AMF POSITION-RECOMMENDATION

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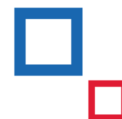

Q&A ON THE RULES OF CONDUCT APPLICABLE TO INVESTMENT SERVICES PROVIDERS

References: Articles L. 533-16, L. 533.20 and D. 533-4 to D. 533-15 of the Monetary and Financial Code, Articles 3, 58 and 59 of Commission Delegated Regulation (EU) 2017/565 and Article 314-11 of the AMF General Regulation

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (hereinafter referred to as "**MiFID II**") has been transposed into the Monetary and Financial Code. It is further clarified, with regard to conduct of business rules, by Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (hereinafter referred to as the "**MiFID II DR**"). In line with the publications produced under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 (hereinafter referred to as "**MiFID I**"), the AMF will continue to support market participants affected by the rules that may be amended by the new legislation.

The purpose of this document is to provide answers to certain questions relating to conduct of business rules that were raised under MiFID I and are still relevant today, and to update them where necessary with the new legislation that has been applicable since 3 January 2018. This Position-Recommendation applies to investment services providers (ISPs),[1] including asset management companies that provide an investment service or market units or shares in UCITS or AIFs in accordance with the conditions laid down in Articles 316-2 IV and 321-1 III, 411-129 I and 421-16 I of the AMF General Regulation.

1. CLIENT CATEGORISATION

1.1. When an ISP provides several services to the same client (e.g. investment advice, third-party portfolio management and order reception and transmission), should it categorise that client by service?

Position

No, the ISP's initial categorisation of the client is valid for all the services that the ISP may provide to that client. Only when the ISP wants its client to benefit from additional protection for certain services or when the client asks to change category can a distinction be made by service, type of financial instrument or even type of transaction.

[1] *See the list of persons in Article 311-1 of the AMF General Regulation, without prejudice to the provisions of Article 314-1 of the same regulation.*

However, ISPs must remember that only clients using the services of order reception and transmission, order execution or own-account dealing can be categorised as eligible counterparties. They must therefore be categorised twice if another service, such as discretionary management or investment advice, is provided at the same time.[2]

1.2. Does the ISP have to review the categorisation of its clients regularly? If so, how often?

Professional clients' situations may change over the course of the contractual relationship, making a change of category necessary or possible. The Monetary and Financial Code states that this will be the case in the following three situations:

- The professional client or eligible counterparty is responsible for informing the ISP of any change that could affect its categorisation (Article D. 533-4 III of the Monetary and Financial Code);
- An ISP that determines that a professional client or eligible counterparty no longer meets the conditions for being categorised as one "shall take appropriate measures" (Article D. 533-4 IV of the Monetary and Financial Code);
- The professional client or eligible counterparty is responsible for requesting that it be placed in a category offering better protection if it believes that it can no longer properly assess or manage the risks to which it is exposed (Article D. 533-4 V of the Monetary and Financial Code).

Retail clients are responsible for asking to be treated as a professional client, provided they meet the criteria laid down in Article D. 533-12 of the Monetary and Financial Code and the procedure laid down in Article D. 533-12-1 of that Code.

Recommendation

The AMF recommends that ISPs take in to account any changes to the ESMA guidelines on updating the client information[3] needed to comply with suitability requirements when updating the client information used for categorisation purposes.

In particular, the AMF recommends that ISPs encourage their clients to update the information they initially provided whenever there are significant changes. The frequency of updating client information may depend on the client's risk profile and the type of financial instruments recommended.

1.3. Do the ISP and account-keeper have to categorise the client separately for a discretionary management service?

Yes, each service provider (the ISP for the portfolio management investment service and the custody account-keeper for the related custody account-keeping service) is required to categorise its client. There is no way that

[2] Article L. 533-20 of the Monetary and Financial Code states: "Investment services providers other than asset management companies authorised to provide the services referred to in Article L. 321-1-1, -2 or -3 may initiate transactions between or enter into transactions with eligible counterparties without complying with the obligations laid down in Articles L. 533-11 to L. 533-14, with the exception of Article L. 533-12 II and III, Articles L. 533-16 and L. 533-18 to L. 533-18-2, Article L. 533-19 I and Articles L. 533-24 and L. 533-24-1 with regard to these transactions or any related services directly linked to these transactions [...]".
[3] ESMA guidelines on certain aspects of the MiFID II suitability requirements, ESMA35-43-1163, 6 November 2018, points 52 and following. These guidelines are applied by the AMF via Position DOC-2019-03 on MiFID II suitability requirements.

the discretionary management service and the custody account-keeping service can be considered as one contractual entity that is subject to a single categorisation obligation by either of the service providers.

