

AMF position – recommendation 2008-23

Questions and answers on the provision of an investment service of investment advice

Reference texts: article D. 321-1 of the Monetary and Financial Code and articles 314-43 to 314-47 of the AMF General Regulation

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The doctrine items presented in this document come from the 2008 analysis of specific reports sent by investment services providers to the AMF concerning the provision of investment advice services, published on 9 December 2009.

Except where recommendations are specifically identified, the doctrine items featuring in this document are positions.

1 Scope of the investment advice service

1.1 What is an investment service of investment advice?

In accordance with article D. 321-1 of the Monetary and Financial Code and in application of MiFID,¹ an investment service of investment advice is defined as the provision of personalised recommendations to a client, either at his request or at the initiative of the investment services provider, on one or more transactions in financial instruments.

In application of article 314-43 of the AMF General Regulation, “**recommendation**” means any recommendation on a transaction covered by one of the following categories:

- Purchasing, selling, subscribing, exchanging, redeeming or holding a particular financial instrument;
- Exercising or not exercising a right attaching to a particular financial instrument to buy, sell, subscribe, exchange or redeem a financial instrument.

The recommendation may be explicit or may result from an opinion or a value judgement on the timeliness of purchasing, subscribing or selling a particular financial instrument or exercising the rights attaching thereto.

A recommendation is not the simple provision of information at the request of the client.

If the investment services provider does not guide the client towards an investment decision and therefore does not issue a recommendation, then it is not providing investment advice.

A “**personalised**” recommendation (article 314-43 of the AMF General Regulation) means a recommendation:

- made to a particular person in his capacity as an investor or a potential investor, or in his capacity as a representative of an investor or a potential investor;
- presented as being adapted for that person or based on an examination of the specific circumstances of that person.

These clarifications are intended to distinguish a personalised recommendation, which is investment advice and may only be dispensed after verification that it is adapted for the client, from a general recommendation made by all and any means and which is addressed to the public or to a broader group or category of clients or potential clients.

Under no circumstances do these clarifications authorise an investment services provider to propose to a given client that he purchases, subscribes or exchanges a financial instrument based solely on the intrinsic qualities of the product, without verifying that it is adapted to the investment objectives and to the client’s financial situation and knowledge.

Such behaviour would be contrary to the more general requirement stipulated in article L. 533-11 of the Monetary and Financial Code for investment services provider to act in an honest, fair and professional manner which is conducive to the clients’ interests.

Furthermore, if an investment services provider who does not have appropriate procedures and directives does not wish to provide advice services, it runs the risk that its operational staff may implicitly or explicitly make recommendations that could legitimately be considered as personalised by the clients to whom they are directed.

1.2 Practical examples of situations which are not personalised recommendations

¹ Article 4, paragraph 1, point 4) of the Markets in Financial Instruments Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004.

Advice given to an issuer, most notably in the framework of issues of securities or mergers and acquisitions, is not a personalised recommendation constituting investment advice, as the issuer is not an “investor” as described in article 19 in Section 2 of Chapter II of MiFID.

In application of the final paragraph of article 314-43 of the AMF General Regulation, general recommendations on financial instruments disseminated through distribution channels or addressed to the public are not personalised recommendations. A “distribution channel” means any method of dissemination whereby information is, or is likely to be, made available to the public due to the large number of people who have access to it. This category includes general recommendations disseminated impersonally in a journal, a magazine or any other publication destined for the public at large (including over the internet) or as part of a television or radio programme (Recital 79 of the MiFID Implementing Directive).

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

- informing the client about how to complete a form;
- passing on information published by companies or announcements;
- restricting oneself to explaining the risks and advantages of one or more given financial instruments, and
- producing performance ranking tables of financial instruments for comparison with published reference indicators.

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

When, at the client’s request, an investment services provider provides the client with the result of investment research, a financial analysis or any other form of general recommendation about transactions in financial instruments, this does not constitute an investment advice service. However, it would be different if the general recommendation were presented as being adapted for the client.

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

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

However, if an investment services provider gives a client advice on a type of financial instrument that it presents as being adapted for the client or as being based on an examination of his personal situation, for example if it recommends that the client invests in bonds rather than stocks in order to obtain regular income, and it turns out that this advice is neither adapted for the client nor based on an examination of his personal situation, the firm may be held responsible under the provisions of articles L. 533-11 and L. 533-12 of the Monetary and Financial Code:

- obligation to act in an honest, fair and professional manner which is conducive to the clients' interests; and
- obligation to provide clients with information which is accurate, clear and not misleading.

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

Asset management advice is a generic, non-regulated activity without any legal definition or existence, which for professionals working under its banner covers a dual expertise serving individuals and legal entities: asset strategy advice, and advice in investment, financial and property investments.

Investment advice is an investment service defined by the Monetary and Financial Code and the AMF General Regulation; one of its components which distinguish it from asset management advice is its scope, namely that investment advice must necessarily relate to particular financial instruments.

Therefore, an asset management adviser who only recommends an asset strategy or an allocation of assets to his clients without recommending transactions in particular financial instruments would not be considered as providing an investment advice service.

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

The sending of bulk emails by securities services to holders of securities to inform them of financial transactions affecting these securities does not constitute a personalised recommendation, provided that this message is not accompanied by any solicitation, recommendation, opinion, or value judgement on the timeliness of the transaction.

However, when the message contains a recommendation that meets the conditions defined in 1.1 above, the sending of bulk mail constitutes investment advice in the same way as that given in person, by telephone or by letter. In this case, the sending of bulk mail entails the requirement for the investment services provider to verify beforehand whether the product or service proposed is adapted to the investment objectives, financial situation, experience and knowledge of the client.

