

Information or advice: the value judgment

KEY POINTS

- The distinction between providing information, and giving advice, is a crucial one.
- The difference is the element of opinion, judgement, or recommendation.
- Any application of skill or judgement, so that the information provided is relevant to or would tend to influence the decision of the recipient, is likely to be regarded as a recommendation.

The distinction between providing information, and giving advice, is a crucial one in the investment market. It can be elusive, particularly in the context of web or mobile based platforms, and tools to aid decision-making and steer customers to consider investment options and solutions.

This article considers the development of the distinction, and its application to innovative products such as online platforms, with particular reference to the FCA's finalised guidance in FG15/1 ('Retail investment advice: Clarifying the boundaries and exploring the barriers to market development').

CASE LAW

There is a growing body of case law in which attempts have been made to define, or at least to describe, the critical distinction between information and financial advice.

In *Re Market Wizard Systems (UK) Ltd* [1998] 2 BCLC 282, Carnwath J considered that the "buy, sell or hold" signals generated by a computer package constituted "advice" for the purposes of para 15 of Sch 1 to the Financial Services Act 1986. He said:

"The signals provide guidance as to the course of action which the user should take in relation to the buying or selling of the investments. Such guidance, in the ordinary use of English, is 'advice on the merits' of purchasing those investments. It matters not that the user is free to follow or disregard the advice; nor that he may receive further advice from his broker before making a final decision."

More recently, in *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB), HHJ Havelock-Allan QC said that:

"The key to the giving of advice is that the information is either accompanied

by a comment or value judgment on the relevance of that information to the client's investment decision, or is itself the product of a process of election involving a value judgment so that the information will tend to influence the decision of the recipient".

Consequences of giving investment advice

In the regulated context, the consequences of a finding that a transaction was "advised" rather than "execution-only" are wide-ranging. The adviser must comply with the relevant FCA 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). Breach of the COBS rules could give rise to a claim in negligence and/or breach of statutory duty under s 138D (2) of FSMA (in the latter case, provided the customer is a "private person", and the breach relates to an FCA rule to which s 138D applies). The adviser also owes common law duties to the customer, and may have contractual duties.

Even in the non-regulated context, the consequences of making a recommendation can be far-reaching. A recent example may be found in *Anderson v Openwork Limited* [2015] EW

Misc B14. Mr Anderson sued his IFA in respect of his purchase of a Newcastle Guaranteed FTSE Bond. The Bond was a structured deposit, not a designated investment, as a result of which the COB rules in force at the time did not apply directly. Nevertheless, where the IFA gave advice in relation to an unregulated product, a duty of care at common law arose. The argument that a common law duty cannot subsist where there is a statutory duty in place to deal with "more complicated investments" was rejected. The starting point for the standard of care is compliance with the regulatory regime, even though it is not directly applicable: see *Green & Rowley v RBS* [2012] EWHC 3661 (QB); [2013] EWCA Civ 1197. Furthermore, where an advisory duty is assumed and breached, the adviser will be responsible for all the foreseeable loss which is a consequence of that course of action being taken, as opposed to the foreseeable consequences of the advice being wrong: *SAAMCO* [1997] AC 191.

THE FCA APPROACH

The FCA's view on the issue of "Advice or Information", as set out in its Perimeter Guidance (PERG) at 8.28, is that:

"... advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures".

In general terms, simply giving information, without making any comment or value judgment on its relevance to decisions which an investor may make, is not advice. However, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:

- offering to tell a client when certain shares reach a certain value on the basis that the price of the shares means that it is a good time to buy or sell them; or

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- providing information “on a selected, rather than balanced, basis which would tend to influence the decision of the recipient”.

The FCA has expressed its concern at the difference between its expectations of firms, and firms’ understanding of what is required of them in this area: the “expectations gap”. In July 2014 it published a Guidance consultation paper on “Retail investment advice: Clarifying the boundaries and exploring the barriers to market development”: GC 14/3. This was followed in January 2015 by its Finalised Guidance document, FG15/1. In addition to a comprehensive discussion of the issues, FG15/1 provides a number of detailed example scenarios, and, in each case, offers a view (and it is, of course, no more than the FCA’s view), on whether or not the example involves the provision of regulated advice and/or a personal recommendation.

In relation to the critical distinction between the provision of “information”, and giving “investment advice”, FG15/1 adopts a conservative approach. The difference is:

“the element of opinion or judgment on the part of the adviser, either in person or, for example, online. Regulated advice involves recommending a course of action or making a judgment on the merits of exercising a right (eg, 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”.

Consistent with the guidance in PERG 8.28, however, the provision of information on a selected rather than balanced basis, so that it influences or persuades, 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.

In the analogous situation under MiFID, the five key tests for determining whether a service is a “personal recommendation” (and so constitutes investment advice) are as set out in the Committee of European Securities Regulators (CESR) finalised Q & A (“Understanding the Definition of Advice under MiFID”) as follows:

- Does the service being offered constitute a recommendation?
- Is the recommendation in relation to one or more transactions in financial instruments?
- Is the recommendation:
 - presented as suitable; or
 - based on a consideration of the person’s financial 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.
- Is the recommendation issued otherwise than exclusively through distribution channels or to the public?
- Is the recommendation made to a person in their capacity as:
 - an investor or potential investor; or
 - an agent for an investor or potential investors.

