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

6 July 2020

Feedback on the European Commission's Draft Delegated Directive - Strengthening the consideration of sustainability risks and factors for financial products (Directive (EU) 2017/593)

Please note the introductory remarks made in Invest Europe's feedback note on the Draft Delegated Regulation (EU) 2017/565 about the relevance and application of MiFID in a private equity context.

The proposed amendments to this Delegated Directive seem fine for the circumstances in which the product governance rules apply. Invest Europe has no further specific comments on this.

That said, we want to use this opportunity 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".

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 not a MiFID activity/service. Marketing is 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 in line with the logic of AIFMD itself. Marketing within AIFMD is not necessarily a MiFID service. Under AIFMD, reception and transmission of orders in relation to financial instruments and giving investment advice are non-core services of an AIFM which require a MiFID top-up authorisation (Art 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 of 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 ask the Commission to clarify that a firm should be able to inform a prospective investor to whom it conducts marketing, that the investor is not a client to whom the firm performs a MiFID service and owes regulatory obligations in case the firm:

- 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 conducting 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.

