Financial Conduct Authority

Finalised Guidance

FG15/1: Retail investment advice:

Clarifying the boundaries and exploring the barriers to market development

January 2015

Contents

Terminology used in this paper

Appropriateness	The requirement on a firm in COBS 10 to assess the customer's knowledge and experience in the relevant investment field to determine whether they can proceed with a purchase of a complex MiFID product.
Execution-only[1]	A service consisting of the execution and / or reception and transmission of client orders relating to particular financial instruments at the client's initiative. The firm does not give any advice on investments or assess appropriateness.
Focused advice	Advice focused, at the request of the customer, on the provision of personal recommendations relating to a specific need, designated investment, or certain assets[2].
Generic advice	Advice or information that does not relate to a particular investment or does not otherwise meet one of the characteristics of regulated advice.
Limited advice	A term used to describe focused advice
Model investment portfolio	A service which provides access to a pre-constructed collection of designated investments that meet a specific risk profile sometimes offered with a periodic rebalancing of investments to maintain a consistent asset allocation.
Personal recommendation[3]	A recommendation relating to taking certain steps in respect of a particular investment, made to a person in their capacity as an investor or potential investor (or their agent), which is presented as suitable based on a consideration of the person's circumstances.
Regulated advice	Advice relating to a particular investment given to a person in their capacity as an investor or potential investor (or their agent) and relates to the merits of them buying, selling, subscribing for, or underwriting (or exercising rights to acquire, dispose of, or underwrite) the investment.

[1] The FCA Glossary provides a technical description of execution-only sales. For the purposes of this paper we have summarised the Glossary definition.
[2] Simplified advice and focused advice are similar in that the advice process is focused on one or more specific needs. The key difference between focused and simplified advice is that the former involves the client stipulating the boundaries of the service they wish to receive, whereas with simplified advice the firm is setting out the boundaries of the service it provides.
[3] The FCA Glossary provides a technical description of a personal recommendation. For the purposes of this paper we have summarised the Glossary definition.

Simplified advice	Advice that is limited to one or more of a customer’s specific needs and does not involve analysis of the customer’s circumstances that are not directly relevant to those needs.
Suitability	The test in COBS 9 that a firm must apply before making a personal recommendation in relation to a designated investment to a customer. The test also applies to a firm that manages investments.

Executive summary

1.1 During 2013, we investigated the extent to which there is a difference between our expectations of firms and firms' understanding of what is required of them – what we termed the 'expectations gap'. This 'expectations gap' project considered how any difference in understanding might affect the availability of products and services offered to customers and the extent to which this might be affected by a lack of clarity around our rules, their implementation and their supervision. In particular, does this 'expectations gap' mean that firms are shying away from providing products or services that would benefit customers for fear of falling foul of the rules?

1.2 The project identified three main areas for additional work:

- Clarifying the advice boundaries (the subject of this paper).
- How we might give firms more confidence to provide shorter, more useful disclosures to customers about their products.
- How we provide guidance to the industry and how this supports confidence and innovation in products and services.

1.3 The main focus of this paper is on what is, and what is not a personal recommendation in relation to retail investments[4], and what scope there is for firms to provide a range of services in relation to those products. The paper covers the following issues:

- Clarifying the current regulatory landscape on personal recommendations in relation to retail investments and, in response to requests from the industry, bringing together in one place the existing guidance that is available to firms from the FCA (particularly on simplified advice) and from the Committee of European Securities Regulators (CESR) and the European Securities and Markets Authority (ESMA).
- We provide detailed example scenarios and in each case offer a view on whether we think the example is regulated advice or not.

1.4 We believe that a well-functioning retail investment market needs different delivery mechanisms to be fully effective for a broad range of potential investors. There are benefits to well-designed, low-cost methods of meeting customers' straightforward needs – the challenge is to ensure that such methods deliver good outcomes for customers in a way that is viable for firms. We know that firms want greater clarity about how they can help customers to make informed decisions without stepping over the boundary into providing a personal recommendation.

1.5 We published two pieces of work – a report on thematic work[5] and the results of consumer research [6]– alongside our consultation paper. We launched Project Innovate, which is an FCA initiative designed to support new and established businesses across the financial sector to bring innovative ideas that are in the customer's interests into the market. More information on Project Innovate is set out in a separate publication which is available via our website.

[4] This paper does refer to products other than retail investment products

[5] The full version of the thematic report has been published. *Developments in the distribution of retail investments: Purchasing investments without a personal recommendation or with simplified advice* http://www.fca.org.uk/news/tr14-10-developments-in-the-distribution-of-retail-investments

[6] http://www.fca.org.uk/your-fca/documents/research/the-motivations-needs-and-drivers-of-non-advised-investors

1.6 We announced in our thematic review of annuity firms' sales practices[7] our intention to consult on replacing the Association of British Insurers (ABI) Code on Retirement Choices with our own rules. We stated that "this will involve considering not only which aspects of the ABI code should be incorporated into new FCA rules, but also where additional changes might be appropriate to extend our regulations in order to help consumers understand their options at retirement and enable them to shop around for the best retirement option for them".

1.7 We will consult on proposals for replacing the ABI code in due course but in the meantime, to help firms understand their obligations in this area we would draw their attention to example C in Section 4 of this paper. This example sets out a way in which a firm can help a consumer think about the product, including retirement income products, they are about to buy based on the consumer's circumstances.

[7] http://www.fca.org.uk/news/tr14-20-annuities-sales-practice

2 Introduction

Background

2.1 In the course of the expectations gap project, we held a number of meetings with firms, trade associations and the Statutory Panels, gathering insights and evidence of potential problems. Overall, there was a general feeling that there were areas where greater clarity would help deliver good outcomes for customers, and we found a small number of examples of firms being reticent to bring products to market. Our thematic work also found an overly cautious approach to providing information that might help customers avoid poor outcomes.

2.2 The project identified three broad issues. The first, which is the subject of this paper, was about what is, and what is not a personal recommendation in relation to retail investments. There appeared to be clarity about the extremes – some services clearly involved giving a personal recommendation and some clearly did not. However, some firms were unsure about exactly where the boundary sat between a service that involves giving a personal recommendation and one that does not. There were also suggestions that there was a lack of clarity about our expectations for services that do not involve providing a full consideration of all of a customer's needs, what is commonly referred to as 'focused advice' or 'simplified advice'. To help firms and customers we have developed a simple table on page 22.

2.3 The second area for more work was about providing information about financial services to customers. Firms' communications often fail to provide customers with the information they need in an accessible and understandable format. We are serious about improving the effectiveness of the information consumers receive about the financial products and services they are considering buying or already have. For this reason, we are inviting firms to work with us as part of Project Innovate to test their proposals for communicating more effectively with customers. More information about Project Innovate is available on our website. We will also publish a discussion paper in 2015 which will look at ways and opportunities for firms to communicate information to consumers more effectively.

2.4 The third issue was how we provide guidance to the industry and how this supports confidence and innovation in products and services. In addressing this issue, we launched Project Innovate, which will help both start-ups and established businesses to bring innovative ideas into financial services markets. The objective of Project Innovate is to foster innovation that can genuinely improve the services and products offered to consumers.

2.5 This paper represents the first output from these strands of work aimed to support firms in understanding what is, and what is not, a personal recommendation. This paper will be an important element in providing clarity to our stakeholders and, in so doing, improving industry understanding of the issues and limitations in this area. We intend this paper to be the definitive source of information on the FCA's view on the boundaries of advice for retail investment products and it will take precedence over any previous non-handbook guidance which deals with the same material other than the Perimeter Guidance Manual[8].

Recent market developments

2.6 The development of technology over the past few years has allowed firms to introduce more innovative solutions for helping customers by providing services through the internet, some of which involve giving personal recommendations and some which do not. Firms are also developing mobile applications that allow customers to invest or trade via their mobile devices, and features from social media have started to make their way into firms' distribution models. We have seen a number of web-based tools, designed to aid decision-making and steer the customer to consider their investment options and solutions without necessarily providing a personal recommendation. These include tools that aid consumers in their budgeting and general financial planning (generic non-regulated advice) and allow customers to input details of their investments that are held in different forms and at different firms. These tools allow investors to obtain a 'portfolio' view of their investments.

2.7 Following the introduction of the Retail Distribution Review[9] (RDR) rules at the end of 2012, concerns have been expressed about the availability and accessibility of personal recommendations to some customers. This is something we monitored in 2014 through the Post-Implementation Review. As part of this, we conducted a large scale piece of quantitative customer research[10], looking at customers' interactions with the retail investment market before and after the introduction of the RDR[11].

2.8 However, concerns about access to personal recommendations and retail investment products[12] have led to greater interest among firms to develop processes that will deliver products and services more quickly and cheaply to people who have straightforward investment needs.

2.9 For some time we (and our predecessor, the Financial Services Authority) have set out our view that a well-functioning retail investment market needs different delivery mechanisms in order to be fully effective for a broad range of potential investors. We

[8] This guidance is issued under section 139A of the Act (Guidance). It represents the FCA's views and does not bind the courts (see PERG 1.3.1G).

[9] The RDR came in on 31 December 2012 and made significant changes to the market for retail investment products. The reforms required advisers to be remunerated by their customers (rather than being paid by commission from product providers); improved clarity for customers about the nature of the advice on offer; and, enhanced the professional standards of investment advisers.

[10] Over 4,000 respondents with more than £5,000 of investable assets took part in this research, which will be published as part of the Post-Implementation Review.

[11] http://www.fca.org.uk/static/documents/research/non-advised-investors-research-paper.pdf

[12] FG12/15 paragraphs 2.3 - 2.5 set out our definition on what constitutes a retail investment product. Also described in our Handbook Glossary.

have recognised that there could be benefits from well-designed, low-cost methods of meeting customers' straightforward needs, and we encourage their development. The challenge, as always, is to ensure that such methods will deliver good outcomes for those customers in a way that is also commercially viable for those who supply the products and services.

2.10 We have therefore been discussing with our stakeholders the options for low-cost, simpler ways of recommending retail investment products, particularly for customers with relatively modest amounts to invest and relatively straightforward investment needs. It is clear that there has been some reluctance from firms to develop these models.

2.11 We are also aware that firms offering retail investments without personal recommendations want greater clarity on how they can support customers in making informed decisions – increasingly via technology-rich solutions – without stepping over the boundary into providing a personal recommendation.