One of the most interesting aspects of FG15/1 is its approach to new technologies and innovative distribution models, such as automated sales processes, public media, and social media. In this area, 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. The FCA endorses the “helpful guidance” provided by the CESR Q & A paper 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 judgment by the firm.
- The outcome of the questioning (whether particular products are highlighted, how many of them, who provides them, their relationship to the questioner, and so on).
- 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.

Automated and web-based processes also feature heavily in the “Example Scenarios” in FG15/1, which are designed to assist firms and their advisers to consider the practical application of the Guidance. The straightforward example of a website without filtering, with general generic information about investments, and no interactivity, is not regulated advice, as it does not involve “any comment or value judgment on its relevance to decisions which an investor may make”. Nor is it a personal recommendation. The addition of pop-ups when the customer picks a product, containing objective information on what he should consider when making investment decisions, such as health, financial circumstances, or retirement date, does not cross the line between information and advice.

However, if the available products are classified into risk categories which are “self-generated”, and not drawn directly from each product’s disclosure material, then this is likely to be regulated advice. It is the combination of self-generated rankings, combined with the fact that these are given to someone in their capacity as investor, that make the classification likely to fall within the scope of regulated advice. Whilst there is no “personal recommendation”:

“... the firm is advising on the merits of buying, selling or holding on to a particular

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Andrew Davies is a barrister at Henderson Chambers specialising in commercial, consumer and regulatory law. Email: adavies@hendersonchambers.co.uk

investment by applying its skill and judgment to determine what product a person with a particular risk appetite should invest in”.

If the web-based list of available investment products is made easier to search by the addition of filtering functionality, a similar distinction applies:

- So long as the website enables the customer to filter the products by reference to objective factors (such as “UK Equity funds”), this is not likely to be regulated advice (or a personal recommendation).
- However, if the filtering is based on “riskiness”, this is likely to be regulated advice (although not a personal recommendation), as skilled analysis and opinion is used by the firm to rank specific products.
- Likewise, if the filtering is based on: investment objectives and judgment as to whether they are suitable for short or long term investment; a number of factors such as riskiness and investment objectives; the ratings of a third party (such as Morningstar); or the firm’s views on “how good” the products are – then this is likely to be regulated advice.

By contrast, where materials including narrative on investment risk, alongside a risk profiling tool, are used to help educate a customer to make a decision on their investment, this is likely to be “Execution only” rather than regulated advice, as there is no element of comment or value judgment on relevance to decisions which an investor may make. Where the filtering process is not based solely on the customer’s risk appetite and preferences in relation to other factors, but also on facts relating to the customer’s life and situation (such as current use of tax wrappers, age, marital status, financial resources, plans, and so on), it is likely to be regarded as regulated advice (and a personal recommendation).

Model investment portfolios (a pre-constructed collection of designated investments meeting a specific risk portfolio: see FG 12/15: Independent and restricted advice) have been the subject of considerable attention from the FCA. PERG 8.29.7 suggests that where a firm is providing

discretionary management services under a mandate, and makes changes to a client’s investment in order to rebalance the portfolio without providing advice, this is not regulated under Art 53. FG 15/1 gives further consideration to what is regarded as discretionary investment management, pointing out that:

“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 (COBS 9.2.1R). As for 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”.

FG 15/1 also contains an interesting discussion of “where the responsibilities (and therefore liabilities) lie with automated advice 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?

While stressing that questions of breach of duty, causation, foreseeability of loss and contributory negligence are ultimately for the court to decide on a case-by-case basis, the FCA suggest that the options available to a firm concerned about this situation arising appear to be:

- To ensure that its systems 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.

- In relation to its general, non-statutory liabilities (although not its liability under s 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 Consumer Contracts Regulations 1999 (see now also the Consumer Rights Act 2015). In the FCA’s view:

“a prominent and clear exclusion clause is likely to be effective in these circumstances ...”.

CONCLUSIONS

The guidance and examples given in FG 15/1 go some way towards exploring and clarifying the boundary between information and advice in relation to online information services and direct-to-consumer trading platforms.

Important questions are left unanswered, particularly in relation to “contextual factors”, where what might otherwise be regarded as the provision of information about share prices, market movement, or the actions of others (as in the case of copy or “mirror” trading), becomes regulated advice because, in the circumstances, it acquires the nature of a recommendation.

The inevitable tension between the desire to encourage innovation and the reduction of cost in the retail investment market, and caution over the approach of the FCA and the courts to these highly sensitive issues, mean these questions are likely to remain controversial. ■

Further Reading:

- To advise or not to advise? [2014] 11 JIBFL 686.
- Banking litigation: A changing landscape [2015] 9 JIBFL 563.
- LexisNexis Financial Services blog: Consumer protection – statutory wording and contractual effect.