18 May 2020

On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

Response to the European Commission public consultation on the review of the MiFID II/MiFIR regulatory framework

Section 1: General questions on the overall functioning of the regulatory framework

Question 1 - To what extent are you satisfied with your overall experience with the implementation of the MiFID II/MiFIR framework?

1 - Very unsatisfied, 2 – Unsatisfied, 3 – Neutral, 4 – Satisfied, 5 - Very satisfied, Don't know / no opinion / not relevant.

Please explain your answer to question 1 and specify in which areas you would consider the opportunity (or need) for improvements.

Unsatisfied.

As a starting point, we would like to clarify how the private equity and venture capital industry is affected by the MiFID II/MiFIR framework. There are broadly two categories:

(1) Many private equity firms are regulated as managers of alternative investment funds (AIFMs) and therefore fall outside the scope of MiFID II. Our view is that this is generally also true for affiliates of the manager of an AIF conducting marketing activities as we consider the marketing of the AIFs not to be a MiFID activity (i.e. not reception and transmission of orders and not investment advice). The concerns we have regarding these are laid out in our response to Question 94.

(2) Even though the above is the general rule, a small number of private equity firms will be fully regulated as MiFID investment firms. These include firms that provide investment services such as the reception and transmission of orders and investment advice if, on the facts, they do not fall within one of the exemptions to MiFID such as the group exemption (they are then referred to as "adviser-arrangers"). The MiFID framework will also apply to those private equity firms that carry out portfolio management.

Moreover, certain MiFID definitions or concepts, like a new category of semi-professional investors, may be relevant to AIFMs (for example, because of the cross-reference to professional clients in the Alternative Investment Fund Managers Directive or AIFMD) and it regularly happens that national competent authorities choose to apply certain MiFID requirements to them.

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Most of the investor protection requirements in MiFID II are aimed at the protection of retail clients and less sophisticated individuals and entities. However, one of the effects of MiFID II/MiFIR has been that the investor protection requirements under MiFID I were extended more broadly such that they apply to a wider range of clients and firms. As a result, many of the obligations (such as the disclosure obligations under MiFID Article 24(4)) are excessive for private equity firms which are dealing with sophisticated and experienced clients and investors and for whom the level of protection under MiFID II/MiFIR is largely unnecessary.

The MiFID II/MiFIR sections with the biggest impact on Invest Europe's members are therefore those dealing with investor protection and the passporting regime. As regards the former, we find many investor protection requirements in MiFID II, irrespective of their level of appropriateness for typical retail clients, to be disproportionate for private equity firms given their limited activities, the nature of their clients and their investor base. Indeed, typical clients of MiFID "adviser-arrangers" tend to be the AIFMs of the relevant private equity funds (as indicated above, themselves authorised entities under the AIFMD).

Examples of areas of MiFID II/MiFIR where we consider that a lighter touch and more nuanced approach would be appropriate are set out below and further throughout this response:

- **Recording of communications (Article 16(7) MiFID II):** At present, requirements to record telephone conversations and to keep a copy of electronic communications apply in respect of all MiFID financial instruments including unlisted securities and private, unlisted funds. We think that this application is too broad and goes beyond ensuring that client orders are accurately transmitted and executed and the prevention of market abuse. Therefore, we consider that there should be an exemption where the relevant financial instruments are not traded on a regulated market or multilateral trading facility.

- **Product governance (Article 24(2) MiFID II):** See our response to Question 46.

- **Disclosures (Article 24(4) MiFID II):** The costs and charges disclosure requirements in MiFID II are onerous for firms but generally of little value to the firm's client, which is often an affiliated entity of the MiFID firm. The costs and charges to be borne by private equity funds are usually subject to extensive negotiation, therefore the underlying fund investors will already be well aware of the costs and charges to be applied. Similarly, much of the information on risk and investment strategies will already be known to and evaluated by private equity investors as part of their own due diligence and negotiation processes. On that basis, we think that there should be an option for firms to agree with professional clients and eligible counterparties to disapply these disclosure requirements.

- **Inducements and research (Article 12 and 13 MiFID II Delegated Directive):** See our response to Question 49.

- **Best execution (Article 27 MiFID II):** See our response to Question 57.