2.12 In April 2014 we held a roundtable discussion with around 30 representatives from trade bodies, consumer groups and a number of firms. The attendees discussed a range of issues such as the needs and objectives of customers in this market, the barriers to developing simplified sales models, and the boundary between a service that involves giving a personal recommendation and one that does not. We continued the dialogue with stakeholders throughout the consultation period.

2.13 The feedback raised some interesting questions around the potential barriers to providing simplified or automated services, many of which resonated with other work in this area. We address these points in this publication.

2.14 Finally, it is important to note the close link between outcomes from this workstream and the retirement income guidance guarantee announced in the recent budget. In our recent Policy Statement[13] on our proposals to support the introduction of the guidance guarantee, we noted that this Finalised Guidance would be relevant to providers to help them understand what they can do through guidance to support customer decision-making on pensions and retirement.

Related work

2.15 To better understand the development of this market, we have also undertaken two other linked pieces of work in this area:

- Thematic discovery[14] work examining the new distribution models firms are using to sell retail investment products to customers within the post-RDR retail investment market. We wanted to take a closer look at the developments in this evolving market, assess how well services where customers purchase investments without a personal recommendation and services providing simplified advice are supporting good

[13] http://www.fca.org.uk/your-fca/documents/policy-statements/ps14-17
[14] http://www.fca.org.uk/news/tr14-10-developments-in-the-distribution-of-retail-investments

customer outcomes. We also wanted to investigate how well the existing regulatory framework is supporting firms.

- Customer research to help us understand the customer experience of purchasing retail investments without personal recommendations. Our research also explored customers' motivations, understanding, and the reasons why they have chosen not to seek a recommendation[15].

[15] http://www.fca.org.uk/static/documents/research/non-advised-investors-research-paper.pdf

3 Existing regulatory regime and guidance

3.1 From our work with firms in 2013 and recent stakeholder events, we gained a greater understanding of what firms think we expect of them. It is clear that there remains some confusion about the existing regime for the sale of retail investment products. In recent years, guidance has been issued in this area by the Financial Services Authority (to explain how simplified advice could operate), the European Securities and Markets Authority (ESMA) and its predecessor, the Committee of European Securities Regulators (CESR), providing guidance on the MiFID definition of 'investment advice'.

3.2 One output from the workshops that we held was feedback from our stakeholders that they would find it useful to have all the relevant information in one place when trying to develop new service models, in order that they can better understand the various options open to them. Our stakeholders have told us that having so many disparate documents creates a lot of 'noise', which can lead to uncertainty. We agreed to pull all the relevant existing information on rules and guidance on what is and is not a personal recommendation on retail investments into one document as a first step in supporting industry.

3.3 We have also found that, while firms are clear on the requirements for full advice and for execution-only business, they are struggling to navigate the options in-between such as simplified advice or limited advice services and sales without personal recommendations that involve guiding the customer in some way. This section of the paper therefore aims to clarify the requirements for providing the various types of service and simplifies how we refer to the different options. It also draws together the guidance from CESR and ESMA and the non-Handbook guidance published by the FSA that already exists in one place. Hence, it provides a single point of access for firms that want to provide services with or without personal recommendations[16].

3.4 We are aware of feedback from both customers and the industry that a lack of clarity may be inhibiting the development of different investment sales models. This may restrict customers from engaging with investments. We therefore believe that it is important to be clearer on the concepts of 'regulated advice', 'generic advice', and 'personal recommendation'.

What is regulated advice under the Regulated Activities Order?

3.5 The regulated activity of advising on investments under Article 53 of the Regulated Activities Order (RAO) is wider in scope than investment advice under MiFID. This is because MiFID requires advice to be of a personal nature whereas the RAO does not.

[16] Firms may also wish to consider paragraph 25 of the judgement of the Supreme Court *in Plevin v Paragon Personal Finance Limited [2014] UKSC 61*

MiFID investment advice[17] involves the provision of personal recommendations to a customer, either upon the customer's request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments. So, for example, if a firm provides recommendations to the public generally this will not normally be a personal recommendation. Our suitability rules only apply to a firm that makes a personal recommendation or manages investments. However, if a firm is giving regulated advice that does not involve a personal recommendation, other requirements in our Handbook such as our Principles for Business and Conduct of Business rules will apply (for example, the requirement to conduct its business with due skill, care and diligence in PRIN 2.1.1R and the client's best interests rule in COBS 2.1.1R). In addition, consumers that meet the eligibility criteria may have the right to approach the Financial Ombudsman Service and the Financial Services Compensation Scheme. It is also important that firms make full use of the Perimeter Guidance Manual (PERG) in this area.

3.6 For advice to be regulated at all, it must relate to a specific investment and must be given to the person in their capacity as an investor or potential investor, or in their capacity as agent for an investor or potential investor, and relate to the merits of them buying, selling, subscribing for or underwriting (or exercising rights to acquire, dispose of or underwrite) the investment[18]. If it does not have all of these characteristics then it is generic advice and is not regulated. For example:

- Advice to a customer to buy shares in ABC plc or to sell Treasury 10% 2014 stock is advice about a specific investment and so is regulated.
- Advice to buy shares in the oil sector or shares with exposure to a particular country is generic advice because it does not relate to a specific investment and is not regulated.
- Advice on whether to buy shares rather than debt is generic advice and is not regulated.
- General advice about financial planning is generic advice and is not regulated.
- Guiding someone through a decision tree where they make their own decision, would not normally be advising on investments[19].

When could generic advice become regulated advice?

3.7 Generic advice is a broad term that covers advice or information that does not relate to a specific investment or does not otherwise meet one of the other characteristics described in paragraph 3.6 above and so is not a regulated activity. However, when generic advice is given with regulated advice (for example, a personal recommendation on a retail investment), the generic advice becomes part of the regulated advice. For example,

[17] Markets in Financial Instruments Directive Annex 1 section A5 and Article 4.1(4)
[18] This must be a 'security' or a 'relevant investment' as defined in article 3(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001
[19] The guidance in PERG that relates to this can be found in PERG 8.26 http://fshandbook.info/FS/html/handbook/PERG/8/26

generic financial planning advice that also involves advice on the merits of investing in a particular product with a particular provider would be captured. So, advice that purports to be generic may in fact be regulated depending on the context and the overall circumstances. For example, advising someone to invest in one geographical area or sector would be regulated advice if there is also an associated recommendation for a particular investment.

Decision trees

3.8 Some online services use decision trees as a key element of their processes. Decision trees involve using a form of sequenced, scripted, questions prepared in advance to gather information from a customer with a view to either providing a personal recommendation or regulated advice or facilitating the customer selecting a financial instrument themselves. Where this is facilitating customer choice, the process of going through questions will usually narrow down the range of options that are available to the customer to choose.

3.9 Effectively, a decision tree is a tool that helps deliver advice, which may be generic advice or a personal recommendation, depending on the questions asked and the solution presented to the customer. Hence, the use of a decision tree does not, in itself, determine whether a firm is providing regulated advice or not. Advice will be regulated if it meets the criteria identified in paragraph 3.6 above, regardless of the method used to deliver it.

3.10 The key criteria for determining whether a personal recommendation is given in the decision tree process are set out in the CESR Q & A 'Understanding the definition of advice under MiFID'[20]. The key considerations are: (1) whether the decision tree process is limited to assisting a person to make his own choice of product; and (2) whether the decision tree process is likely to be perceived by the customer as assisting them to make their own choice of product, taking into account the features that the customer regards as important. For it not to constitute a personal recommendation, the decision tree and, where relevant, the person asking the question it contains, would need to avoid making any judgement or assessment that would result in a single product or a list of products being identified as suitable for a customer[21], whether as a result of information that the customer provides or otherwise. However, it is entirely reasonable for a decision tree to provide a range of options for the customer to consider, though firms would need to guard against presenting these options as suitable for the customer.

What is the difference between 'information' and 'investment advice'?

3.11 The difference between 'information' and 'investment advice' is the element of opinion or judgement on the part of the adviser, either in person or, for example, online. Regulated advice involves recommending a course of action or making a judgement on the merits of

[20] http://www.esma.europa.eu/system/files/10_293.pdf
[21] Paragraph 3.24 gives further explanation of implicit recommendations

exercising a right (e.g. to sell or buy). Generally speaking, giving someone information and nothing more, does not involve giving regulated advice. So, for example, giving facts about the performance of investments, the terms and conditions of investment contracts, or the price of investments, does not involve regulated advice if the investor is left to exercise their own opinion on the action to take.

3.12 However, the circumstances in which information is provided can make it regulated advice. For example, if information is provided on a selected rather than balanced basis so that it influences or persuades, this may be regulated advice. If, for instance, share price information is given in circumstances which suggest that the firm is communicating that it is a good time to sell, then what appears to be the provision of information may, in fact, be regulated advice. Determining whether something is regulated advice depends not only on the facts of the individual case, but also the context.

What is MiFID investment advice?

3.13 The regulated activity of advising on investments (for the purposes of Article 53 of the Regulated Activities Order) is wider in scope than investment advice under MiFID. This is because MiFID requires advice to be of a personal nature whereas Article 53 of the Regulated Activities Order does not.

3.14 MiFID investment advice[22] involves the provision of personal recommendations to a customer, either upon the customer's request or on the firm's initiative, in respect of one or more transactions relating to MiFID financial instruments. So, for example, if a firm provides recommendations to the public generally this will not normally be a personal recommendation. Our COBS suitability rules only apply where a personal recommendation is made.

3.15 A personal recommendation is defined in our Handbook glossary and follows the MiFID definition. It comprises three main elements:

- there must be a recommendation that is made to a person in their capacity as an investor or potential investor, or in their capacity as an agent for an investor or personal investor

- the recommendation must be presented as suitable for the person to whom it is made or based on the investor's circumstances, and

- the recommendation must relate to taking certain steps in respect of a particular investment.

3.16 So, for example, a firm may provide a recommendation in the form of an investment bulletin that is not targeted at individual customers without it constituting a personal recommendation (and therefore triggering the suitability requirements) but it could still amount to regulated advice (i.e. the activity of advising on investments under Article 53

[22] Annex 1 section A5 and Article 4.1(4)

of the Regulated Activities Order)[23]. Firms providing regulated advice on investments still need to be authorised and must adhere to other Handbook requirements, for example, our Principles for Businesses.

