

## Regulatory categorisation, treatment and protection of professional client communications

The below seeks to demonstrate that there are a wide range of communications which firms may provide to their professional clients, many of which are not purely factual, which do not fall into either of the definitions of investment recommendation under MAR nor investment advice under MiFID and the UK implementation of MiFID in the FSMA Regulated Activities Order. We also seek to show which FCA rules apply to each category of communications (to ensure appropriate client protection dependent/ commensurate with the communication). Ultimately, any form of communication issued from financial institutions will be regulated in some element but it is not as simple as slotting each in every communication element into three categories of factual, advice or recommendation.

Definitions of both investment recommendation and investment advice are provided in the Annex for ease of reference.

Category	Applicable rules & client protection requirements	Examples	Audience	Instruments	Comment / analysis
<b>Investment recommendations</b>	<ul style="list-style-type: none"> <li>MAR Investment Recommendation (IR) rules (which require objective presentation and conflicts of interest disclosures)</li> <li>Other FCA conduct rules will apply such as financial promotions rules under COBS 4 and conflicts</li> </ul>	<ul style="list-style-type: none"> <li>Investment research (Independent research)</li> <li>Strategy notes</li> <li>Ideas circulated through alpha capture systems</li> <li>Sales notes that include recommendations</li> </ul>	<ul style="list-style-type: none"> <li>To more than one client (“intended for distribution channels or for the public”)</li> <li>No requirement to disseminate to the public at large in the definition</li> <li>But can be to the</li> </ul>	<p>Relates to a financial instrument (as defined in Article 4.1 of MiFID) which is admitted to trading or traded on an EU exchange/ MTF (or OTF) or an issuer of such financial instrument(s)</p> <p>Also includes OTC derivatives which</p>	<p>Materials sent to a number of appropriate clients – these are not tailored to their specific investment objectives nor are they presented as suitable or based on a consideration of the specific circumstances of the recipient</p>

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	management rules under SYSC 10		public at large- will be in scope by sending a sales blast/ mass communication	can influence or give exposure to those EU tradeable instruments	
<b>MiFID investment advice</b> <b>(note: MiFID investment advice is narrower than the UK activity of 'advising on investments<sup>1</sup> but the principles remain the same)</b>	<ul style="list-style-type: none"> <li>MiFID conduct rules (including suitability requirements in COBS 9 as well as general conflicts management and disclosures under SYSC 10)</li> </ul>	Bespoke, bilateral communications which have been prepared on the basis that the instruments discussed are suitable for the client given the client's needs and objectives	Personal to one single client (or could be the same idea to multiple investors if presented as tailored (suitable) to their needs and objectives or based on consideration of the client's circumstances). In any event, materials are not distributed to the public	Any MiFID financial instrument	Wholesale sell side firms generally have a policy of ensuring that their communications do not constitute investment advice (unless there are specific reasons to offer this service).  Training is provided to Sales staff on dos and don'ts
<b>Other communications</b>	<ul style="list-style-type: none"> <li>Principles 5,6,7,8</li> <li>Financial promotions (including fair, clear, not misleading)</li> </ul>	Factual comments (e.g. "company x results are out"; "we've seen a lot of activity in y")	To one single client, or to a section of clients, or public at large	N/A	Factual information, no recommendation
		Explaining risks and	To one single client,	Any MiFID financial	Factual information, no

<sup>1</sup> See PERG 13.3 Q19

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	requirements (COBS 4.2.1R))	benefits of a particular financial instrument <sup>2</sup>	or to a section of clients, or public at large	instrument	recommendation
	<ul style="list-style-type: none"> <li>Conflicts of interest</li> <li>Appropriateness</li> <li>Market conduct</li> </ul>	Producing league tables showing the performance of financial instrument against a benchmark <sup>3</sup>	To one single client, or to a section of clients, or public at large	Any MiFID financial instrument	Factual information, no recommendation
		Recommendation on currency or commodity spot transactions	To one single client, or to a section of clients, or public at large	N/A	Not in respect of a MiFID financial instrument (currency and commodity spot are not MiFID financial instruments) or an issuer
		Discussions on a sector or a curve, possibly including opinion on future price changes or potential strategy but no identifiable issuer / financial instrument	To one single client, or to a section of clients, or public at large	N/A	No identifiable MiFID financial instrument/ issuer
		Alerts about the happening of certain events (e.g. shares reaching a certain price)	To one single client, or to a section of clients, or public at large	MiFID or non-MiFID financial instrument	Factual information, no recommendation