Question 2 - Please specify to what extent you agree with the statements below regarding the overall experience with the implementation of the MiFID II/MiFIR framework? 1 – Disagree, 2 – Rather not agree, 3 – Neutral, 4 – Rather agree, 5 – Fully agree, N/A

The EU intervention has been successful in achieving or progressing towards its MiFID II/MiFIR objectives (fair, transparent, efficient and integrated markets).	Neutral
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	Disagree
The different components of the framework operate well together to achieve the MiFID II/MiFIR objectives.	Neutral
The MiFID II/MiFIR objectives correspond with the needs and problems in EU financial markets.	Disagree
The MiFID II/MiFIR has provided EU added value.	Disagree

Please provide qualitative elements to explain your answers to question 2.

As discussed in our response to Question 1, we think that MiFID II imposes requirements on private equity firms which are unnecessary given the activities, clients and investor base of such firms. We do not think that the policy intention behind MiFID II was to impose substantial, additional requirements on firms which are dealing with sophisticated and experienced clients and investors who are themselves capable of protecting their own interests.

Therefore, we believe that the current scope of application of MiFID/MiFIR should be narrowed in a number of respects to avoid placing an unnecessary burden on private equity firms as well as other firms providing services to professional clients.

Question 3 - Do you see impediments to the effective implementation of MiFIDII/MiFIR arising from national legislation or existing market practices? Please explain your answer.

Yes. MiFID investment firms are a highly heterogeneous group: not all of them share the same business model and pose the same risks to their customers and the market. It is essential for the MiFID implementation to be done in such a way that the specificities of the different business models are at least taken into consideration.

Question 6 - Have you identified barriers that would prevent investors from accessing the widest possible range of financial instruments meeting their investment needs? If you have identified such barriers, please explain what they would be.

The greatest barrier for investors to be able to access a wide range of financial instruments is currently the definition of professional client (including “on request” professional clients) under Annex II of MiFID II. See our response to Question 40 for more details.

Section 2: Specific questions on the existing regulatory framework

I. Investor protection

Question 31 - Please specify to what extent you agree with the statements below regarding the experience with the implementation of the investor protection rules? 1 - Disagree, 2 - Rather not agree, 3 - Neutral, 4 - Rather agree, 5 - Fully agree, N/A

The EU intervention has been successful in achieving or progressing towards more investor protection.	Neutral
The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	Disagree
The different components of the framework operate well together to achieve more investor protection.	Neutral
More investor protection corresponds with the needs and problems in EU financial markets.	Rather not agree
The investor protection rules in MiFID II/MiFIR have provided EU added value.	Rather not agree

Question 31.1 - Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.

As a pan-European association, it is difficult for Invest Europe to provide concrete numbers that would be accurate and representative for the full membership.

That said, irrespective of the cost, we believe that the benefit of investor protection rules for the client is limited in our case. Professional and sophisticated clients MiFID private equity firms provide services to, simply do not require the same level of information or protection as retail investors.

2. Relevance and accessibility of adequate information

Context: *Information should be short, simple, comparable, and thereby easy to understand for investors. One challenge that has been raised with the Commission are the diverging requirements on the information documents across sectors. One aspect is the usefulness of information documents received by professional clients and eligible counterparties ('ECPs') before making a transaction ('ex-ante cost disclosure'). Currently, the ex-ante cost information on execution services apply to retail, professional and eligible clients alike. With regard to wholesale transactions a wide range of stakeholders consider certain information requirements a mere administrative burden as they claim to be aware of the current market and pricing conditions.*

Question 34 - Should all clients, namely retail, professional clients per se and on request and ECPs be allowed to opt-out unilaterally from ex-ante cost information obligations, and if so, under which conditions?

Professional clients and ECPs should be exempted without specific conditions	Yes
Only ECPs should be able to opt-out unilaterally	No. Professional clients should also be able to opt-out.
Professional clients and ECPs should be able to opt-out if specific conditions are met.	No, this should be wholly within the discretion of the client and specific conditions should not be applied.
All client categories should be able to opt out if specific conditions are met.	No
Other	N/A

Please specify what is your other view on whether all clients, namely retail, professional clients per se and on request and ECPs should be allowed to opt-out unilaterally from ex-ante cost information obligations? What conditions should apply ?

Given the more sophisticated nature of professional and semi-professional clients and ECPs, which means that they would generally be in a position to obtain such information from other sources, we think that such clients should either be exempted or be able to opt-out unilaterally from ex-ante cost information obligations. We think that this should be an option for all firms and not be subject to any specific conditions.

3. Client profiling and classification (semi-professional investor definition)

Question 40 - Do you consider that MiFID II/MiFIR can be overly protective for retail clients who have sufficient experience with financial markets and who could find themselves constrained by existing client classification rules? Please explain your answer.