Recommendation

It is recommended that the account-keeper bear in mind the category assigned to the client by the ISP providing the portfolio management service.

2. INFORMATION REQUIRED TO BE PROVIDED TO CLIENTS

2.1. Can an ISP send its clients the required information in a durable medium via email? Is it sufficient to provide this information online on the ISP's website?

Yes, provided that it complies with certain conditions laid down in Article 3(1) of MiFID II DR and Article 314-5 of the AMF General Regulation, an ISP may provide its clients with the information due to them in a durable medium via email.

Under Article 3(1) of the MiFID II DR and Article 314-5 of the AMF General Regulation, providing information in a medium other than paper (including by email) must meet the following conditions to be considered as providing information in a durable medium:

a) The information provided in that medium is appropriate to the context in which the business between the ISP and the client is or will be conducted;[4]

b) The person to whom the information is to be provided, having been offered a choice between information provided on paper or in that other durable medium, formally opts for the information to be provided in that other medium.

Furthermore, according to ESMA question and answer (Q&A) documents,[5] information that the ISP must provide to the client in a durable medium (e.g. a transaction notice or portfolio statement) may be made available on the ISP's website in a secure area reserved for the client, provided that the client has received prior notification of its availability (by email or any other means of communication), that this means of communication is consistent with the way the client is interacting with the ISP, and that the client has given their consent.

Recommendation

The AMF recommends that ISPs apply the above-mentioned ESMA Q&A when providing information in a durable medium.

Furthermore, pursuant to Articles 46 to 50 and 66(3) of the MiFID II DR, certain information may be communicated to the client via an ISP's website without necessarily being addressed to the client in person. Providing information in this way must comply with the conditions laid down in Article 3(2) of the MiFID II DR.

[4] *Article 3(3) of the MiFID II DR provides that "the provision of information by means of electronic communications is treated as appropriate to the context in which the business between the ISP and the client is or will be conducted if there is evidence that the client has regular access to the internet. The provision by the client of an email address for the purpose of conducting that business shall be construed as evidence of such regular access".*

[5] *See Question & Answer 3, Suitability and appropriateness and Question & Answer 3, Other issues, Q&A ESMA On MiFID II and MiFIR investor protection and intermediaries topics.*

2.2. Does the requirement to retain records laid down in Article L. 533-10, II, 6° of the Monetary and Financial Code apply to transaction notices?

Yes, retaining records of transaction notices provides evidence that the ISP has complied with its obligations to provide information to its clients.[6]

2.3. How should Article 59 of the MiFID II DR , under which an ISP that "carries out" an order on behalf of a client, other than for portfolio management, must send the client notices confirming execution of the order, be applied?

The AMF considers that Article 59 of MiFID II DR applies to an ISP that carries out or transmits an order on behalf of its client, on the understanding that when the order passes through a chain of intermediaries, the ISP responsible for sending the initial ordering party a transaction notice is the ISP responsible for executing the order on behalf of this ordering party.[7]

2.4. Can a client place an order using the deferred settlement service (DSS) with an ISP that will carry it out on a "simple execution" basis?

Under the terms of Article L. 533-13 II of the Monetary and Financial Code, ISPs must ask their clients, including potential clients, for information about their investment knowledge and experience with regard to the specific type of financial instrument or service offered or requested, so that they can determine whether the service or financial instrument is suitable.[8]

With regard specifically to the use of the DSS, which necessarily involves leverage, and under the terms of a ruling by the commercial division of the Cour de Cassation of 12 February 2008, ISPs must ensure "from the outset of the contractual relationship" that clients who use this service are "warned of the risks involved" or, failing that, must "inform them of these risks".

In general, therefore, the ISP must ensure that clients wishing to use the DSS have the financial knowledge and experience to understand the risks involved in using the DSS and, if not, must warn them of these risks when they enter into a business relationship with the client, in most cases when the client's financial instrument account is opened and, at the very latest, before the DSS is used.

Once these steps have been taken, the ISP may provide its client with one or more order reception and transmission or order execution services on a "simple execution" basis, meaning without checking with the client to see whether the investment service provided or product requested is suitable for them, provided that the conditions laid down in Article L. 533-13 III of the Monetary and Financial Code are met.