3.17 The examples set out in Section 4 aim to show the line between what constitutes a personal recommendation and what does not[24]. They are not intended to relate directly to the question of whether an activity constitutes 'advising on investments' for the purposes of the Regulated Activities Order (i.e. whether it is regulated advice). This is important, because it is the definition of 'personal recommendation' that drives the application of the suitability rules set out in our Handbook[25].

Tests that determine whether MiFID investment advice has been given

3.18 MiFID, together with the MiFID Implementing Directive, places various requirements on firms when they provide investment advice. Importantly, MiFID includes requirements to ensure the suitability of personal recommendations to customers and potential customers.

3.19 To help clarify the circumstances when a personal recommendation is being given by investment firms, the Committee of European Securities Regulators (CESR) launched a consultation paper entitled *Understanding the definition of advice under MiFID* in October 2009[26]. In its finalised Q&A[27], CESR set out five key tests that need to be met for a service to be a 'personal recommendation' and constitute investment advice under MiFID. We have replicated these tests in a flowchart in Annex A of this paper but also set out the five tests below:

- Does the service being offered constitute a recommendation? For example, firms would need to consider the difference between information and a recommendation and whether assisting a customer to filter information amounts to a recommendation.

- Is the recommendation in relation to one or more transactions in financial instruments? For example, firms would need to consider how to distinguish generic advice and general recommendations from MiFID investment advice. Also, whether recommending a firm or a service can amount to investment advice.

- Is the recommendation: a) presented as suitable, or b) based on a consideration of the person's circumstances? For example, firms would need to consider how a financial instrument might implicitly be presented as suitable, the impact of disclaimers, and what it means to consider a person's circumstances.

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[23] A recommendation is not a personal recommendation if it is issued exclusively through distribution channels
[24] Article 52 MiFID Implementing Directive
[25] COBS 9
[26] http://www.esma.europa.eu/system/files/09_665.pdf
[27] http://www.esma.europa.eu/system/files/10_293.pdf

- Is the recommendation issued otherwise than exclusively through distribution channels or to the public? For example, firms would need to assess recommendations delivered via the internet, assess recommendations given to multiple customers at once, and the effect of distributing investment research.

- Is the recommendation made to a person in their capacity as: a) an investor or potential investor, or b) an agent for an investor or potential investor? For example, firms would need to identify investors and their agents. Firms would also need to consider the distinction between corporate finance advice and investment advice.

Suitability

3.20 Where a personal recommendation is being given, the person making the recommendation is obliged to ensure, and be able to demonstrate, that the personal recommendation is suitable for the customer, taking account of their personal and financial situation, knowledge and experience and investment objectives[28].

3.21 To do this, a firm must obtain from a customer information necessary to understand the essential facts about them and have a reasonable basis for believing that the recommendation:

- meets their investment objectives

- is such that they can financially bear any related investment risk consistent with their investment objectives

- is such that they have the necessary experience and knowledge to understand the risks involved.

3.22 This suitability requirement relates to all personal recommendations, no matter how they are delivered. Thus, a personal recommendation provided through a simplified advice process[29] must comply with the suitability requirements. However, it is important to note that the suitability requirement is flexible and allows firms to develop a simplified process dependent on the product and type of customer for which it is intended. For example, the suitability requirement is qualified by reference to 'the nature and extent of the service provided', and the information that must be obtained is qualified by the condition 'where relevant'. The information that it is 'necessary' for a firm to obtain will vary from case to case. In general, the more complex and high risk the product, the more information will be required.

What is an 'implicit' recommendation?

3.23 MiFID also identifies the importance of presentation in determining whether investment advice is being given. Thus, one of the tests that the MiFID Implementing Directive sets

[28] COBS 9.2
[29] http://www.fca.org.uk/static/pubs/guidance/fg12-10.pdf

out is whether a recommendation is presented as suitable, rather than whether it is actually suitable for the customer. From our discussions with firms, we know this is an area of concern, particularly when deciding if they have made an implicit recommendation.

3.24 A financial instrument might be presented as suitable to a customer either explicitly or implicitly. In both cases the firm will be providing MiFID investment advice if the other tests set out in the CESR Q&A *Understanding the Definition of Advice under MiFID*[30] are met. For example, a financial instrument would be explicitly presented as suitable if a firm was to say 'this product would be the best option for you'. However, if it was presented to the customer in some other way that would influence the customer to take a course of action in relation to a specific financial instrument over others, this is likely to be an implicit recommendation. For example, for a recommendation to be 'implicit', it may be presented with a statement / scenario stating 'people like you buy this product' or, 'this is what I would do if I were you'. Such a statement gives the customer the impression that the product would be suitable for them.

Collecting customer information

3.25 A 'tick-box' approach should not be used either to collect customer information or to assess suitability. Suitability is not about collecting irrelevant information but such information as is necessary to achieve the outcome, a suitable recommendation[31].

3.26 For example, MiFID (the relevant requirements of which are transposed in COBS 9) makes the assessment of a customer's experience and knowledge a key part of the personal information that needs to be gathered from the customer. MiFID highlights information on a customer's 'level of education and profession or relevant former profession'. But MiFID is clear that this should only be collected 'to the extent appropriate to the nature of the customer, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved'. So, if a product is very simple, relatively little information may be needed on the customer's knowledge or experience.

3.27 MiFID[32] also states that, if a firm does not obtain the 'necessary information' to assess suitability, it may not make a recommendation. However, in practice, we believe that the MiFID requirement offers inherent flexibility in allowing a sensible assessment to be made of what 'necessary information' entails because it uses the phrase the 'necessary information *to assess suitability'*. The information that needs to be collected can be calibrated according to the type of customer and the nature and extent of the service provided. MiFID accommodates a range of advice, from comprehensive and sophisticated to 'limited investment advice' (i.e. where a customer requests advice on a limited range of investment products or strategies).

[30] http://www.esma.europa.eu/system/files/10_293.pdf
[31] COBS 2.1.1R and COBS 9
[32] The relevant sections of MiFID are article 19(4) of the Level 1 Directive and Articles 25, 37 and 52, and Recitals 57 and 58 of the Level 2 Implementing Directive

3.28 One area of particular concern for firms is the collection of information relating to customers' existing investments. The Financial Services Authority (FSA) discussed these requirements in its guidance on simplified advice[33]. It is worth restating here as the principles are applicable to all sales involving personal recommendations.

3.29 A sales process may ask a customer whether they want their existing investments (if they have any) to be considered in terms of (i) whether they are still suitable, or (ii) whether they would influence the suitability of a recommendation to purchase a new product. If the customer indicates that they do not want either (i) or (ii), and the firm has reason for believing that the customer understands the implications of this decision, the extent of information required on a customer's existing investments may be reduced. If the customer indicates that they would like (i) or (ii), or they are unclear on what they want or the implications of this decision, the firm should not continue with the limited advice process.

3.30 The extent of information required on a customer's existing investments may also be reduced, in that the firm may not need to know certain details about these investments, such as the broad asset allocation, product types or country / sector exposure. This is because this specific information may not be relevant for the limited service being provided. To understand a customer's regular financial commitments, firms should understand the level of any regular contribution products owned by the customer.

Personal recommendations and automated sales processes

3.31 The way that customers choose to buy products, including financial services products, has changed radically over the past ten years. Customers are more confident in using the internet to inform their buying decisions and therefore want to be confident about the type of service they are interacting with. For instance, ONS data shows that, in 2008, total e-commerce sales were valued at £335bn, reaching £492bn in 2012, an increase of £157bn. The average annual growth in e-commerce sales since 2008 was 10% over the period 2008 to 2012, with total growth since 2008 of 47%. Many commentators expect that growing numbers of customers will look to explore the options for accessing financial products and services by making use of developments in technology, in line with experience in other industries.

3.32 Research[34] by Mintel (April 2014) shows that around 40% of customers currently prefer to receive personal recommendations face-to-face rather than online, although 24% would be willing to receive personal recommendations online. The attraction for firms of offering services online is clear: economies of scale and the opportunity to deliver highly consistent customer experiences. Therefore we need to consider what impact technology is likely to have on areas such as automated sales processes and how innovation in the interests of customers can be facilitated.

[33] http://fca.org.uk/static/pubs/guidance/fg 12-10.pdf
[34] Mintel, Consumers and Financial Advice UK April 2014

3.33 One of the key concerns for firms and customers alike is clarity about the type of service being provided / used. This is particularly seen to be an issue in automated sales processes on websites, when filtering tools – a process that uses questions to the customer to filter out irrelevant products – are being used.

3.34 The CESR Q&A[35] paper provides some helpful guidance (provided the other tests referred to in paragraph 3.19 are met) on whether a filtering tool on a website can lead a firm into the territory of a 'personal recommendation'. In this context CESR suggests that the following factors may be relevant:

- 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 of questions and whether they suggest to the customer the use of opinion or judgement 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).
- 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.

3.35 The CESR Q&A[36] also gives an example of a price comparison website that allows a customer to enter information to generate a list of investment products for which they are eligible or that meet criteria that the customer has chosen but does not otherwise make a recommendation. CESR considers that, in these circumstances, the ability of the customer 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 MiFID investment advice (i.e. a personal recommendation) provided the other tests referred to in paragraph 3.19 are met[37]. Our approach in the scenarios is consistent with this and an example is provided in section 4 of this paper.

[35] Paragraph 23 http://www.esma.europa.eu/system/files/10_293.pdf
[36] Paragraph 25 http://www.esma.europa.eu/system/files/10_293.pdf
[37] This is likely to be regulated advice as described in paragraphs 3.5 & 3.6 of this paper

Advice through public media

3.36 There is a specific exclusion in MiFID[38] for a recommendation given through a distribution channel (such as a newspaper or other media, including the internet), where information is, or is likely to become publicly available. By its nature, a recommendation given through these distribution channels will not normally be a personal recommendation. However, it is unlikely that this exclusion would apply to messages sent to individuals that are not publicly available. This is particularly relevant to interaction with customers through email and social media. The CESR Q&A[39] made clear that, in deciding whether a personal recommendation was being given, one criterion was whether it would be reasonable to think that a personal recommendation is being made.