Fully agree.

The *per se* professional client definition in MiFID II is relatively narrow and a significant sub-set of sophisticated private equity investors such as high net worth individuals would generally not qualify. In addition, given the nature of private fund investing, many of these investors, including larger and highly sophisticated ones, will also not satisfy the "on request" professional client criteria (the "two out of three" quantitative test) in Annex II of MiFID II, even though they are experts in their field (e.g. with significant experience of investing in private equity funds or in entrepreneurial businesses) and despite their level of wealth and/or their often sophisticated investment strategies.

This is mainly because:

(i) the requirement to carry out transactions on the relevant market at an average frequency of 10 per quarter is calibrated to transactions in liquid instruments and not private equity investing which has a significantly lower transaction frequency; and

(ii) individuals who have significant experience of investment in unlisted securities, such as founders or CEOs of businesses, will often not have worked in the financial sector.

This is particularly important because the current MiFID distinction between retail and professional investors, although drafted in the context of regulated markets, is cross-referenced in other EU financial services legislation, like the AIFMD[1]. As such, a MiFID definition risks ultimately being applied to other EU financial market players, including those that fall outside the MiFID framework and have very different characteristics from traded securities.

While we do not dispute that high standards of protection are necessary for retail investors, using the restrictive MiFID definition in a private equity context, for example for the purposes of marketing under the AIFMD, prevents fund managers in many cases and jurisdictions from being able to approach high net worth or sophisticated investors, leaving investor demand unfulfilled and shutting down an important source of capital for the private equity and venture capital industry without any meaningful increase in investor protection.

The result of Annex II of MiFID II is therefore that the range of appropriate financial instruments which can be offered to sophisticated individuals or institutions will be limited, making it harder for them to meet their investment needs.

Broadening the "professional investor" criteria (our preferred option) or **creating a new EU-wide harmonized category of "semi-professional" investors** (as is already the case in many Member States) would provide a much needed and appropriate layer of flexibility and better represent the diversity of financial investors. It would facilitate investments by high net worth individuals into private equity, growth and venture capital funds without any loss of protection for true retail investors. It would also provide far better access to funding for SMEs from a hitherto largely untapped source of capital.

Question 41 - With regards to professional clients on request, should the threshold for the client's instrument portfolio of EUR 500,000 (See Annex II of MiFID II) be lowered? 1 - Disagree, 2 - Rather not agree, 3 - Neutral, 4 - Rather agree, 5 - Fully agree, Don't know / no opinion / not relevant. Please explain your answer.

Rather agree.

We agree that the financial instrument threshold of EUR 500,000 could be lowered without necessarily lowering investor protection.

In addition to the threshold *amount* itself, also the interpretation can be problematic. Annex II of MiFID II defines "the client's financial instrument portfolio" as "including cash deposits and financial instruments". However, in some circumstances where obviously experienced investors, e.g. owner-managers of privately held businesses, serial entrepreneurs or business angels, want to invest, they have a high net-worth but most of it is not held in cash deposits and/or financial instruments. This is particularly relevant in some jurisdictions where savings are invested in specific saving products (i.e. and not necessarily in financial instruments).

Therefore, in addition to lowering the amount, it might be worth considering an alternative threshold referring to the **person's total net worth** (excluding main home) (see also Question 45). Ideally, such a threshold should more broadly cover all saving and investment products, and not only the client's financial instrument portfolio (defined, as alluded to above, as including cash deposits and financial instruments). The wording should cover unit-linked insurance contracts.

[1] Concretely, the "professional investor" definition in the AIFMD cross-refers to the "professional client" definition in Annex II of MiFID II.

Question 42 - Would you see benefits in the creation of a new category of semi-professional clients that would be subject to lighter rules? 1 - Disagree, 2 - Rather not agree, 3 - Neutral, 4 - Rather agree, 5 - Fully agree, Don't know / no opinion / not relevant. Please explain your answer.

Rather agree.

Due to the way in which MiFID categorises investors (professional and retail), and the use of this categorisation in other EU and national laws, many private equity firms are not allowed to approach sophisticated investors in many jurisdictions under the AIFMD marketing rules or are subject to additional requirements when they are able to do so. Consequently, these funds and their managers are unable to benefit from important sources of capital and expertise.

Introducing a new category of semi-professional clients or, more appropriately, extending the category of "elective professional investors" to include "semi-professional clients" would provide a better recognition of the diversity of the "professional client" landscape, beyond the liquid markets.