It is also important to note that the ISP must comply with:

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[6] This is because the last paragraph of Article 72(3) of MiFID II DR allows the AMF to require ISPs to retain records that are not mentioned in Annex I of the Regulation. Transaction notices are mentioned in Article 59 of MiFID II DR (under the heading "send a notice to the client in a durable medium confirming execution of the order"), but Annex I does not provide for their retention.

[7] This interpretation is consistent with the English version of the above-mentioned Delegated Regulation ("carry out") and was also used when Article 40 of Commission Delegated Directive 2006/73/EC of 10 August 2006 was transposed into the AMF General Regulation (formerly Article 314-86 of the AMF General Regulation).

[8] Article L. 533-13 II of the Monetary and Financial Code applies to the provision of investment services other than investment advice and third-party portfolio management. The deferred settlement service falls under the heading of order reception and transmission and order execution services on behalf of third parties.

- the provisions of Article L. 533-13 I and the last paragraph of II of the Monetary and Financial Code, which apply to ISPs providing an investment service involving a bundled offer as defined by Article L. 533-12-1 of the Code;[9]

- the obligations relating to the governance of financial instruments that apply to distributors under Articles 313-18 and following of the AMF General Regulation;

- the obligations to provide information to clients about the risks of financial instruments, especially those that use leverage (Article 48(2) of MiFID II DR);

- the obligation to provide hedging for the client's position.

3. AGREEMENT ENTERED INTO WITH THE CLIENT

3.1. Does the obligation to enter into an agreement pursuant to Article 58 MiFID II DR still apply when the investment services provider is dealing on own account?

Article 58 of the MiFID II DR provides that "[i]nvestment firms providing any investment service or the ancillary service [of safekeeping and administration of financial instruments] to a client after the date of application of this Regulation shall enter into a written basic agreement with the client, in paper or another durable medium, setting out the essential rights and obligations of the firm and the client".

Although legally classified as an investment service under Article L. 321-1 of the Monetary and Financial Code, a transaction carried out purely as part of own-account dealing does not necessarily require a service agreement if it does not result in the provision of services to a client. This would not be the case if the own-account dealing was accompanied by the provision of an order execution service on behalf of third parties.

4. SUITABILITY ASSESSMENT

4.1. To what extent should an ISP advising a client on a collective investment with an active management objective take into account the fee level when carrying out a suitability assessment?

Position

[9] *Article L. 533-12-1 of the Monetary and Financial Code: "Where an investment services provider other than an asset management company offers an investment service together with another service or product as part of a bundled offer or as a condition for obtaining the agreement or bundled offer, it must inform the client whether it is possible to purchase the different components of the offer or agreement separately and provide separate evidence of the costs and fees associated with each component.*
Where the resulting risks are likely to be different from those associated with the individual components, the provider must provide retail clients with an appropriate description of the different components of the agreement or bundled offer and explain how combining them changes the risk."

ISPs are subject to Article 54.9 of the Delegated Regulation (EU) 2017/565[10] and must, in particular, have policies and procedures in place to assess the long-term relationship[11] between the fee level[12] of funds with an active management objective and how closely their performance compares to that of their benchmark (e.g. through calculating tracking error) when determining whether collective investments are likely to be suitable for their clients' profile.

This position is applicable from 1 January 2023.

4.2. To what extent should an ISP advising a client on a collective investment with a passive management objective take into account the fee level when carrying out a suitability assessment?

Position

ISPs are subject to Article 54.9 of the above-mentioned Delegated Regulation (EU) 2017/565 and must, in particular, have policies and procedures in place to compare the fee level of funds with a passive management objective with the fee level of comparable funds to determine whether equivalent lower-cost collective investments are likely to be suitable for their client's profile.

This position is applicable from 1 January 2023.

[10] *Article 54.9 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 states: "Investment firms shall have, and be able to demonstrate, adequate policies and procedures in place to ensure that they understand the nature, features, including costs and risks of investment services and financial instruments selected for their clients and that they assess, while taking into account cost and complexity, whether equivalent investment services or financial instruments can meet their client's profile".*
[11] *Over a rolling five-year period or since the creation of the collective investment fund if this occurred less than five years before the calculation date.*
[12] *Defined as recurrent costs under the PRIIPS regulation.*