SIMPLIFICATION

MIFID - PRIIPS - MAR

AMAFI proposals

AMAFI is the trade association representing financial markets' participants of the sell-side industry located in France. It has a wide and diverse membership of more than 170 global and local institutions notably investment firms, credit institutions, broker-dealers, exchanges and private banks. They operate in all market segments, such as equities, bonds and derivatives including commodities derivatives. AMAFI represents and supports its members at national, European and international levels, from the drafting of the legislation to its implementation. Through our work, we seek to promote a regulatory framework that enables the development of sound, efficient and competitive capital markets for the benefit of investors, businesses and the economy in general.

In line with the European Commission's stated objective of reducing the administrative burden on businesses, the European institutions have been working for several months to simplify the regulatory framework, particularly in the area of financial activities.

AMAFI has therefore begun to consider possible areas for simplification in several fields relating to market activities, in particular:

- Sustainable finance (*AMAFI / 25-08*),
- Transaction *reporting* (*AMAFI / 25-54*),
- The customer journey (*AMAFI / 25-60*), and
- A set of compliance rules derived from MiFID, MAR and PRIIPs.

This note sets out areas for simplification relating to the latter, focusing on provisions identified at this stage as particularly burdensome or inefficient for market activities. This selection is not intended to be exhaustive: other provisions, which could be identified through further work, could also benefit from simplification.

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MiFID

ORGANISATIONAL RULES

1. Outsourcing

A disproportionate regulatory burden

The conditions under which financial institutions may outsource are governed by a multitude of rules resulting from MiFID[1] , CRD[2] , DORA[3] , EMIR[4] and the GDPR. In addition to these Level 1 and Level 2 provisions, there are various lower-level texts issued by the ECB[5] , the EBA[6] , the ESMA[7] and national regulators as, in France, the AMF[8] and the ACPR[9] . These obligations are also about to be further strengthened by the EBA's draft guidelines on the management of risks associated with third-party service providers, which plan to extend the rules governing ICT service providers under the DORA Regulation to non-ICT service providers[10] .

This excessive level of regulation contravenes the principles of proportionality and clarity. It creates implementation difficulties for financial institutions, particularly smaller ones, leading to additional costs and reducing their ability to innovate or adapt outsourcing models to changing business needs.

AMAFI therefore recommends, at a minimum, removing the Level 3 texts relating to outsourcing. These do not provide any real added value in terms of clarity and substantially add to Levels 1 and 2 rather than clarifying them. Furthermore, their implementation creates a very substantial administrative burden, as their provisions are not in fact based on a risk-based approach.

If difficulties arise in interpreting Level 2 provisions, particularly between competent authorities, it would seem more appropriate, as indicated in the AMAFI's response to ESMA's *call for evidence* on the *Retail Investor Journey*, to ensure convergence through non-binding questions and answers. These should then be subject to prior consultation as a matter of course.

In general, prior to drafting Level 3 texts, European authorities should work more closely with industry to assess the appropriateness of adding new provisions and, where appropriate, draw on existing standards or best practices.

[1] MiFID 2, Art. 16.5; MiFID II Implementing Regulation, Arts. 30 to 32.
[2] CRD, Art. 85.
[3] DORA: Art. 5(2)(h)&(i), 5.3, 6.9, 8.5, 11.4, 11.5, 13.6, 16(e), 26(2), 3, 4, 5, Chapter V.
[4] EMIR, Art. 35.
[5] ECB, Guide *on outsourcing cloud services to cloud service providers.*
[6] EBA *guidelines on outsourcing arrangements.*
[7] ESMA *guidelines on outsourcing to cloud service providers.*
[8] Provisions of the General Regulation.
[9] Decree of 3 November 2014 on internal control of companies in the banking, payment services and investment services sectors subject to supervision by the Prudential and Resolution Authority.
[10] Information and communication technologies.