<sup>2</sup> See PERG 13.3 Q20

<sup>3</sup> See PERG 13.3 Q20

Category	Applicable rules & client protection requirements	Examples	Audience	Instruments	Comment / analysis
		Details of directors' dealings in own company shares	To one single client, or to a section of clients, or public at large	MiFID or non-MiFID financial instrument	Factual information, no recommendation
		Economic / macro commentary	To one single client, or to a section of clients, or public at large	N/A	No identifiable MiFID financial instrument/ issuer
		<ul style="list-style-type: none"> <li>Pitching for new corporate finance business, including M&amp;A</li> </ul>	<p>Prospective corporate finance client</p> <p>Pitches are not distributed to the public</p>	<p>Newly-issued securities for issuance work; possibly financial instruments (transferable securities) for some M&amp;A work</p>	<p>Pitches are promotions of a firm's services to a prospective client, not suggestions of trading activity</p> <p>The preliminary ideas that are discussed are neither for public dissemination nor presented as suitable to particular objectives. They are merely introductory ideas (i.e. not a recommendation) – sometimes before a client relationship is established and therefore before the investment objectives and the level of knowledge and experience of the</p>

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					prospective client can be assessed.
		<ul style="list-style-type: none"> <li>Roadshows where acting on behalf of an issuer client-communication of facts about an issuer and their securities</li> </ul>		Usually transferable securities	Representing an issuer or communicating with corporate finance contacts on behalf of an issuer client is subject to corporate finance business provisions (COBS 3.2.2G).
		Events where a firm organises for a number of potential investors to meet a number of companies seeking investment	To one single client, or to a section of clients	Could be transferable securities or units in a CIS	Depending on the precise arrangements, the firm might be receiving and transmitting orders (e.g. when it brings a potential seller and a potential buyer of a stake together).  However, the firm bringing the parties together is not making a recommendation merely by virtue of making the arrangements for the roadshow

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		Market soundings	Not distributed to the public (inside information and/or confidentiality restrictions- even when strictly speaking there is no inside information)	Transferable securities, which may be in existence (M&A) or may be merely contemplated (issuance)	Firm is representing an issuer or potential bidder; communications are subject to scripting and other rules set out in the market sounding safe harbour
		General views on a financial instrument, e.g. in light of recent events in the market	To one single client or to more than one client but without a pre-planned dissemination strategy	MiFID or non-MiFID financial instrument	No advice provided, and no recommendation, and not intended for distribution channels or the public
		Presenting various execution ideas to a single client where no specific idea is recommended or presented as tailored to a client's objectives	To one single client, or to a section of clients	N/A	Does not recommend/ suggest an investment strategy concerning financial instrument(s) or issuer(s), i.e. not investment recommendation.
		Discussion materials regarding investment structures and	Specific group or sector of clients	Collective investment scheme interests /	Discussion of how the structure works and its advantages /

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		opportunities using those structures e.g. the Authorised Contractual Scheme		structures	disadvantages. Materials discuss options for structuring with their respective pros & cons, rather than recommending an investment strategy as such
		Discussing a trading tactic and timing when a client has already established a trading strategy	To one single client	Likely a financial instrument	Not concerning or suggesting any investment decision or strategy, nor the merits of the investment.  No recommendation because communication is to only one client
		Independent research Strategy notes Trade ideas	To one single client, or to a section of clients, or public at large	Does not relate to an in-scope financial instrument (as defined in MiFID II) or issuer. E.g. non-EU issuer or non-EU instrument with no EU listing/trading or impact)	Outside scope of IR because non-EU instrument or issuer.

## Annex 1 Definitions

**Investment recommendation:** means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public.

(Article 3(35) MAR)

**Investment advice:** means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments. (*MiFID2 art. 4(1)(4)*)

“A personal recommendation shall be considered a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.

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

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

A recommendation shall not be considered a personal recommendation if it is issued exclusively to the public.” (*Draft Commission delegated regulation published on 25.4.16, art. 9*)

Note: current Art 53 FSMA Regulated Activities Order is drafted slightly differently and it is not clear yet on whether there will be any MIFID II transposition changes on this. We consider that for these purposes the MiFID II definition is more relevant