3.37 To avoid any confusion in this area, ESMA has consulted on the removal of the exemption for recommendations that are 'exclusively through distribution channels' in favour of a simple exemption for recommendations made 'exclusively to the public' in MiFID II[40]. This would make it clearer that newsletters and investment tip sheets do not constitute personal recommendations if published or distributed publicly, but may be viewed as personal recommendations if, for example, they are tailored and distributed to named individuals. However, they could still constitute investment advice under Article 53 of the Regulated Activities Order.

Social media

3.38 Social media[41] provides access to large numbers of potential investors and is used to provide a range of services including personal recommendations.

3.39 Many of the messages that are sent or 'posted' in batches to customers or potential customers are unlikely to amount to personal recommendations. The fact that a recommendation is made to multiple customers does not automatically mean that it could not be a personal recommendation, but it could be investment advice. Personal recommendations can be provided in many ways, including face-to-face, orally to a group, by telephone, by correspondence (including email and text messaging), using a website or through providing an interactive software system.

3.40 To assess whether a 'message' sent to several customers amounts to a personal recommendation, different factors need to be taken into account, for example, the target audience, and the content of the message (provided the other tests referred to in paragraph 3.19 are met).

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[38] Article 52 MiFID Implementing Directive
[39] Paragraph 6 http://www.esma.europa.eu/system/files/10_293.pdf
[40] http://www.esma.europa.eu/system/files/2014-549_-_consultation_paper_mifid_ii_-_mifir.pdf
[41] In this paper we use the term 'social media' to refer to internet-based applications such as blogs, Linkedin, Facebook and Twitter

- Target audience – the way the firm selects the customers to whom the message will be sent can have a bearing on whether the 'message' constitutes a personal recommendation. For example, when the internal procedures of a firm specify that a financial instrument may only be sold to a sample of customers selected on the basis of certain factors, such as customers under a certain age or who hold similar products, the selection of the target audience will not automatically mean that the firm is providing personal recommendations. 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 customer.

- Content of the 'message' – if, taking into account the context, tone and language of the message, it amounts to a recommendation, for example, because it contains a solicitation, an opinion or a judgement about the advisability of a transaction, which could lead to it being a personal recommendation.

3.41 In the sort of situation described above, 'messages' addressed to customers would be unlikely to be considered as issued exclusively through distribution channels or to the public (as described in paragraphs 3.36 and 3.37).

The range of possible investment sales models

3.42 Several trade associations and firms have expressed their concern that the lack of clarity when interpreting the boundaries of services involving and not involving personal recommendations is a barrier to firms developing innovative distribution models. Several have also discussed with us the viability of providing a simplified advice process.

3.43 To help firms and customers understand the material differences between the possible options, we have developed a simple summary in the form of a table. Table 1 sets out a range of sales options (i.e. execution only, appropriateness test, simplified advice, focused advice and full advice) and provides for each:

- a description
- qualification requirements
- whether the appropriateness test or suitability requirements apply
- products available
- adviser charging options, and
- whether there is access to the Financial Ombudsman Service and the Financial Services Compensation Scheme

3.44 We hope that the table will help to standardise the language used to discuss these models. We want firms to be clear on the range of possibilities they have open to them, the requirements of each and our approach to them. In particular, we want firms to understand that there are options for them that sit between execution-only and full advice, that we believe that there are no regulatory barriers to providing these alternatives, and we want to help our stakeholders understand the requirements and boundaries for each.

Table 1 – Summary of the range of distribution models for retail investment products

	Without a personal recommendation			With a personal recommendation		
	Non-MiFID products	MiFID products	Non-complex products	Simplified advice	Focused advice	Full advice
Description	Execution and/or reception of and transmission of orders for (a) pension or insurance-based investments; or (b) other non-MiFID products, excluding (in response to direct offer financial promotions) non-readily realisable securities, derivatives or warrants.	Execution and/or reception of and transmission of orders for MiFID products or (in response to direct offer financial promotions) non-readily realisable securities, derivatives or warrants.	Execution and/or reception of and transmission of orders for non-complex MiFID products at the client's initiative.	Provision of personal recommendations where **the firm sets out the limited nature of the service** in line with the guidance provided on this issue, either face-to-face, by telephone or electronically.	A deliberate limiting of the range of personal recommendations **sought by the client** to suit their particular needs e.g. to seek a recommendation on buying and ISA.	Full regulated advice which may be independent or restricted and will consider the full range of the client's needs, including their debt and protection needs.
Training and competency qualifications	N/A	N/A	N/A	QCF level 4 for any adviser, or for a person designing the system if automated	QCF level 4	QCF level 4
Appropriateness Client has necessary knowledge and experience to understand the risks involved	No	Yes	No	No	No	No
Suitability a) Meets the client's investment objectives b) Client is able to bear investment risks consistent with his investment objectives c) Has necessary knowledge and experience to understand the risks	No	No	No	Yes Standard qualified by reference to 'the nature and the extent of the service provided'; information which must be obtained is qualified by the condition 'where relevant', but the process includes safeguards e.g. to exit consumers with more complex financial needs.	Yes Standard qualified by reference to 'the nature and the extent of the service provided'; information which must be obtained is qualified by the condition 'where relevant', but this remains at the instigation of the customer.	Yes
Limited range of product solutions	As above	As above	As above	Yes – the FCA would expect the product range to reflect the limited nature of the suitability assessment	Yes – limited access dependent on the requirements of the client.	Not if independent, but more or less limited if the advice is restricted
Adviser charging	No	No	No	Yes	Yes	Yes
Access to the ombudsman service	Yes	Yes	Yes	Yes – recognising the nature of the service	Yes – recognising the nature of the service	Yes
Access to FSCS	Yes	Yes	Yes	Yes	Yes	Yes

NB: Basic advice is not included within this table as it has its own regime outside of MiFID. Outside of these distribution models, firms might also be providing Article 53 RAO advice, for example, issuing research or managing investments.

This table is a summary, so please refer to the detailed rules in any particular case.

The appropriateness test

3.45 If a customer wants to purchase a complex financial instrument without a personal recommendation, the appropriateness test applies. If the financial instrument is non-complex, the customer can proceed down an execution-only route. This section describes how the appropriateness test applies to sales of complex financial instruments and how firms can integrate the test into their service model.

3.46 If a customer wants to purchase a complex financial instrument without a personal recommendation, an investment firm must seek information to enable the firm to determine whether the customer has the knowledge and experience (to the extent appropriate to the nature of the customer, service and financial instrument) to understand the risks involved in the transaction or service that is envisaged. Hence, it is a test of whether it is 'appropriate' to sell a very complex financial instrument to the person, i.e. whether they will be likely to understand the risks involved. How the appropriateness test can best be integrated into a firm's particular business model and processes will be for each firm to determine (e.g. online, or face-to-face, over the telephone or in hard copy).

3.47 The appropriateness test is only required for sales of complex financial instruments[42]. Not all products involving high levels of risk will be hard to understand (e.g. some funds and shares) and so the appropriateness test does not apply to them. In contrast, options, swaps and other derivative contracts are examples of instruments that are considered complex, as well as spread bets and other contracts for difference. If a customer could lose more money than their initial investment, as with a spread bet, or if a financial instrument is infrequently traded so it would be hard to value or sell, this would mean that a product is considered complex. More information on the distinction between complex and non-complex financial instruments for the purpose of the MiFID appropriateness test can be found in CESR's paper from November 2009[43].

3.48 With the introduction of MIFID II, the type of investments that will be considered complex will be extended to include, for example, shares, bonds or other forms of securitised debt that embed a derivative, or contain instruments that incorporate a structure which makes it difficult for the customer to understand the risks involved. However, it remains unlikely that most retail customers would want to access such products without a personal recommendation, so the appropriateness test is unlikely to be particularly relevant to most firms setting up sales processes without personal recommendations for the mass market. Instead, it will be more relevant to firms offering services without personal recommendations to confident and experienced investors.

3.49 The appropriateness test allows firms to collect the amount of information that is relevant to the financial instrument or service. In certain cases, firms will need to do little more than determine whether the customer is a sufficiently experienced investor in the type of product envisaged. However, we would expect an appropriateness assessment to be

42 COBS 10.4.1R(3)
43 http://www.esma.europa.eu/system/files/09_559.pdf

particularly rigorous if a firm were offering more complex financial instruments to less experienced customers who may be less likely to understand the risks.

3.50 Firms may also wish to use targeted questions designed to establish the customer's knowledge in order to understand the risks relevant to the specific type of financial instrument or transaction envisaged. It is also possible to seek to increase the customer's level of knowledge about a financial instrument or service through providing pertinent information to the customer before assessing appropriateness (though in doing so, firms should be mindful of the risk of this amounting to a personal recommendation).

3.51 The assessment could work online. For instance, a firm could use electronic application forms that automatically process customers' answers to targeted questions to help the firm come to a decision.

3.52 Our rules[44], which implement the MiFID Implementing Directive, indicate what information may be relevant. This includes:

- the types of services and financial instruments with which the customer is familiar
- the nature, volume and frequency of the customer's previous transactions
- the customer's level of education, and
- the customer's profession or former profession.

Disclaimers

3.53 It is important to remember that even a clear, prominent and understandable disclaimer stating that no advice or recommendation is being given is unlikely to be sufficient to avoid having presented a recommendation as suitable for the customer. For example, if a firm stated that its product would suit a particular customer's needs, including a disclaimer saying that this was not advice would not necessarily change the basic nature of a communication and it may still constitute a personal recommendation.

Assessing risk

3.54 In March 2011 the Financial Services Authority published guidance on *Establishing the risk a customer is willing and able to take*[45]. This document set out the findings of a review that focused on three key areas:

- whether methodologies for assessing the risk that a customer is willing and able to take with their money are fit for purpose, including the use of risk-profiling tools

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[44] COBS 10.2.2R
[45] http://www.fsa.gov.uk/pubs/guidance/fg11_05.pdf

- whether descriptions firms use to reflect and check the level of risk a customer is assessed as being willing and able to take are fair, clear and not misleading, and

- whether processes for choosing investments result in selections that are suitable for the risk a customer is willing and able to take, including the use of asset-allocation tools.