Outsourcing within a group

Activities entrusted to entities within the group to which the financial institution belongs are considered to be outsourced. They are therefore subject to the same control requirements as those applicable to delegation to a third party.

However, these requirements often conflict with the group's organisation, raising important questions of feasibility and relevance. Indeed, the rational organisation of the group, involving a top-down hierarchy but also the centralisation of certain activities for reasons of efficiency and internal consistency, does not always allow all the required control requirements to be met, particularly when the delegated entity is the parent or sister company of the institution concerned. Furthermore, some of these controls (particularly those relating to the detection of market abuse) only make sense when carried out at group level.

While it is legitimate for the delegating financial institution to have the means to monitor the proper performance of the activity entrusted to it, it is equally necessary to take into account the internal organisation of the group so as not to impose requirements on the institution that it is unable to implement with regard to its group, and whose value in terms of risk management has not been established.

Thus, activities delegated to regulated entities, which are subject to supervision by both the group and the competent authorities of those entities and the group, should be assessed differently, taking into account that the level of requirements imposed by regulators on a large group cannot be replicated at the level of each of the group's smaller entities, which, if they were isolated, would be subject to more proportionate requirements.

In particular, the requirements relating to the **formalisation of an outsourcing agreement and the monitoring of delegated activities should be relaxed in the case of intra-group delegation**. At the very least, this relaxation should apply **when the delegation is entrusted to entities within the group that are authorised within the European Union or in third countries that have been granted equivalence status by the European Commission**[11] and which, like the delegating institutions, are subject to all European requirements, including those resulting from MiFID or rules deemed equivalent.

2. Personal transactions

In order to manage the risks of conflicts of interest and the use of confidential or inside information to which certain employees of institutions are exposed, MiFID requires, among other provisions, that: "*the firm is informed promptly of any personal transaction entered into by a relevant person, either by notification of that transaction or by other procedures enabling the firm to identify such transactions*" (*Delegated Regulation (EU) 2017/565 , Art. 29.5 b)*[12].

This requirement creates significant burdens and poses implementation difficulties, even though its effectiveness is highly questionable.

[11] Under Article 47 of MiFIR.
[12] Provision derived from Article 16.2 of MiFIDII.

A cumbersome and dissuasive notification process for relevant persons' personal investments

The framework governing relevant persons' personal investments touches on a sensitive aspect of their private lives. Institutions therefore take care, as far as possible, to put in place effective processes, which often involve internally developed or externally acquired IT notification systems.

Each declaration must also be checked quickly, which requires available resources[13]. However, the work involved in these checks inevitably causes delays, sometimes of several days. When the institution requires its relevant persons to give prior notification in order to authorise (or prohibit) the transaction, these delays are inevitably poorly perceived by such persons as they often work to their disadvantage (unfavourable price movements, missed order deadlines, tax implications, etc.).

Thus, transaction monitoring is both resource-intensive for the institution and a source of frustration for employees, who often experience it as an intrusion into their private lives. Some institutions therefore prefer to prohibit all personal transactions by their relevant persons rather than implement a notification process and be exposed to the associated legal risks (*see below*).

This system is not only costly for institutions, but also unsatisfactory for many employees, who choose not to invest in the financial markets rather than go through the cumbersome procedures. This is regrettable for professionals who should, on the contrary, be able to gain direct, practical experience of the markets. This also runs counter to the European authorities' objective of facilitating access to capital markets for retail investors.

A legal risk for institutions with regard to employee privacy

- The scope of persons concerned

MiFID subjects not only transactions carried out by the relevant persons on their own behalf to the personal transaction control mechanism, but also transactions carried out on behalf of " *any person with whom he has a family relationship, or with whom he has close links " (Delegated Regulation (EU) 2017/565, Art 28, (b), (ii)).* In its doctrine, the AMF has clarified that "*a transaction carried out by a person close to the relevant person on their own behalf is not a personal transaction provided that this close person is the sole holder of the securities account (and not a joint holder with the relevant person), regardless of the applicable matrimonial regime, if any " (AMF - DOC-2007-25, § 1.1.1, (a))*. However, this interpretation does not seem to be shared by most EU Member States, which require the disclosure of transactions carried out by such persons close to the relevant person outside the situations referred to by the AMF. This poses difficulties in terms of coordination with national provisions on banking secrecy, labour law and the European GDPR regulation.