In addition to the portfolio size (see Question 41), also the other "elective professional investor" tests in MiFID II, i.e. the "frequency" and "experience" criteria, are inappropriate and problematic for private equity managers.

- The frequency test, being calibrated for participants in liquid markets such as those for exchange-traded equities, is inherently discriminatory due to the long-term and illiquid nature of private equity funds, or any illiquid funds. Not even the most seasoned institutional investors, with an active private equity investment programme, make as many as 10 commitments per *quarter* to private equity funds. These investors will typically build portfolios of say 20-40 private equity fund managers over a number of *years* in order to spread vintages and manage cash-flows. In addition, the assessment to determine whether transactions are of a significant size also gives rise to uncertainties or queries in the context of private equity funds.

- Similarly, the requirement to work or have worked in the financial services industry for at least one year in a professional position requiring knowledge of the relevant transactions or services (i.e. the experience test) may be met by some investors but is unlikely to be met by new entrants, such as serial entrepreneurs who decide to invest into a fund for the first time. Many high net worth individuals and entrepreneurs will not have worked in the financial sector (a term which is not defined within MiFID II) but are very well suited to invest in venture capital and private equity funds, bringing with them both capital and expertise in building companies. See also our comments in Question 45.

Furthermore, employees (e.g. private equity fund executives) and other individuals associated with a private equity firm (e.g. former employees, personal trustees, consultants, operating partners or, in some cases, the chairpersons of the portfolio companies) will often (co-)invest their own money into the fund / alongside the main fund. This is an important tool to promote alignment of interests with investors and to ensure that the investment team has "skin-in-the-game". Although these individuals will typically be sophisticated (having detailed knowledge of the product from their association with the firm) and/or be high net worth, investments by such executives, directors or employees involved in the management of a fund would also be considered retail investors if the relevant individuals do not meet the current criteria for elective professional client status.

Against the above background, an extension of the elective professional client category (or a new additional category of semi-professional investors) should comprise those investors who are currently not deemed professional under Annex II of MiFID II but **whose level of understanding and sophistication makes it inappropriate for them to be considered as average retail investors**. This includes investors who are "sophisticated" because of:

(i) the size of the investments they are able to make, i.e. they are sufficiently high net worth to have sophisticated personal investment strategies and programmes, often advised or managed by professionals; and/or

(ii) their knowledge and understanding of the types of companies into which investments will be made (in the case of entrepreneurs, for example), the broader investment environment (in the case of family offices, for example), or the private equity or venture capital industry (in the case of executives working for the fund management vehicle who are investing alongside the fund but who do not have sufficient personal net worth to be eligible for elective professional client status).

Question 43 - What investor protection rules should be mitigated or adjusted for semi-professional clients? 1 - Irrelevant, 2 - Rather not relevant, 3 - Neutral, 4 - Rather relevant, 5 - Fully relevant, N.A.

Suitability or appropriateness test	Fully relevant
Information provided on costs and charges	Fully relevant
Product governance	Fully relevant
Other	Fully relevant

Please specify what other investor protection rules should be mitigated or adjusted for semi-professional clients? Please explain your answer.

As discussed in our response to Question 1, we think that there are a number of investor protection rules which should be modified or disapplied for professional clients. We also consider that those rules should be modified or disapplied for semi-professional clients. As a general matter, the level of investor protection granted to semi-professional clients should reflect that granted to professional clients.

Indeed, semi-professional investors clearly demonstrate a more acute knowledge of the industry they operate in than typical retail investors. They will be able to differentiate between different types of products and their related risks (or will be able to afford sophisticated advice on the point), whereas "true" retail investors may require additional protections.

One example of an investor protection rule which should be mitigated relates to KID PRIIPS, namely firms should not be required to provide a PRIIPs KID to semi-professional investors.

Question 44 - How would your answer to question 43 change your current operations, both in terms of time and resources allocated to the distribution process? Please specify which changes are one-off and which changes are recurrent.

As an association, Invest Europe is not in a position to provide a response to this answer which would be representative for the full industry. That said, we believe that a change to the rules would lead to an overall broader scope of funding sources for investment firms and asset managers, allowing more investors with direct knowledge and expertise to commit capital. This could in turn have a positive impact on the investor culture and contribute to a better functioning of the EU capital markets.

Question 45 - What should be the applicable criteria to classify a client as a semi-professional client? 1 - Irrelevant, 2 - Rather not relevant, 3 - Neutral, 4 - Rather relevant, 5 - Fully relevant, N.A.