3.55 The findings suggested many firms did not understand how the tools they use work, including what they are (and are not) designed to do. Firms should use a tool only where they are satisfied that it provides outputs that are appropriate and fit for purpose. Firms need to recognise where a tool has limitations and mitigate these.

3.56 These tools can be used to help advisers when used in the full advice process but also to help customers who are using an online process that does not provide a personal recommendation. They are also particularly relevant when using a simplified advice process.

3.57 Where firms use a questionnaire to collect information from customers, it is important that the question and answer options are balanced, and use an appropriate weighting to answers.

3.58 Risk profiling and asset-allocation tools can usefully aid discussions with customers, by helping to provide structure and consistency. However, they often have limitations that mean there are circumstances in which they may produce flawed results. Where firms rely on tools, they need to ensure they are actively mitigating any limitations.

3.59 Firms remain responsible for the integrity of any sales process, whether it is providing a personal recommendation or not. Tool / system providers have a role to provide clear supporting information to firms that will use the tools, to help them use them as designed, but it is the investment firms that must take on the responsibility to ensure they are satisfied that any tools / systems they provide are accurate and robust.

Model investment portfolios: provision of discretionary services

3.60 In FG 12/15: Independent and restricted advice we described *"model portfolios to mean a pre-constructed collection of designated investments, including some retail investments products that meet a specific risk profile, sometimes offered with a periodic rebalancing of investments to maintain a consistent asset allocation. Model portfolios allow a firm to pre-determine what will generally be its advised asset allocation for certain investment objectives or attitudes to risk, and to distil its product research in line with these asset allocations".*

3.61 The terminology we have seen used by firms in the market to describe these sorts of model portfolios is varied, but in many cases firms are describing a discretionary investment portfolio.

3.62 When a firm offers a model investment portfolio that involves discretionary decision-making, they must establish a mandate with the customer based on stated investment needs / parameters. The discretion must be exercised in relation to the composition of the portfolio under management and not in relation to some other function (such as proxy voting) carried on by the firm[46].

3.63 Firms must be aware of their obligation with this type of service when they 're-balance' the investments contained in a portfolio to bring it in line with a particular model or approach. 'Re-balancing' involves trading investments without prior reference to the customer (or otherwise exercising a customer's rights, for example to switch between fund choices associated with an investment), i.e. acting on a discretionary basis. As set out in our Handbook[47], a firm must ensure that any decision to trade is suitable for its customer based on the mandate established with the customer. When managing a customer's investment the firm must obtain the necessary information set out in COBS 9 to take a decision which is suitable for the customer.

3.64 The firm would not be acting with discretion if the customer decides that they want the firm to return the portfolio to a predetermined asset allocation (for example, the asset allocation of the model portfolio as originally purchased) on a set date each year regardless of performance and market developments. As an illustration, the client would instruct the firm to revert every 1 April to a 60 / 40 split between a specific fund and a specific bond. Since the specific assets were chosen by the customer at the outset, the firm is not exercising any discretion. But, the firm could decide to delay the re-balancing for a few days until, say, the Budget has been announced, changing to a different asset allocation, deciding for itself to use a different fund, or if the firm is given a high-level instruction to invest in an asset class and decides on behalf of the client which specific assets to invest in, This would mean that the firm is acting with discretion and the requirements set out in paragraph 3.63 above would apply.

Application of suitability requirements to discretionary investment management

3.65 We have seen propositions for the sale of model portfolios being developed in a way that allows customers to buy model portfolios without a personal recommendation. While the FCA welcomes innovative approaches that allow customers the option of accessing a wide range of products and services, firms must be aware of the requirements that are set out in MiFID for the provision of discretionary investment management and ensure that when a model investment portfolio is rebalanced on a discretionary basis that each trade is suitable for the client[48].

3.66 As for all other areas the nature of the suitability obligation and the range and level of information requested from customers will depend on the type of service being provided and the nature of the customer.

[46] PERG 2.7.8 G
[47] COBS 9.2.1R
[48] COBS 9.2.1R

3.67 As set out in our Handbook[49], a firm must obtain the 'necessary' information so as to enable the firm to take a decision that is suitable for its customer. What is 'necessary' will vary from case to case. The scope and detail of the information that must be obtained may vary depending on the customer, the product and the service concerned.

3.68 A firm will need to consider how much information is necessary and relevant in relation to a customer's financial situation, taking into account the type of product, service or transaction to be entered into, and the nature of the customer. The amount of information required may also vary depending upon the size of the proposed investments and the range of financial products for which the firm intends to provide discretionary portfolio management services. The detail needed for the suitability assessment is also likely to reflect whether the discretionary mandate relates to the whole of the customer's portfolio or only a portion of the whole, and whether the firm sets the investment strategy or this is dictated by the customer. Some investors may have a pre-determined investment strategy. Where reasonable, a firm may rely on instructions to follow such strategies as the basis of the customer's investment objectives. But this does not in any way remove the firm's obligation to ensure that the individual decisions to trade that it makes are suitable for the customer.

Are discretionary management firms able to exclude some aspects of key client information?

3.69 COBS 9.2.2R(1)(b) makes clear that a firm must obtain the information that is necessary for it have a reasonable basis for believing that the specific transaction to be entered into while managing is such that the customer is able financially to bear any related investment risks consistent with his investment objectives. COBS 9.2.2R(3) states that the information regarding the financial situation of the customer must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

3.70 If the customer wishes to limit the nature and extent of the service they wish the firm to provide, it would be possible for the firm to focus the scope of the service it provides to fit with the service the customer requires. The firm must then obtain the necessary and relevant information from the customer to enable the firm to provide that service. The firm would not be able to ignore, for example, the customer's capacity for loss if the nature of the mandate being granted meant that there would be a potential for that customer to incur financial loss.

3.71 If the customer wishes to invest a discrete sum of money and grant the firm a limited discretionary mandate to manage that sum of money, then the information a firm would be required to obtain under COBS 9.2 would be less than the information the firm would be required to obtain in relation to advising a customer on the whole or a substantial proportion of their investment portfolio. In the latter example, the firm is likely to need to obtain a more extensive set of information to be able to 'understand the essential facts about the customer'.

[49] COBS 9.2.1R & 9.2.2R

Customers are unwilling to discuss / disclose their wider financial circumstances

3.72 A firm must not actively encourage customers to limit the amount of information they provide for the purposes of assessing suitability[50]. However, a customer may choose not to discuss his wider financial circumstances with a firm or may request that the firm provides a limited service. In these circumstances, it is possible for the firm, with the customer's agreement, to focus the scope of its service to fit with the customer's request. For example, if a customer asks a firm to manage only a limited part of his portfolio, the firm would only need to obtain sufficient information to enable it to assess suitability in relation to that limited part. But if, in effect, the customer is not prepared to provide sufficient information to enable the firm to assess suitability about that limited part of the portfolio, then the firm would need to comply with COBS 9.2.6R and inform the customer that it will not be able to provide the limited discretionary management service being requested. (The firm may, however, take the view that it is able to arrange a deal for that customer on a non-advised basis, because it has enough information to enable it to meet the requirements set out in COBS 10).

Rules applicable to simplified advice

3.73 In March 2012, the FSA published guidance on simplified advice[51] in which it set out the requirements for firms when developing a simplified, automated advice model for customers with straightforward investment advice needs.

3.74 The guidance explained that the suitability standards for simplified advice are the same as for all other forms of retail investment advice that involve a personal recommendation[52], although the information required to assess suitability would be that for a simple product meeting simple needs. If the customer agrees to automated simplified advice process, firms are not absolved of their suitability obligations. Firms must also, as appropriate, review the relevance of other products already held by the customer[53]. Knowing your customer and risk profiling will be important tools in any sale involving a personal recommendation.

3.75 The guidance also explained that the design of systems for providing simplified advice would need to involve competent individuals; FG 12/10 set out the requirements for these individuals. It is worth clarifying that these requirements may equally apply to third party suppliers of such systems. This will depend on the agreement between the firm and the supplier. A firm that uses a third party system or 'tool' must satisfy itself through an appropriate due diligence process that the system or 'tool' is, and continues to be, fit for the purpose intended by the firm.

3.76 Where an individual is involved in delivering a simplified advice process, the training and competence requirements for anyone making personal recommendations to customers through the process are the same as for a fully qualified retail investment adviser. The

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[50] COBS 9.2.4R
[51] http://www.fca.org.uk/static/pubs/guidance/fg12-10.pdf
[52] COBS 9.2
[53] Refer paragraphs 3.25 & 3.26

Retail Distribution Review's (RDR's) adviser charging and remuneration rules also apply to the delivery of simplified advice[54].

3.77 The simplified advice process falls into the category of 'restricted advice', as the products available are likely to be limited to one or more particular product providers and particular types of product will be ruled out. If a firm provides simplified advice (which is restricted advice) in addition to independent advice, it should not promote itself as a provider of independent advice for its business as a whole (nor would it be appropriate for the firm to include the word 'independent' in its name)[55].

3.78 In the guidance the FSA set out three options about the professional standards expected of firms when providing simplified advice. These remain relevant:

- Simplified advice provided through a fully automated system, i.e. one in which the customer will not at any stage in the process have the opportunity of discussion with an employee. The design, testing and review of the operation of such a system is likely to be more complex than the design of procedures to provide advice to customers face-to-face, or over the telephone. The design of such systems would need to involve competent individuals with expertise in a number of different areas, including IT specialists. However, given that the purpose of the system would be to provide advice on investments, a fully qualified retail investment adviser should be fully involved in the design process.

- Individuals who give simplified advice. An individual provides personal recommendations on retail investment products delivered through an automated system with support for the customer over the telephone, face-to-face, or using web-based channels such as Skype and web-chat or directly over the telephone, face-to-face or web-based channels. The individual must meet the training and competence standards of a retail investment adviser.

- Individuals who do not give simplified advice. An individual provides some support to customers but does not provide regulated advice or a personal recommendation. This individual must not provide personal recommendations if they do not meet the training and competence standards of a retail investment adviser.

3.79 The requirements for firms are clear in relation to these options. We do not believe that relaxing the requirements for individuals who give simplified advice is in the best interests of the customer.