[13] This generally involves checking, for each transaction reported, whether it relates to a security on which there is a potential conflict of interest or on which the institution holds inside information.

- Indirect information on the financial situation of employees

The internal control teams responsible for processing notifications have access to personal information about relevant persons (they can, for example, deduce their financial standing). Even though they are bound by confidentiality, there is a risk that this information may be leaked.

- Reporting of transactions " *entered into"* or planned transactions

Some institutions, considering that ex-post notification is ineffective, require prior notification in order to authorise (or prohibit) the transaction. They base this on the possibility of implementing "*other procedures enabling the firm to identify such transactions*". However, this basis could be challenged by an employee, exposing the institution to legal risk.

- Banking secrecy, labour law and the GDPR

Some institutions that consider ex-post notification alone to be ineffective require access to employees' account statements. Others require employees to hold their accounts at the institution. These requirements may expose the institutions concerned to legal risks in terms of banking secrecy and labour law, as well as personal data protection (GDPR).

An inherently ineffective system

Regardless of the means used by the firm to be " *informed promptly of any personal transaction entered into* ", they all rely on the goodwill of the employee, either by notifying the firm of transactions carried out (or that they wish to carry out), or by carrying out their transactions on the securities accounts that they have declared or registered with the institution.
This means that an employee who intentionally wishes to use confidential or inside information can easily evade control by not declaring their transactions or by carrying them out on other accounts.

Ultimately, the system put in place by institutions does not prevent criminal behaviour and, at best, allows them to identify any omissions or errors made by employees.

This situation raises serious questions about the relevance of the personal transaction controls required of institutions, and that even if significant resources and risks are involved.

With regard to market abuse, the competent authorities now have extensive information on transactions carried out, including their final beneficiaries,[14] and can therefore detect market abuse by any person. In this context, the control exercised by firms over notifications, which is ineffective by design, is also unnecessary in view of the supervision carried out by the competent authorities.

With regard to the risks associated with the use of confidential information and conflicts of interest, numerous controls and organisational procedures are already in place, particularly within particularly exposed activities, pursuant to MiFID requirements, which are sufficient to prevent these risks (*Delegated Regulation (EU) 2017/565, Section III, Chapter II*).

[14] These provisions were adopted at a time when the competent authorities had much less powerful transaction monitoring tools than they do today. Significant progress has since been made in this area, notably with the addition of data relating to LEIs and beneficial owners.

Therefore, instead of the bureaucratic system, which is *ultimately* ineffective against genuine offenders and applies to the monitoring of personal transactions by investment services providers' employees, the texts should simply lay down general provisions. These texts would aim to inform employees of the prohibitions imposed on them, to oblige them to comply with these prohibitions by including them in the internal regulations, and to explain the penalties they face, while also reminding them of the tools available to the regulator to detect market abuse.

RULES OF CONDUCT

1. Investment advice provided to professional clients by nature

Professional clients by nature[15] carry out professional activities that give them reliable financial knowledge. This is recognised by the regulations, which do not require the knowledge and experience of these clients to be verified as part of the suitability and appropriateness tests.