Semi-professional clients should possess a minimum investable portfolio of a certain amount (please specify and justify below).	Rather relevant
Semi-professional clients should be identified by a stricter financial knowledge test.	Rather not relevant
Semi-professional clients should have experience working in the financial sector or in fields that involve financial expertise.	Rather relevant
Semi-professional clients should be subject to a one-off in-depth suitability test that would not need to be repeated at the time of the investment.	Rather relevant
Other	

Please specify what other criteria should be the one applicable to classify a client as a semi-professional client:

We generally agree with the above list of criteria.

Importantly, we consider that "semi-professional" clients as described in this section are as sophisticated as professional ones. Therefore, we would suggest that the criteria below should be part of a list to determine what is an "elective professional client" rather than being used to create a separate category of semi-professional clients.

In Invest Europe's view, the four, non-cumulative, key criteria for investors to be qualified as an 'elective professional investor' should include:

1. **expertise/ability to understand the risks**
2. **wealth/portfolio size**
3. **frequency**
4. **minimum investment amount**

A client will then have to meet two out of these four criteria to opt-up to the professional status.

Criterion 1: Experience and expertise

It is important that this criterion is not confined to working in the financial sector and should also encompass other relevant sector knowledge or investment expertise. As such, we suggest extending the experience criterion to also cover investors with recognised expertise. The onus should be put on the ability of the investor to understand the risk, i.e. expertise, rather than on having specific experience. Naturally, expertise may be derived from experience, but it could also be the result of academic and professional qualifications or from an understanding of the sector where the investment is made. Expertise in investing should therefore be seen as sufficient. [For example, if an executive worked before at an investment bank and holds a CFA qualification, it shouldn't matter that they (so far) have relatively little experience of private equity.]

In the case of private equity, many of these investors have extensive industry or sector experience (for example, in an operational role or as an entrepreneur) that provides them with a sophisticated understanding of the specific investment into a private equity or a venture capital fund that they are intending to make.

Criterion 2: Wealth

A minimum net worth or personal wealth could be a criterion to allow investors to be deemed sophisticated. Please also see our concerns raised at Question 41 in relation to the definition of the current instrument portfolio threshold.

Criterion 3: Frequency

While frequency is not, for the reasons explained above, a relevant criterion for the firms Invest Europe represents, it may be in other contexts.

Criterion 4: Minimum investment amount

A minimum investment (commitment) should be added as a fourth criterion. We would strongly suggest the European Commission to base itself on the definition of "sophisticated investors" in the EuVECA Regulation, where the minimum investment amount is EUR 100,000. Concretely, the EuVECA definition of "sophisticated" investors looks as follows:

"1. Managers of qualifying venture capital funds shall market the units and shares of qualifying venture capital funds exclusively to investors which are considered to be professional clients in accordance with Section I of Annex II to Directive 2004/39/EC or which may, on request, be treated as professional clients in accordance with Section II of Annex II to Directive 2004/39/EC, or to other investors that:
commit to investing a minimum of EUR 100 000; and
state in writing, in a separate document from the contract to be concluded for the commitment to invest, that they are aware of the risks associated with the envisaged commitment or investment."
"2. Paragraph 1 shall not apply to investments made by executives, directors or employees involved in the management of a manager of a qualifying venture capital fund when investing in the qualifying venture capital funds that they manage."

Invest Europe has always been fully supportive of the recognition in EuVECA that:

- not all so-called retail investors are alike and that the binary distinction set within MiFID might impose unnecessary or disproportionate restrictions (e.g. compliance costs) in some cases. The acknowledgment that high net worth individuals or family offices – a crucial part of the private equity and venture capital investor base – are different from the average retail investor adds a welcome level of granularity and makes it easier for venture capital and private equity funds to approach and attract these investors; and
- there may be interest from individuals who, although wealthy, are not ultra-high net worth but who are associated with the firm or otherwise have experience of the private equity industry and are sufficiently sophisticated to understand the risks of doing so (e.g. executives, family members, personal trustees and chairpersons).

As per the EuVECA Regulation, semi-professional investors should also provide a statement indicating they are aware of the risks of the investment. If this requirement were to be introduced more generally, it is important to ensure that such a statement should come from the prospective investor, as opposed to any third party, and it should only be necessary to obtain such a document when accepting an investor's application to subscribe, i.e. it should not be necessary to obtain it before marketing to the investor. To cater for subscriptions to be made by digital means only, e-mail, PDF copies, etc. should be a sufficient form for such statement. It should not require wet-ink signature to be transmitted in original.