Development of simplified advice models

3.80 The guidance stated that "simplified advice processes have the potential to meet the wants and needs of those customers who might benefit from investment advice but who cannot, or do not want to pay for full advice". It went on to say:

[54] COBS 6.1A
[55] COBS 6.2A.4G

"Our aim is to ensure that we have a regulatory regime for retail investment advice which provides for an appropriate level of customer protection, and within which firms can offer simplified advice processes if they think this is an attractive proposition for them and their customers. Our other priorities are (i) to ensure that our rules are compatible with EU law, and (ii) that our regulatory approach maintains sufficient flexibility so that firms are able to develop individual solutions which suit their business models and target market[56]."

3.81 The industry has told us that there are two main barriers to developing widespread simplified advice models:

1. Most customers will not buy an investment product purely online; they require some type of human interaction to confirm they are making the correct buying decision.

2. The liability for providing a personal recommendation through simplified advice, which rests with the firm providing the recommendation as with any advice service.

These issues are explored in further detail in the next section.

[56] http://www.fca.org.uk/static/pubs/guidance/fg12-10.pdf

4 Issues and examples

MiFID II

4.1 On 12 June 2014, the revised Markets in Financial Instruments Directive (MiFID II) was published in the Official Journal of the European Union, along with the new Markets in Financial Instruments Regulation (MiFIR) and both will apply from 3 January 2017. The revised Directive does not alter the definition of investment advice. Similarly, ESMA did not consult on any significant changes to the MiFID Delegated Acts, in regard to the definition of advice.

4.2 MiFID II does not fundamentally change the requirements on firms in regard to the suitability of personal recommendations, or the appropriateness test that they are required to perform for transactions of complex products not involving personal recommendations. The changes to the rules in this area that MiFID II brings include, for example, making clear that when a firm recommends a bundle of products, the overall bundled package must be suitable. The list of products that would be considered complex is also being widened to automatically include, for example, shares and bonds that embed derivatives, so firms will have to conduct appropriateness tests when selling a wider range of investments without advice. Similarly, ESMA consulted on more detailed measures on suitability and appropriateness[57], chiefly seeking to add to the existing implementing directive some of the standards previously communicated in ESMA's *Guidelines on certain aspects of the MiFID suitability requirements*[58].

4.3 Given the nature of the changes that MiFID II is set to bring in regarding suitability and appropriateness, we do not believe that the new directive will create any significant uncertainty to prevent firms from designing and operating new business models to distribute retail investments at this stage. Firms wishing to find more information on MiFID II can look at our website[59]. As MiFID does not apply to insurance-based investments, we will need to consider whether or not there is a case for applying some or all of the revised MiFID standards to such products in the UK. In March, we will be publishing a Discussion Paper on investor protection aspects of MiFID II.

Example scenarios

4.4 To help firms and customer groups to understand what constitutes a personal recommendation and what does not, and to build upon the existing published guidance, we have developed a number of examples. For each we have provided our opinion on whether or not it constitutes a personal recommendation. We have also added our reason

[57] http://www.esma.europa.eu/system/files/2014-549_-_consultation_paper_mifid_ii_-_mifir.pdf
[58] http://www.esma.europa.eu/system/files/2012-387.pdf
[59] http://www.fca.org.uk/firms/markets/international-markets/mifid-ii

why we have reached this opinion. We have tried to cover a range of sales processes that we have seen operating in the market, but obviously we cannot cover every possible variation. When considering the examples, firms should be aware that we have based our conclusion on the assumption that nothing is done, beyond what is stated in the examples, to suggest that the customer is given a recommendation, or to suggest that the output is presented as suitable for them or based on a consideration of their personal circumstances.

4.5 Table 2, Example scenarios, must be read in connection with the guidance provided throughout this paper and in particular with the guidance in paragraphs 3.13 to 3.74. This table is based on the assumption that the firm in the scenarios is exclusively carrying on the described activities.

Table 2: Example scenarios

Example	**Personal recommendation or not**	**Regulated advice or not**
(A) Website without filtering with general generic information		
Firm A has a website through which it provides a range of information about the world of investments. This includes generic explanations of the different asset classes available and the likely risks that may attach to each, the benefits of diversification and the different types of investment strategies used in the market. The information does not bias towards a particular type of investment, strategy or asset allocation. There is no interactivity. The website provides lists of investments for purchase without additional comment (bar links to the relevant disclosure material for the individual products).	Not a personal recommendation. This is because giving generic information does not involve giving a personal recommendation. (Please refer to the answer to Q.21 in PERG 13.3).	Not regulated advice because simply giving information without making any comment or value judgement on its relevance to decisions which an investor may make does not involve advising on investments as described in Art 54 RAO see PERG 8.28.2 G.

(B) Website without filtering but which classifies the available products In each example the categorisation by Firm A is not interactive. The investments are not displayed or filtered in accordance with information input by the customer. The ranking is set out in the way it would be in a hard copy document.		
(1) Firm A ranks its products into risk categories. One set of categories could be Low Risk, Low-Medium Risk, Medium Risk, Medium-High Risk and High Risk. Firm A allocates each investment using its own opinion on the level of risk of each product (i.e. it is self-generated and not drawn directly from each product's disclosure material). For example a list of funds' riskiness based on the firm's analysis and metrics. The website also has material elsewhere explaining investment risk and material to help customers self-determine the level of risk they are willing and able to take. Each risk category description includes notional customer attitudes, the types of investments that may be found within funds/portfolios matching this risk level and also historic factual data on volatility of such investments. Customers are prompted to read the risk category descriptions and use this material to think about which category best fits their circumstances.	Not a personal recommendation. As explained in the answer to Q.19 in PERG 13.3, material will only amount to a personal recommendation if it is presented as suitable for the customer or based on a consideration of their personal circumstances. In this example the material is not presented in this way. The customer reads both sets of information (list of products and	Likely to be regulated advice, see Note 2 below.

	explanatory material) and makes any investment decision on that basis.	
(2) Firm A classifies the products it sells by reference to high-level investment objectives, for example capital growth, income, or a balance of both. It also uses judgement to classify the investments by reference to whether they are suitable for long or short investment. There is material elsewhere on the website to help customers self-determine what their investment objectives should be.	Not a personal recommendation. The reason is the same as it is for example B1.	Likely to be regulated advice, see Note 2 below.
(3) Examples (B1) and (B2) are combined. So the investments are classified by reference to a number of factors. For example, each fund may have three boxes next to it on the website. One has a riskiness rating. One box is about the investment objectives. The other is about whether it is designed for long or short-term investment.	Not a personal recommendation. The reason is the same as it is for example B1.	Likely to be regulated advice, see Note 2 below.
(4) Same as Examples (B1) to (B3). In addition Firm A gives each fund it lists a star rating based on whether the fund is good value. The star rating is supplied by an external unconnected party and does not reflect past performance. The rating is not exclusive to Firm A and is widely used in the industry. This might be something like the Morningstar analysts rating.	Not a personal recommendation The reason is the same as it is for example B1.	Likely to be regulated advice. Please see the reasons in Note 3 below.
(5) Same as Examples (B1) to (B3). In addition Firm A gives each fund it lists a star rating based on whether it thinks that the fund is good value. Firm A uses skill and expertise in putting together the ranking by, for example, adjusting figures from the product providers to take into account the different ways that the product providers calculate growth and the different reporting periods and by taking into account management charges.	Not a personal recommendation The reason is the same as it is for example B1.	Likely to be regulated advice, all the elements in PERG 8.24.2G are met.

(C) Website with pop-up boxes		
Same as Example (A). In addition the website has pop-up boxes that come up when the customer picks a product to buy. They prompt the customer to think about the customer's circumstances, such as the customer's health, financial circumstances and retirement date. The pop-up boxes have links to website material explaining the importance of those factors. (This example may be particularly relevant to firms who wish to offer pension related products without a personal recommendation).	Not a personal recommendation. The reason is the same as it is for example B1. The pop-up box only prompts the customer to think about various factors rather than advising the customer based on the customer's personal circumstances.	Not likely to be regulated advice as long as the pop-up boxes contain objective information on what should be considered when making investment decisions. The reason is the same as for example A.

(D) Website with filtering Firm A decides to make its list of the investment products it sells easier to search. It adds filtering functionality that allows the customer to filter products based upon the filtering factors. Only products that meet the search criteria input by the customer are displayed.		
(1) The website enables the customer to filter the products by reference to objective factors of the type in section (A) of this table (e.g. 'UK Equity funds').	Not a personal recommendation. The reason is the same as it is in example B(1). The website displays parts of an existing list based on what the customer wants to see and not on consumer's specific information.	Not likely to be regulated advice as long as the filtering tools is based on objective factors. The reason is the same as for example A.
(2) The filtering is based on riskiness as described in Example (B1).	Not a personal recommendation,. Please see the reasons in Note 1 below.	Likely to be regulated advice, see Note 2 below.
(3) The filtering is based on investment objectives and judgement as to whether they are suitable for long or short investment as described in Example (B2).	Not a personal recommendation, for the same reason as example D2.	Likely to be regulated advice, see Note 2 below.

(4) The filtering is based on a number of factors as described in Example (B3).	Not a personal recommendation for the same reason as example D2.	Likely to be regulated advice, see Note 2 below.
(5) The filtered results are ranked in accordance with the ratings of a third party as described in Example (B4).	Not a personal recommendation for the same reason as example D2.	Likely to be regulated advice, see Note 3 below.
(6) The filtered results are ranked in accordance with Firm A's views on how good they are as described in Example (B5).	Not a personal recommendation, for the same reason as example D2.	Likely to be regulated advice, all the elements in PERG 8.24.2G are met.

(E) Guided sales and limited advice		
(1) The filtering process is not based solely on the customer's risk appetite and preferences in relation to other factors. The filtering process is also based on facts relating to the customer's life and situation. For example, it might take into account the customer's current use of tax wrappers, the customer's age, the customer's marital status and whether the customer is in a long-term relationship, the customer's financial resources and commitments, the customer's plans for their family in the short and longer term (e.g. a new car, work on the family home or school fees), what other investments and assets the customer has and the customer's career and retirement plans. Like the examples in section (D) of this table, the customer inputs information to the website. The difference is that the information not only relates to the investor's wishes but is personal factual information. The filtering is not based solely on what the investors wants but also on what is good for them.	This is a personal recommendation. See Note 4.	Likely to be regulated advice, all the elements in PERG 8.24.2G are met.
(2) Firm A provides advice on a limited straightforward issue at the request of the customer, such as which ISA product to invest in. The wider financial situation is not covered. The advice is limited to the specific issue in hand and the information collected on that basis. The treatment of suitability reflects that narrower customer objective.	This is a personal recommendation. See Note 5 in connection with example E(1).	Likely to be regulated advice, all the elements in PERG 8.24.2G are met.