Therefore, with some exceptions, such professional clients are able to make their investment decisions without resorting to investment advisory services, relying in particular on general or specific information provided by their financial intermediary[16]. This is particularly true given that a significant

[15] Namely, pursuant to I of Annex II of MiFID II:
" Entities which are required to be authorised or regulated to operate in the financial markets. The list below shall be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a third country:
(a) Credit institutions;
(b) Investment firms;
(c) Other authorised or regulated financial institutions;
(d) Insurance companies;
(e) Collective investment schemes and management companies of such schemes;
(f) Pension funds and management companies of such funds;
(g) Commodity and commodity derivatives dealers;
(h) Locals;
(i) Other institutional investors;
(2) Large undertakings meeting two of the following size requirements on a company basis:
— balance sheet total: EUR 20 000 000
— net turnover: EUR 40 000 000
— own funds: EUR 2 000 000
(3) National and regional governments, including public bodies that manage public debt at national or regional level, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.
(4) Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions."
[16] Namely, the majority of "*entities that are required to be authorised or regulated to operate in the financial markets*" according to 1) of I of Annex II of MiFIDII.

proportion of these intermediaries act on behalf of third parties and pursue objectives for which they have a fiduciary responsibility towards their own clients[17].

However, the line between providing information and giving investment advice based on the concept of personal recommendations remains difficult to draw. Institutions exposed to this risk of reclassification therefore face legal uncertainty when serving clients who are professional by nature.

Therefore, for professional clients by nature, investment advice should only be considered to have been provided if the client expressly requests it or if the investment firm has explicitly agreed to provide this service, and only for the transactions or types of transactions covered by this request or agreement. The amendments proposed by the AMAFI to the MiFID Directive on this subject are presented in the annex.

2. Costs and charges

The 2022 MiFID Quick Fix[18] has eased the obligations applicable to professional clients by removing the requirement to provide detailed information[19] on costs and charges for all investment services, except portfolio management and investment advice[20].

However, these clients have the capacity to protect their own interests and are sufficiently competent to assess for themselves the extent of their information needs when using one of these services.

Therefore, the obligation to provide detailed information on the costs and charges for portfolio management or investment advice services provided to professional clients should be removed, at least for firms and activities that only provide these services to such clients and could save on the implementation of technical measures to provide this information. Consequently, Article 29a(1) of MiFID II should be amended as follows: "*The requirements set out in Article 24(4****)(c) shall not apply to services provided to professional clients ~~except for investment advice and portfolio management~~***."

[17] Objectives are the only criterion of the *suitability* regime that must be verified for *per se* professional clients, as Article 54(3) states that ".*Where an investment firm provides an investment service to a professional client it shall be entitled to assume that in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge for the purposes of point (c) of paragraph 2.*
Where that investment service consists in the provision of investment advice to a professional client covered by Section 1 of Annex II to Directive 2014/65/EU, the investment firm shall be entitled to assume for the purposes of point (b) of paragraph 2 that the client is able financially to bear any related investment risks consistent with the investment objectives of that client."

[18] Directive (EU) 2021/338 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis.

[19] This is in line with the requirements of Article 24(4)(c) of MiFID, which stipulates that: "*information on all related costs and charges shall include information on investment services and ancillary services, including the cost of advice, where applicable, the cost of financial instruments recommended to or marketed to the client and how the client can pay for them, including any third-party payments*."

[20] Article 29a of MiFID II , as amended; it should be noted that the text of the Delegated regulation should be adjusted to take account of developments at Level 1.

At a minimum, firms should have the right to agree to a limited application of the detailed requirements with these clients, which is currently not authorised under MiFID Delegated Regulation (*Delegated Regulation (EU) 2017/565, 2nd indent of Article 50.1*)

3. Treatment of remuneration received for providing an investment or ancillary service to a third party

Remuneration received by an institution when providing an investment or ancillary service to a client should not be considered as an *inducement* for the provision of another service to another client.

However, under MiFID Delegated Regulation, firms are under the obligation that payments received in relation to arranging the issuance should comply with inducement rules when providing another service, such as advice, to an investor, relating to the same financial instruments (*Delegated Regulation (EU) 2017/565 , Article 41.1*).