Financial test

Given the diversity of MiFID firms, not all investors will be sophisticated in the same way and it is very likely that a financial test, like a frequency test, would favour some types of clients over others. This could for example be problematic for these investors in MiFID firms that only do reception and transmission of orders.

It is important to bear in mind that among the "semi-professional" investor group, a distinction can be made between:

(i) "industry experts", who are "sophisticated" because of their industry knowledge, but may not be ultra-high net worth; and
(ii) "(ultra-)high net worth investors", who will have a sophisticated investment programme and usually professional advice/management, but who may not personally have experience of or expertise in the private equity industry.

While a financial test could be one of the options to achieve the professional (or semi-professional) status, it should not be a mandatory criterion. If the Commission is keen to introduce some sort of test, it should remain a self-certification of expertise and understanding of the risks, possibly accompanied by a risk warning.

Please explain your answer to question 45 and in particular the minimum amount that a retail client should hold and any other applicable criteria you would find relevant to delineate between retail and semi-professional investors:

As explained above, the minimum investment amount for a sophisticated investor should be set at EUR 100,000, in line with the current approach used in the EuVECA Regulation.

4. Product Oversight, Governance and Inducements

European Commission context: *The product oversight and governance requirements shall ensure that products are manufactured and distributed to meet the clients' needs. Before any product is sold, the target market for that product needs to be identified. Product manufacturers and distributors should thus be well aware of all product features and the clients for which they are suited. To do so, distributors should use the information obtained from manufacturers as well as the information which they have on their own clients to identify the actual (positive and negative) target market and their distribution strategy.*

There is a debate around the efficiency of these requirements. Some stakeholders criticise that the necessary information was not available for all products (e.g. funds). Others even argue that this approach adds little benefit to the suitability assessment undertaken at individual level. Similar doubts are mentioned with regards to the review of the target market, in particular for products that don't change their payment profile. Concerns are raised that the current application of the product governance rules might result in a further reduction of the products offered.

Question 46 - Do you consider that the product governance requirements prevent retail clients from accessing products that would in principle be appropriate or suitable for them? Please explain your answer.

From our perspective, as an asset class with no typical retail clients, the current scope of the MiFID II product governance rules seems excessively wide. The level of obligations on firms is onerous especially as they have little benefit for the sophisticated investors. These investments are always negotiated and the investor is therefore not relying on an assessment of the financial instrument.

Where the investors are not typical retail clients, we therefore think that the framework could be improved by excluding private equity and similar long-term strategic funds from the product governance requirements.

Question 47 - Should the product governance rules under MiFID II/MiFIR be simplified? Please explain your answer.

It should only apply to products to which retail clients can have access (i.e. not for non-equities securities that are only eligible for qualified investors or that have a minimum denomination of EUR 100.000).	Yes
It should apply only to complex products.	Yes
Other changes should be envisaged – please specify below.	Yes
Simplification means that MiFID II/MiFIR product governance rules should be extended to other products.	No
Overall the measures are appropriately calibrated, the main problems lie in the actual implementation.	No
The regime is adequately calibrated and overall, correctly applied.	No

We do not see the value of MiFID product governance rules for professional and sophisticated clients/investors. In the best case scenario, this information is of no relevance to the professional client but there may well be cases where it will create unnecessary confusion and lead to perverse outcomes.

Question 48 - In your view, should an investment firm continue to be allowed to sell a product to a negative target market if the client insists?

N/A

Question 49 - Do you believe that the current rules on inducements are adequately calibrated to ensure that investment firms act in the best interest of their clients? Please explain your answer.

No.

We would like to ask the European Commission to add a specific carve-out from the MiFID inducements regime for professional clients and, if such investor type were to be introduced, semi-professional investors. As of now, only ECP are exempt from the inducements regime when providing certain investment services (Article 30 MiFID II). Both professional and semi-professional investors have sufficient expertise and a sophisticated understanding of the specific investment into a private equity or a venture capital fund and, in particular, the remuneration structures in private equity or venture capital scenarios. We do not see any benefit in applying the onerous obligations resulting from the MiFID inducements regime to investor types which, at least in this respect, should be treated equal to ECP and do not need further protection.

From that perspective, we think that the scope of acceptable minor non-monetary benefits in Article 12 of the MiFID II Delegated Directive (EU) 2017/593, which applies to firms providing independent investment advice or portfolio management, is too narrow and prevents or reduces certain normal business activities which would ultimately be of benefit to professional and sophisticated clients.