(F) Execution only		
Materials including narrative on investment risk alongside a risk profiling tool are used to help educate a customer they make a decision on their investment.	In these circumstances this is not a personal recommendation. However, this depends how the information is presented to the customer.	Not likely to be regulated advice. The reason is the same as it is for example A
General Note Where the table expresses whether an activity amounts to the regulated activity of 'advising on investments', as described in Article 53 of the RAO, that is what in our view is the most likely analysis. However, firms should refer to PERG for specific guidance on that activity.		

Note 1:

In principle this example involves a recommendation because a recommendation includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell.

It is true that a factor like riskiness is itself neutral, being neither necessarily a good nor a bad thing. So the filtering is done on the basis of what the customer wants and not what is right for the customer. However, in this example this does not stop it being a recommendation because the customer has told Firm A, via the website, what his investment objectives are and the purpose of the filtering process is to identify products for the customer to buy.

However, the fact that a recommendation is involved does not necessarily mean that there is a 'personal' recommendation. As explained in the answer to Q19 in PERG 13.3, material will only amount to a personal recommendation if it is presented as suitable for the customer or based on a consideration of his personal circumstances. In the FCA's view, therefore, there is no personal recommendation because the material in this example does not meet this requirement, for the following reasons.

It would be perfectly possible to arrange the products Firm A sells into categories based on riskiness in a hard copy. It cannot be said that a hard copy arranged in that way is based on the personal circumstances of the person reading it. All the filtering does is eliminates products that do not fall within the specified categories.

The filter is simple in that the number of inputs by the customer is small in number and the translation from the customer's input to the list of displayed products does not involve any opinion or complicated processing: if the customer chooses high-risk products then there is a pre-existing list of products that are displayed for that customer. The same results will be displayed for any other customer that chooses that category of risk. This sort of filtering is just a form of indexing pre-existing information. It does not become a personal recommendation just because it is on a website or just because the website screens out information the customer does not want to see.

It should be noted that this example does not fall outside the definition of 'personal recommendation' on the grounds that investment objectives (such as riskiness) are not part of a customer's personal circumstances or that there is no personal recommendation where the advice is about whether a product meets the customer's objectives rather than being good or bad. Information about a person's circumstances could include both factual information (e.g. the customer's address, income or marital status) and more subjective information about the customer's wants and needs (e.g. the customer's overall risk appetite, short and long-term investment objectives or the customer's desire for protection from particular risks).

Equally, this example does not fall outside the definition of personal recommendation merely because the website only takes into account a narrow range of factors. The fact that Firm A has not considered all the customer's circumstances does not mean that there is no personal recommendation.

The conclusion that this example does not involve a personal recommendation is given some support by ESMA's guidance on the meaning of personal recommendation (CESR/10-293). That says, where the filtering process is limited to assisting the customer to make his own choice of product that has particular features which the person regards as important, then it is unlikely that the process will involve a personal recommendation.

As described in paragraph 6 of the ESMA Guidance, whether or not a personal recommendation is given depends in part on whether the customer is led to think that one is being given. Therefore it is important that the customer understands that Firm A is not advising on whether the products are suitable for the customer. If buying the products identified in the website's output is positioned as the appropriate action for the customer to take, the overall service might be viewed as a personal recommendation. The customer should understand that, because the website takes into account such a narrow range of the customer's personal circumstances, the result may be that the customer ends up with products that are unsuitable for them.

As per paragraph 50 of the ESMA Guidance, including a disclaimer is not enough on its own to prevent a personal recommendation. For example, if Firm A says that the filtered products displayed by the website would suit the customer's needs, the inclusion of a disclaimer saying that this was not advice or a personal recommendation would be unlikely to change the nature of the communication. A legalistic disclaimer will not be enough on its own: the material must prominently and clearly explain the limited nature of the service that Firm A provides and the risk that the customer will end up with unsuitable products.

Note 2

Where all a firm (for example, a fund) is doing is ranking its own products' riskiness with reference to the specific investment objectives for those products, that firm is unlikely to be providing regulated advice. The firm's investment objectives are factual and therefore constitute information and not advice (see PERG 8.28.2 G). The difference between such a firm and a firm in this example is that the latter is not using skill and judgement to arrive at the ranking.

Similarly, where the firm is offering products that are issued by a third party and the level of riskiness is drawn directly from the product's disclosure material the firm is unlikely to be giving regulated advice. The level of riskiness is the factual representation of the product's disclosure material and therefore information and not advice.

To fall under article 53 RAO (regulated advice), advice must meet all characteristics in PERG 8.24.2). Our analysis turns on the following three: (1) it must be 'advice' (that is, not just information), (2) given on the merits of buying, selling or holding on to an investment (3) to a person in their capacity as investor.

Characteristic	Explanation
(1)	The skilled analysis and opinion used by the firm to rank specific products constitute advice (see PERG 8.28.1G).
(2)	In PERG 8.29.4G we say that '*advice in the form of rating issuers of debt securities as to the likelihood that they will be able to meet their repayment obligations need not, of itself, involve any advice on the merits of buying, selling or holding on to that issuer's stock.*' Hence, we accept that a factor like riskiness can itself be neutral and does not necessarily give an opinion as to the merits of investing into a particular product.
(3)	PERG 8.27.5G states that '*advice will still be covered by article 53 even though it may not be given to or directed at a particular investor (for*

example, advice given in a periodical publication or on a website) . In this example the firm is providing its opinion as to the riskiness of a product to a person who is accessing the website in order to buy investments, i.e. in their capacity as investor. In that context that opinion (advice) would amount to the pros and cons of investing in the particular product (see PERG 8.29.2G). In summary, in this example it is the combination of self-generated ranking combined with the fact that these are given to someone in their capacity as investor that make it likely to fall within the scope of Regulated advice. Whilst there is no 'personal recommendation' (see the reasons in Note 1). The firm is 'advising on the merits of buying, selling or holding on to a particular investment' by applying its skill and judgement to determine what product a person with a particular risk appetite should invest in.
Note 3 The same analysis in Note 2 applies. However, if the firm, instead of providing its 'self-generated assessment of riskiness', is only providing the star rating supplied by a third party, the firm will not normally be providing regulated advice. Assuming the firm is not endorsing the rating it is, depending on the circumstances, unlikely to be giving advice but only information.
Note 4 Firm A collects information about a specific customer's circumstances and uses an element of opinion and skill (albeit automated) in translating this into a display of a particular product or products. Either explicitly or implicitly this is presented as meeting the customer's requirements and wishes. If the customer has to input a large range of personal information then Firm A cannot argue that it has not taken into account the customer's personal circumstances when in fact it actually has. The difference with the examples in section D of this table is that the input from the customer is much more extensive and the way that they interact on the website is much more complicated.
Note 5 This example is not about structured sales. It is included to make a point about example E1. The answer to example E1 is not based on the approach that there is no personal recommendation unless the advice takes into account a wide range of factors. The point in example E1 is that the range of the factors taken into account is relevant in the specific context of filtered sales.

Focused advice

4.6 In addition to full financial advice and services that do not involve giving a personal recommendation, Table 1 shows that other services can be provided, depending on the need of the customer. Thus, it is perfectly feasible, within both MiFID and our domestic regulatory framework, to provide a service that focuses on a specific need of the customer and which does not require the detailed factfind of a full advice offering.

4.7 An example of this might be a customer who had straightforward requirements and was looking for advice on how to invest money in a stocks and shares ISA. In this situation the customer and intermediary could agree that the service provided would be focused on this one situation and would not include wider discussion of, say the customer's pensions or mortgage situation, or indeed of their other investments beyond assessing the attitude to risk and capacity for loss.

4.8 The adviser would be able to focus on a smaller number of questions, including around the aims and objectives of the customer, and come to a suitable recommendation. Thus, if an intermediary and customer agree to look at just one specific need / objective, this would be focused advice. In this situation, an intermediary can give a recommendation on a specific need or objective and only on that need or objective. Another way of looking at this would be to say that the intermediary is able to limit the scope of a service, but the depth of the suitability obligation cannot be limited. Firms would need to collect the relevant information to make sure they provide a suitable recommendation within the specific scope of the advice they have agreed.

4.9 How does focused advice work in practice? A customer might approach a firm with a specific objective, for example, to find out what they should do with their existing with-profits policy. The firm could agree with the customer that it will do so, although it should explain to the customer this will mean their other financial needs / objectives will not be addressed. In other words, the firm would need to outline the level of service they will provide and what they will not be providing – that way the customer is clear about the level of service they are receiving. If a customer believes they are getting a full financial review, this is what they should receive.

4.10 However, it is not possible to specify what personal information an intermediary needs to obtain from a customer when focused advice is provided, as it will depend on both the scope of the advice and on the circumstances of the customer.

4.11 With focused advice, an intermediary may not be expected, for example, to advise the customer on whether they should review their protection needs, their regular savings needs, their mortgage or their life cover if none of these relates to the specific need / objective agreed. However, if it became apparent, for example, that the customer might be better off using their with-profits policy to pay off their mortgage than keep it, then that should be explained to the customer. This is because it would be an issue that arose from the information needed to deal with the specific objective or need the intermediary has agreed to advise their customer on.

4.12 It is also important to highlight that, even within focused advice, there remains a duty to use reasonable skill, care and diligence when providing advice. The standard of care required to discharge that duty is that exercised by the reasonably competent adviser. The existence of a duty of care depends on what is said or done by the adviser. If, for example, the intermediary is dealing with a customer who is receiving focused advice in relation to a specific element of their investments, but the firm is aware that the customer has a family and no protection, there would be an expectation that the adviser highlights that need to the customer. That is not to say they have to deal with that need, but it would be right in their professional capacity to highlight what they have observed so that the customer can decide what to do. The ability to provide a focused advice offering is something that is clearly anticipated and allowed by MiFID and which we have previously made clear is an option to the industry.