In practice, this type of message sent in bulk can be addressed to clients for whom the service or the product has been considered as adapted further to a test carried out beforehand, either when the investment services provider entered into a relationship with the client or at any moment prior to the sending of the mail shot. These requirements can be satisfied by “targeting” recipients according to the other investments they have already made, for example.

Recommendation

It is recommended that the message should specify that the client is invited to contact his adviser in order to ensure that the information on which the test was based has not changed before sending the message.

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

The fact that clients are all “professionals” within the meaning of the MiFID directives, especially legal entities, does not disqualify the advice as personalised investment advice. In other words, individuals, i.e. natural persons categorised as “retail” clients, are not the only ones that can benefit from an investment advice service provision.

1.7 Does the absence of specific remuneration disqualify an investment advice service?

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

1.8 Can the investment advice service only be provided at the initiative of the client?

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

1.9 Can the way products are structured lead service providers to provide an investment advice service?

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

1.10 Does the wording of documents sent to clients qualify an investment advice service?

The insertion into documents sent to clients, including commercial documents, of specific wording indicating that advice will not be dispensed to them and that the appropriateness of the product proposed to them has not been verified is not sufficient to conclude that the advice service is not provided. Such a service is provided if a personalised recommendation is made by the investment services provider, for example in a telephone conversation with its client.

1.11 Does the internet channel disqualify the provision of an investment advice service?

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

1.12 Which advised transactions in financial instruments are likely to constitute investment advice?

The categories of transactions likely to be covered by the definition of a personal recommendation in application of article 314-43 of the AMF General Regulation are, aside from those mentioned in the previous paragraph, the exchange, redeeming, underwriting or holding of financial instruments. The term “hold” should be understood in the sense of “keep”, so that giving a client a personalised recommendation to keep a financial instrument constitutes an investment advice service.

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

This is the situation whereby investment services provider 1 (producer) sells investment services provider 2 (distributor) a financial instrument destined to be marketed by the latter to its own clients. In this situation investment services provider 1 producing the financial instrument sold by investment services provider 2 is not in a direct business relationship with the end clients and is not deemed to have provided them with an advice service, even if it has drafted some of the materials used to market the said financial instrument.

1.14 Can the discussions that occur between the investment services provider and the client in the phase prior to the signing of a portfolio management mandate be analysed as the provision of an investment advice service?

Recital 60 of the level 2 directive stipulates that “A recommendation or request made, or advice given, by a portfolio manager to a client to the effect that the client should give or alter a mandate to the portfolio manager that defines the limits of the portfolio manager's discretion should be considered a recommendation within the meaning of Article 19(4) of Directive 2004/39/EC”. As indicated by the CESR², “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).”

² CESR document, Questions & Answers, Understanding the definition of advice under MiFID (19 April 2010, Ref.: c/10-293).

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

The performance of a transaction is not a criterion used in the definition of an advice service pursuant to article D 321-1 of the Monetary and Financial Code; it should therefore be considered that even when it is not followed by a transaction, a personalised recommendation within the meaning of article 314-43 of the AMF General Regulation constitutes an investment advice service. It is reminded that the advice service may consist in recommending that a client keeps the financial instruments that he holds (see question 1.12).

2 Obligations of the investment services provider in the provision of an investment advice service

2.1 Is it possible for an investment services provider to provide an order reception and transmission service or an execution-only service on behalf of third parties relating to a transaction on which it has not given advice?³

The provision to a client by an investment services provider of an order reception and transmission service or an execution-only service on behalf of third parties relating to a transaction on which it has not given advice due to the transaction's unsuitability to its client's profile is always possible, provided that the client is first warned if the transaction is deemed unsuited to his knowledge and experience (paragraph 2 of II of article L. 533-13 of the Monetary and Financial Code).

2.2 Must the investment services provider verify that the information provided by the client is reliable?

The texts do not stipulate any requirement for the investment services provider to verify the information supplied by the client. However, this investment services provider may be considered to have acted unprofessionally if its appraisal of the client's profile were based on clearly inaccurate or inherently inconsistent data or data that is inconsistent with other data provided in another context.

Certain conduct of business rules designed to limit the occurrence of disputes may be listed, such as that consisting in collecting information from the client and then obtaining a confirmation from him of the profile information collected by the investment services provider.

2.3 Can the investment services provider charge fees to a third party in relation to the provision of an investment advice service to its client?

In accordance with article 314-76 of the AMF General Regulation, the investment services provider can receive from a third party a remuneration, a commission or a non-monetary benefit in relation to an investment advice service provision if:

- 1) the client is clearly informed of the existence, nature and amount of the remuneration, commission or benefit or, when the amount cannot be established, the method used to calculate it;
- 2) the purpose of the remuneration, commission or non-monetary benefit is to improve the quality of the service provided to the client and does not endanger compliance with the requirement for the investment services provider to act in a manner which is conducive to the client's interests.

As regards the latter condition, situations in which the level of remuneration paid on a given product is particularly high compared with other products in the range or with market practice should be documented in detail, especially when recommendations to purchase such products are particularly frequent.

³ This question and its answer are currently being re-examined.

Additionally, the remuneration policy of persons involved in the provision of investment advice services must be designed in such a way that they are not encouraged to make biased personalised recommendations.

2.4 Must the investment services provider report to its client on the provision of an investment advice service?

In accordance with article L. 533-15 of the Monetary and Financial Code, investment services providers are required to send their clients a report on any service provided, and this naturally includes investment advice.