As an example, the description of *de minimis hospitality* in the MiFID II Delegated Directive suggests a very narrow approach which, in practice, leads to firms being overly cautious. There is scope for a less restrictive approach without compromising the best interests of experienced clients: for instance, it should not be necessary for hospitality to be limited to “business meetings, conferences, seminars or training events”; this could also include certain types of business development-related hospitality (such as reasonable businesses lunches).

We also have concerns regarding the requirements set in Article 13 of the Delegated Directive in relation to research. Under the current rules, a MiFID firm may only receive third party research without it being considered an inducement either if it is paid for by the MiFID firm out of its own resources or if it is paid for from a separate research payment account which complies with detailed rules (“research requirement”).

Private equity firms do not regularly execute orders relating to traded financial instruments and any trading is likely to be incidental to the main activities of the firm (for example, when disposing of a rump of securities following an exit through an initial public offering). Any research received to assist such trading would therefore be very specific and infrequent and it is arguably disproportionate to apply the “research requirement” to the receipt of such research. To avoid such situations, it would be appropriate for MiFID firms which do not generally invest in traded financial instruments or whose trading activity is potentially to acquire control over companies to be excluded from this requirement.

We also suggest the European Commission to add a specific carve-out from the disclosure requirement for intra-group client relationships, particularly where all information is held on central systems equally accessible to both entities. Payments received by group entities should not be deemed payments received by "any party" for purposes of Article 24 (9) MiFID II as the respective MiFID firm should be attributable to such group entity.

Question 51 - Would you see merit in setting-up a certification requirement for staff providing investment advice and other relevant information? Please explain your answer.

No.

Any certification requirements should be left for the national competent authorities to implement if they consider it to be appropriate, rather than being mandated at EU level.

However, if it is decided to implement such a requirement (for example for cross-border sales), we think that it should distinguish between staff providing advice to retail clients and staff providing advice to professional clients and other more sophisticated persons. This would enable a more tailored approach to be taken and seek to minimise the administrative burden on staff and firms.

Question 52 - Would you see merit in setting out an EU-wide framework for such a certification based on an exam? Please explain your answer.

No.

We are concerned that an EU-wide certification requirement for staff providing investment advice may not sufficiently take into account national realities. Indeed, the type of investment advice carried out in different EU jurisdictions varies and therefore it would be difficult to produce a framework which is appropriate for every jurisdiction without unnecessary and irrelevant requirements.

For example, some jurisdictions have a significant investment funds industry or a large number of advisors to large institutions whereas for other jurisdictions the majority of the investment advice provided may be to retail clients. It would therefore be preferable for any certification requirement to be produced at Member State level.

If any such requirement is introduced at EU level, it should be limited to staff providing investment advice to retail clients.

6. Reporting on best execution

Investment firms shall execute orders on terms most favourable to the client. The framework includes reporting obligations on data relating to the quality of execution of transactions whose content, format and periodicity are detailed in Delegated Regulation 2017/575 (also known as 'RTS 27'). The best execution framework also includes reporting obligations for investment firms on the top five execution venues in terms of trading volumes where they executed client orders and information on the quality of information. Delegated regulation 2017/576 (also known as 'RTS 28') specifies the content and format of that information.

Question 57 - Do you believe there is the right balance in terms of costs between generating these best execution reports and the benefits for investors?

In general, private equity transactions do not involve the execution of any 'order' in the sense intended here and they are not undertaken on any execution venue, so the best execution reporting requirements are not relevant to the vast majority of private equity transactions. However, some private equity firms do occasionally undertake transactions in listed securities where the requirements may be engaged. We would therefore be in favour of a *de minimis* exemption from the reporting requirements where transaction volume is very limited.

We also think that there should be an option for firms to contract out of the obligation to take all sufficient steps to obtain, when executing orders, the best possible results where the clients in question are not retail clients. This would reduce the administrative burden on firms, such as private equity firms which provide negotiated, bespoke services to their clients and carry on limited trading activities, whose clients have sufficient knowledge and understanding of their trading activities that they do not need the protection offered under the best execution rule.

OTHER SECTIONS

SME research

Question 58 - What is your overall assessment of the effect of unbundling on the quantity, quality and pricing of research?

As discussed in our response to Question 49, we think that it would be appropriate for MiFID firms which do not generally invest in traded financial instruments or whose trading activity is potentially to acquire control over companies, to be excluded from the rule in Article 13 MiFID II Delegated Directive on third party research.

