90. In CESR's view, the reference in Article 52 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 he is the agent)