

MiFID II

Investment advice and the use of distribution channels

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Key Points

- The definition of "personal recommendation" is being amended to remove the exception that applies where the advice is issued exclusively through "distribution channels".
- As a result, only recommendations made exclusively to the public at large will come outside the definition of "personal recommendation" and thus fall outside the scope of the rules relating to personal recommendations (such as the suitability rule).

Background

The concept of "investment advice" is currently defined in Article 4(1) of the MiFID I Directive as follows:

"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 52 of the MiFID Implementing Directive expands on this definition:

"For the purposes of the definition of 'investment advice' in Article 4(1)(4) of Directive 2004/39/EC, 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 potential investor.

That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:

- to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;*
- to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.*

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public."

In connection with these concepts:

- a "distribution channel" means a channel through which information is, or is likely to become, publicly available;
- "likely to become publicly available information" means information to which a large number of persons have access; and
- Article 79 of the MiFID Implementing Directive contains an exclusion which means that advice about financial instruments in a newspaper, journal, magazine, publication, internet communication or radio or television broadcast do not amount to a personal recommendation for the purposes of MiFID.

Distribution channels

ESMA was asked to consider whether this definition should be amended in order to achieve the broadest application of the MiFID II investor protection rules. In particular, the concern appears to have been that some recommendations that were available to a large number of persons via distribution channels (e.g. email mailing lists or social media) but were not available to the public at large were being excluded from the definition of a personal recommendation.

The ESMA Technical Advice recommended that the words "through distribution channels or" should be removed from the Article 52 definition of investment advice.¹ This approach is confirmed by the amended definition of investment advice given at Article 9 of the MiFID II Delegated Regulation.²

As a result, a recommendation will only not amount to a personal recommendation if it is made exclusively to the public. Recommendations made to a large number of

¹ ESMA, Final Report: Technical Advice to the Commission on MiFID II and MiFIR, 19 December 2014 (ESMA/2014/1569) (the "**Technical Advice**"), Chapter 2.2.

² Article 9 of the Delegated Regulation 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 (the "**MiFID II Delegated Regulation**").

people but not to the public at large will now amount to personal recommendations. Recital 14 of the MiFID II Delegated Regulation helpfully clarifies that even if the recommendation is issued to a specific person through a distribution channel such as email correspondence, this could still amount to a personal recommendation.

This will mean that firms who provide advice to a large number of clients simultaneously (e.g. through exclusive newsletters) will have to comply with the rules relating to personal recommendations – including ensuring that the content of the advice is suitable for the clients receiving it.

The exemption in Article 79 of the MiFID Implementing Directive for advice about financial instruments in a newspaper, journal, magazine, publication, internet communication or radio or television broadcast will continue to apply and will not be affected by the change.

In its Technical Advice, ESMA noted that the area of advice through internet based channels may certainly deserve attention in the near future (through guidelines or other "Level 3" work).

Timescales for implementation

The MiFID II Directive and the Markets in Financial Instruments Regulation ("**MiFIR**") came into force on 3 July 2014, and most of their provisions will come into effect in member states from 3 January 2018. Member states have until 3 July 2017 to transpose the MiFID II Directive into national law.

The relevant sections in the MiFID Implementing Directive will be replaced by provisions in the MiFID II Delegated Regulation which will become effective by 3 January 2018. The MiFID II Delegated Regulation will have direct effect and the member states will not need to implement these changes into national law.

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