

21 April 2021

**France Invest's contribution to ESMA's consultation on
Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements**

Established nearly 40 years ago, France Invest brings together venture capital (VC), private equity (PE), infrastructure and private debt teams based in France, as well as the associated professions which support them. Its membership currently counts 365 management firms and 180 associate members.

Private equity supports unlisted companies for a fixed period of time and provides them with the equity capital, through the acquisition of minority or majority stakes in their capital, needed to finance growth and transformation projects. It supports the creation of start-ups (venture capital), participates in the growth and transformation of many regional SMEs and mid-caps (growth capital) and contributes to the transfer of companies (replacement capital).

France Invest's members represent one of the main growth drivers for the French and European economy and support a significant portion of employment in France and Europe. In 2020, French venture capital and private equity and infrastructure players invested €23.1 billion in 2,150 companies and infrastructure projects. They raised €23.5 billion from investors, a third of which at international level, which will be invested over the next 5 years.

French venture capital and private equity is no1 in the EU27 in terms of funds raised, capital invested, and number of companies funded. European companies, in particular start-ups and SMEs, are the main recipients of their investments. In 2018, companies backed by French private equity created 75,000 jobs.

France Invest acknowledges that MiFID II appropriateness and execution-only framework is an important element of investor protection and supports ESMA's objective to achieve a consistent level of investor protection in the EU. In this context, we welcome ESMA's consultation on guidelines to enhance clarity and foster convergence in the application of certain aspects of the appropriateness and execution only requirements.

As per EU regulations, an alternative investment fund manager (AIFM) providing an investment service shall apply the business conduct rules pertaining to this investment service.

Furthermore, in France, regarding the marketing of AIFs, pursuant Article 421-26 of the AMF General Regulation and without prejudice to the legal and regulatory provisions applicable to the provision of the service of investment advice:

- an AIFM that markets AIFs under its management shall comply with the conduct of business rules applicable to the service of order execution for third parties provided for in the AMF General Regulation;
- an AIFM that markets AIFs managed by other entities shall comply with the conduct of business rules applicable to the service of order reception and transmission for third parties provided for in the AMF General Regulation.

In other words, as detailed in AMF Instruction DOC 2008-04, AIFMs receiving and processing subscription or redemption orders for units, shares or interests in an AIF shall apply:

- business conduct rules pertaining to the service of order execution for third parties in the case of an AIF for which it is the AIFM;
- business conduct rules pertaining to the service of reception and transmission of orders for third parties in the case of an AIF for which it is not the AIFM.

These rules are defined in Chapter IV of Title I of Book III of the AMF General Regulation, without prejudice to the application of the provisions of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016, and apply to AIFMs which market AIFs in France (<https://www.amf-france.org/en/eli/fr/aai/amf/rg/book/3/title/1/chapter/4/20210101/notes>).

Accordingly, the rules in respect of order processing, client classification and certain rules specific to order reception and processing shall be complied with. The conditions are defined in AMF Instruction DOC 2008-04 - Application of business conduct rules to marketing of units or shares in UCITS or AIFs by asset management companies, management companies or managers.

- Preliminary remark: We generally support ESMA's approach to take its Guidelines on certain aspects of the MiFID II suitability requirements as a starting point for its guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements, as this will ensure an appropriate level of consistency among the two different sets of rules.
- **General remark: we call for further integrating the principle of proportionality in the Guidelines in particular in order to better take into account the type of client and the activity and size of the firm:**
 - Proportionality to better take into account the type of client:

We would like to highlight the need to apply proportionality in relation to the type of investor, professional or not, or eligible counterparty, when considering their knowledge and experience in order to assess whether the investment service or product envisaged is appropriate for them. **We would like to recall that, as per article 56 of Delegated Regulation 2017/565 of April 2016, it can be assumed that professional clients have the required knowledge and experience to understand the**

risks in relation to investment services or types of products such as shares or units of venture capital and private equity funds¹. The firm will have to disclose information about such situation where no assessment is performed and the consequences thereof for the client.

- Proportionality to better take into account the activity and size of the firm:

We believe that the size of the firm should be better taken into consideration. Indeed, the members of France Invest are not all large firms which have the resources to put in place burdensome procedures. We generally recommend adopting a pragmatic approach, especially when firms only target professional clients.

Moreover, investments in venture capital and private equity funds, which are closed-ended funds, are made over the long-term, and investors may not make frequent transactions in relation to such funds. The frequency of the assessment of the knowledge of investors therefore needs to be tailored to this specific feature.

- **Specific remarks on the guidelines proposed in Annex III of the consultation paper:**

- Guideline 1 - Point 14

We fully agree that clients should understand the importance of providing the necessary information to the firm. However, in our view, they should only be provided information that is meaningful to them. We doubt that non-professional clients are in a position to understand the differences between advised and non-advised services. We are afraid that such information, rather than help, will confuse them. We therefore propose removing the obligation to summarise differences between advised and non-advised services.

- Guideline 1 - Point 16

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- Guideline 3 - Points 29-31

¹ "An investment firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client."

We fully support that “The extent of information asked may vary taking into account the type and characteristics of the investment products or services to be considered (i.e. level of complexity and risk of the investment products or services) and the client category (retail client or professional client)” and that “a firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or investment product, for which the client is classified as a professional client.”

We suggest explicitly stating that, following a specific request from a professional investor (e.g. request for proposal), firms do not have to assess the investor’s knowledge. It should generally be assumed that professional clients have the required knowledge and experience to invest in venture capital and private equity funds. In our opinion, the level of protection afforded to professional clients is sufficient.

- Guideline 3 - Point 35

It seems difficult for a firm to ignore other information collected (financial situation, investment objectives, ...) it may have collected in the context of for example product governance arrangements or other investment services, in conducting the appropriateness assessment.

- Guideline 4 - Point 36

It should be specified that, in the context of professional clients, self-assessments may be relied upon.

- Guideline 4 - Point 37

In our opinion, it is too burdensome to require firms to take reasonable steps to check the reliability, accuracy and consistency of information collected about clients.

We recommend integrating footnote no 13 (“When dealing with professional clients, firms should take into account the proportionality principles as referred to in guideline 3, in line with Article 56 (1), first subparagraph of MiFID II Delegated Regulation”) in the body of the Guidelines.

- Guideline 5 - Point 40

Some products, such as venture capital and private equity funds, may be closed ended and as a consequence, investments in such funds are made over the long term. Clients may not make new investments on a frequent basis. It is therefore important that firms are allowed adapt the frequency at which they update information on their clients’ knowledge and experience. It should be noted that firms should not be required to provide information to existing clients on a regular basis, in case no investment service is provided, and that these requirements only apply to clients entering a new transaction. Firms should be required to update information only when a new service is performed.

The Guidelines set out that particular attention should be given to the update of information for more vulnerable clients such as the elderly. Conversely, we recommend adapting the frequency of the update for professional clients.

- Guideline 6 - Point 49

We understand that the requirement for the firm to “adopt the most prudent approach by taking into account the information on the person with the least knowledge and experience” if a group of two or more natural persons involved have difficulties in deciding the person(s) from whom the information on knowledge and experience should be collected only applies to non-professional clients.

- Guideline 6 - Point 50

We understand that the group referred to is made of non-professional clients.

- Guideline 12 - Point 84

In our opinion, it should be clearly stated that policies and procedures may be simplified for professional and eligible counterparties, even with regards complex products.

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