Customer's perception of service

4.13 We have also been asked about the relative importance of the customer's perception of whether they have received a recommendation. In particular, firms want to understand what is the driver for the FCA and the Financial Ombudsman Service in deciding whether the firm has given a personal recommendation or not – is it the customer's perception or is it the substance of the actual service?

4.14 CESR[60] set out that a particular customer's understanding of the nature of the service they have received may not always be accurate:

"…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."

4.15 The Courts apply an objective test: whether an impartial observer, having due regard to the regulatory regime and guidance, and what passed between the parties, would conclude that advice had been given[61].

4.16 Firms should be mindful that 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 customer's circumstances or presented as suitable, then this is likely to amount to a personal recommendation. However, while the customer's own perception of the service received is very important, it is feasible that the customer will not always be correct in their understanding.

Financial Ombudsman Service

4.17 Firms have told us that the response by the Financial Ombudsman Service to complaints is a barrier to developing new systems that match the requirements of our Handbook. This view emerged in our roundtable discussion and through the thematic review. This

[60] http://www.esma.europa.eu/system/files/10_293.pdf

[61] Rubenstein v HSBC Bank plc [2011] EWHC 2304 (QB) at paragraph 83.

risk may be perceived to be more significant for firms using automated systems where there is potential for systemic mis-selling.

4.18 The Financial Ombudsman Service has explained on its website its approach to dealing with complaints received on basic advice and simplified advice:

> "We are already used to dealing with complaints about many financial products where there is no specific requirement in relation to 'suitability' or 'know your customer'. In such cases – as long as they have not been misled – we expect customers to be responsible for their own choice.
>
> "We assess any complaint we deal with involving the sale of a 'stakeholder product' on the understanding that the customer received 'basic advice'. We will not, for example, expect a 'fact find' to have been completed – or the adviser to have made detailed enquiries to 'know the customer'. As with other products, we take the regulator's rules and guidance into account. We also look at good industry practice.
>
> "'Simplified advice' processes must comply with the same regulatory requirements as those involving full advice – including the requirement that the advice has to be 'suitable'. But in any complaints we might receive, we would judge the advice in the specific context in which it was given. So we would not expect a 'full fact-finding' exercise. But we would look at the questions asked and the options open to the particular customer concerned.
>
> "Where the 'simplified advice' involves an automated process, we would look – as part of our consideration of any complaint – at whether there was a good record of the information the customer gave and the choices they made".

4.19 The Financial Ombudsman Service has stated that the law requires them to decide each complaint on the basis of what it believes is fair and reasonable. In doing so, its rules require it to take account of the law, our rules and good practice in the industry. The Financial Ombudsman Service's approach is to ask questions, listen to both sides of the story, and decide each case on its individual facts and merits, not on how cleverly or persuasively either side argues their case.

4.20 The fact that the Financial Ombudsman Service may arrive at different outcomes on separate cases should not be seen as surprising. It is not a question of inconsistency, but a matter of the Financial Ombudsman Service looking at each complaint individually and making a decision on what it believes is fair and reasonable in the circumstances of that particular case. There may be surface similarities between some complaints. But when looked at in detail, the Financial Ombudsman Service generally finds that very different facts and issues are involved. This reflects the reality that everyone's personal and financial circumstances will be different.

4.21 Deciding a complaint, like financial advice itself, can involve a complex balance of judgement, often based on a wide array of seemingly contradictory facts. The 'right' outcome in one case will not automatically be the right answer in other 'similar' cases.

Liabilities/Responsibilities

4.22 Firms have raised concerns about where the responsibilities (and therefore liabilities) lie with automated advice services. It is felt that some of the risks may be higher for these types of services than for traditional face-to-face services. The main concern lies around where a customer enters a simplified advice model, receives a personal recommendation to purchase a product but then buys exactly the same product elsewhere on an execution-only basis. What liability will the firm that provided the personal recommendation have if that product turns out to be the wrong product later down the line?

4.23 This is a complex issue and the question of liability will be dependent on the facts in a given scenario. However, as with 'full' advice, simplified advice involves a firm giving regulated advice and so the adviser must comply with the relevant Handbook requirements (in particular COBS 2.1 and the requirement to take reasonable steps to ensure that a personal recommendation is 'suitable' for the customer (COBS 9)). A firm also owes duties to the customer under common law (duty of care as a professional adviser). It may also have contractual duties depending on whether a contract has been entered into with the customer.

4.24 A breach of the COBS rules could give rise to a claim for negligence and / or breach of statutory duty under section 138D(2) of FSMA (if the customer is an individual customer and if the breach relates to an FCA rule to which s.138D applies) and this is no different where a firm has given simplified advice. If there is a prima facie breach of statutory duty or negligence, whether a firm will be liable depends on the usual tests: a causal link must be shown between the breach and the loss, the loss suffered must have been of a type that was foreseeably likely to arise from the breach of duty, contributory negligence is a factor, and the claimant cannot have waived his rights after the breach has occurred or otherwise received redress from another avenue (e.g. the ombudsman service).

4.25 There may be factual reasons that could contribute to why a claim would fail the causation or foreseeability tests, for example, if the advice was good at the time it was given but a long period of time elapses during which the customer's circumstances have changed and it is as a result of those changes in circumstances that the product is no longer suitable. However, ultimately these questions would be for the court to decide on a case-by-case basis.

4.26 The options available to a firm that is concerned about this situation arising appear to be:

a) To ensure that its system and processes for making a personal recommendation are compliant with the relevant COBS rules and that the design of the process is robust, and subsequently rely on the usual defences of causation and remoteness of loss if a claim is brought by a customer.

b) In relation to its general, non-statutory liabilities (but not its liability under section 138D for breach of COBS rules), a firm could include a provision in the terms and conditions of the simplified advice process that limits its liability or excludes liability (both contractual and tortious) if the customer does not buy the product recommended in the process from the firm. The exclusion clause must comply with common law and statutory requirements such as the reasonableness test under the Unfair Contract Terms Act 1977 and the Unfair Terms in Customer Contracts Regulations 1999. In our view, a prominent and clear exclusion clause is likely to be effective in these circumstances (although this is ultimately a decision for the court).

Existing customers

4.27 One particular area where there appears to be confusion is in situations involving providing information to existing customers (e.g. about a change of fund manager / asset allocation of their existing fund). In our view, where the firm sends factual information to its customers without regard to the specific customers' investment positions, for example, to notify that a fund manager is changing or to offer additional or alternative products, that would not constitute regulated advice. On the other hand, factual information may constitute regulated advice where it is provided to customers because, in the firm's view, the customers' portfolio could / should be 'improved' and in the context the factual information contains an implied recommendation, for example, advising the customer to reconsider the portfolio and sell an investment or buy an alternative product.

4.28 For example, if a firm believes that some of its customers are in a poorly performing fund with a poor prospect of performance improving in the future, the firm may want to highlight this to its customers and help them move to alternative funds. However, the firm is nervous of writing to customers as this could constitute an implied recommendation and so may decide to take no action to help its customers. A possibility in this situation is that the firm could contact its customers to offer factual information about the performance of the fund, and perhaps also offer information about a range of alternative funds that the customer may consider. It cannot offer an opinion on which fund(s) may suit the customers' circumstances, as to do so would be a personal recommendation.

Customer responsibilities

4.29 There is some evidence (for example from research[62] conducted for the FCA Practitioner Panel) that one of the barriers discouraging customers from accepting more responsibility for their decisions is impenetrable disclosure documents. Our recent research found that respondents wanted clear and simple fund information (risk level, access, charges, term etc.) at an easy click of the button (when using automated services) with key information that would help customers make better informed decisions clearly highlighted.

4.30 In services that do not amount to full advice, the customer must be made aware of the limitations of the service and, assuming they have been properly described, accept those limitations. Where the service does not involve giving advice, but is execution-only, the customer will, inevitably, be taking responsibility for the decision themselves and recourse to redress would be limited, for instance to cases where there was misrepresentation.

4.31 In GC14/3, we said that a second area for more work as a result of the expectations gap project related to identifying how we can help firms (and their advisers) improve the quality and effectiveness of the information they provide consumers about the products and services they are buying or already have. We plan to publish a discussion paper in 2015 reporting on the outcome of this work and inviting views on areas where we see opportunities for change.

4.32 As part of this work, and linked with Project Innovate, we are also inviting stakeholders, from across the financial services industry, consumer groups and other industries and sectors, to engage in this debate now and get in touch to share:

- their research and broad ideas for improving the effectiveness and delivery of information to consumers about products or services. We are interested in all potential ideas particularly those that take advantage of technological developments
- ideas they are currently testing or are considering, and
- ideas that have been effective in other areas of their business or that have worked in other sectors or abroad

4.33 We also want to work with stakeholders and help test out practical ideas and proposals for alternative approaches to communicating with consumers. Our website has further details on Project Innovate. If successful, such testing could lead to us making changes to our rules or granting waivers where we can. Stakeholders can also get in touch with any ideas, questions or to request an informal discussion via disclosuretesting@fca.org.uk.

[62] *Customer Responsibility; Identifying and Closing the Gap*. Jackie Wells & Associates. September http://www.fs-pp.org.uk/documents/fca_practitioner_panel_consumer_responsibility_report_september_2013.pdf

ANNEX A the five key tests for investment advice[63]

Is it investment advice?

Examples of issues to consider:

1. Does the service being offered constitute a recommendation?

- the difference between information and a recommendation
- whether assisting a customer to filter information amounts to a recommendation

YES

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

- how to distinguish generic advice and general recommendations from investment advice
- whether recommending a firm or a service can amount to investment advice

YES

3. Is the recommendation at least one of the following…

…a) presented as suitable?

…b) based on a consideration of the person's circumstances?

- how a financial instrument might implicitly be presented as suitable
- the impact of disclaimers
- what it means to consider a person's circumstances

YES YES

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

- assessing recommendations delivered via the Internet
- assessing recommendations given to multiple customers at once
- distributing investment research

YES

5. Is the recommendation made to a person in his capacity as one of the following…

…a) an investor or potential investor?

…b) an agent for an investor or potential investor?

- identifying investors and their agents
- the distinction between corporate finance advice and investment advice

YES YES

INVESTMENT ADVICE

[63] Reproduced from CESR's Q&A *Understanding the definition of advice under MiFID*