Derivatives trading obligation

Question 80 - Do you agree that there is a need to adjust the DTO regime to align it with the EMIR Refit changes with regard to the clearing obligation for small financial counterparties and non-financial counterparties?

Fully agree.

As a general matter, we think that the derivatives trading obligation under MiFID II/MiFIR should be aligned with that in the European Markets Infrastructure Regulation. This would simplify the requirements for firms that otherwise would have a greater regulatory burden in complying with two sets of overlapping but differing regulatory requirements.

Foreign exchanges

Question 92 - Do you believe that the current regulatory framework is adequately calibrated to prevent misbehaviours in the area of spot foreign exchange (FX) transactions? If you do not believe that the current regulatory framework is adequately calibrated to prevent misbehaviours in the area of spot foreign exchange (FX) transactions, which recommendations would you make to improve the robustness of the regulatory framework?

As mentioned above, MiFID private equity firms only engage in some limited services, which do not include derivatives trading, but any change to the MiFID derivatives rules could have an impact on them as FX derivatives end-users. From that perspective, we agree with the European Commission's comments that, if the decision is made to extend MiFID to the spot FX market, it will not be a simple matter of adding to the list of in-scope instruments. The way the market works would not lend itself to this.

Any new regime should therefore be the subject of careful thought and proper consultation. In any case, any changes and new obligations would need to be proportionate to the risks and the activities of the various different market participants.

Question 94 - Have you detected any issues beyond those raised in previous sections that would merit further consideration in the context of the review of MiFID II/MiFIR framework, in particular as regards to the objective of investor protection, financial stability and market integrity?

Yes, we would like to share a concern with the way MiFID has been implemented in certain countries, in particular in relation to what has been considered as "marketing".

As explained in our response to Question 1, Invest Europe has always considered that affiliates of the manager of an AIF conducting marketing activities are not covered within the scope of MiFID as the marketing of the AIFs is **<u>not</u>** a MiFID activity/service. Marketing is indeed neither giving investment advice (given and as long as the entity that is offering the AIF units is only doing so on behalf of the AIFM) nor reception and transmission of orders (given and as long as the entity is not involved in the subscription process and its activities are simply limited to providing fund documentation and marketing materials, clearly acting on behalf of the AIFM and not for the account of the investor).

This interpretation is also in line with the logic of the AIFMD itself. Marketing within the AIFMD is not necessarily a MiFID service. Under AIFMD, reception and transmission of orders in relation to financial instruments and giving investment advice are **<u>non-core services</u>** of an AIFM which require a MiFID top-up authorisation (Article 6(4)(b) AIFMD), whilst the "marketing" of AIFs (including "third party" AIFs with respect to which the AIFM is not performing the portfolio and risk management functions) is referred to as a function that an AIFM may additionally perform under the AIFM authorisation (Annex I(2)(b) AIFMD).

In light of this, if – against our view - it is considered that marketing is treated as reception and transmission or orders, it is important to allow firms conducting marketing activities on behalf of AIFs to regard themselves as acting only for the fund or its AIFM. We therefore ask the European Commission to clarify that a firm should be able to inform a prospective investor to whom it conducts marketing, that **the investor is <u>not</u> a client to whom the firm performs a MiFID service and owes regulatory obligations <u>in case the firm</u>**:

- does not provide investment advice (a tailored investment recommendation based on the investor's existing portfolio) to the investor; or
- does not take steps to execute the investor's order to invest in the fund, either by executing the order as the investor's agent or by conducting "reception and transmission of orders", which is taking responsibility for the investor's order by transmitting it to the fund on the investor's behalf.

As a matter of practice, firms conducting marketing activities on behalf of AIFs will not usually provide these services, or give any indication to the client that they do. Those firms will not provide investment advice and will usually direct the investor to submit its subscription agreement to the fund or the fund's administrator. To provide investment advice to the investor would raise an acute conflict of interest, given the firm has been appointed by the fund or its AIFM and to act in the fund or its AIFM's interests.

Such a clarification could be obtained for example by clarifying the concept of "bringing together two investors" as set forth in Recital 44 of MiFID II.

This would align the position of firms conducting marketing activities on behalf of an AIFM with EU corporate finance firms which act for issuers raising capital. In that circumstance, corporate finance firms will make it clear to investors participating in the capital raising that they only act for the issuer and do not owe any regulatory duties to the investor. Corporate finance firms conducing MiFID activities in this context could not observe client relationships on both the buy-side and sell-side, given the conflicts of interest involved.

Contact

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About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.
For more information please visit www.investeurope.eu.