To our knowledge, this requirement is not consistently applied across the EU. Moreover, those who apply these rules have to face difficulties such as:

- they are prohibited from investing such financial instruments in the portfolio of clients to whom they provide a portfolio management service or from advising them when providing an independent investment advice service;
- for RTO services, execution of order on behalf of clients or non-independent advice, they have to apply both the quality enhancement test and the disclosure requirements. This last requirement may be problematic to apply[21] when the payments perceived for the service provided to the issuer are in the form of a fixed amount that is very difficult to allocate to end client investments.

These obstacles are likely to have very problematic effects on the primary market in the EU with negative effects on the real economy as a result. Therefore, it runs contrary to the SIU objectives. It is also questionable in principle as payments received from the issuer client are clearly not a "cost" for the end-client. Therefore, it adds no benefit for the investor. Moreover, it creates complexity which runs counter the political European objective of simplification.

A similar difficulty arises when a firm acts as an intermediary in a transaction between two clients to whom it simultaneously provides two investment services for which it is remunerated separately by each of them.

Thus, it should be clarified that payments received by an investment firm for providing services to a client should not be viewed as an inducement for the provision of another investment or ancillary service to another client. Such situations, which should however be thoroughly monitored, should be addressed through the conflict-of- interest rules in MiFID II, rather than the inducement rules. In such situations, the rules on conflicts of interest are sufficient to ensure client protection. The application of the rules on *inducements* therefore appears redundant and inappropriate.

[21] Apart from firms located in France where the AMF clarified, in its Position-Recommandation AMF DOC-2013-10, that such remunerations are inducement only if they vary according to the amount of securities actually distributed.

4. The obligation for the institution granting inducements to consider the improvement of the service provided to the client

For an *inducement* to be considered legitimate, MiFID stipulates that the inducement must be "*designed to enhance the quality of the relevant service to the client" (Directive 2014/65/EU*, Article 24. 9. (a)). The delegated directive further clarifies this point by requiring that any enhancement provided must be verified not only by distributors but also by the manufacturers of financial instruments who grant these *inducements*. However, the latter are not in a position to verify the reality of the improvement in the service provided to end clients, which will necessarily be granted by distributors, who are the only ones in contact with these clients. Moreover, if such distributors fall under MiFID requirements, they will have to conduct such a quality enhancement assessment on the inducements received. **Therefore, the scope of this obligation should be limited to firms that receive *inducements*. As a minimum, such obligation should be disapplied for firms remunerating distributors within the scope of the MiFID inducement framework, including MiFID Article 3 nationally exempted entities, bound by requirements that are analogous to those established under MiFID. The obligations of paying institutions should consist of preventing and managing conflicts of interest when designing inducement schemes.**

5. Distinction between professional and non-professional clients

Ability to offer re-categorisation as a professional client

MiFID allows non-professional clients to request to be treated as professional clients either generally or in respect of a particular investment service or transaction, or type of transaction or product (*Directive 2014/65/EU, Annex II, II*), provided that they meet certain criteria and have passed a test carried out under the responsibility of the investment service provider. This change of category gives them the opportunity to invest in products with characteristics that are better suited to their profile, and to avoid being overwhelmed by excessive information designed for less sophisticated investors.

This is why, contrary to what is currently stated in an ESMA Q&A[22], **investment firms should be able to offer their clients the option of changing categories.** Without such clarification, this possibility remains largely theoretical, as clients are not necessarily aware of this option or of the limited scope of the advice they receive, as their adviser cannot present them with products reserved for professional clients.

[22]ESMA, Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics, Question 2 section 11 : *"Investment firms should strictly refrain from implementing any form of practice that aims at incentivising, inducing or pressuring a private individual investor to request to be treated as a professional client."*

This possibility seems all the more legitimate given that:

- the change of category takes place following " *an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, [*which] *gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making investment decisions and understanding the risks involved*. "[23].
- MiFID Delegated Regulation (*Delegated Regulation (EU) 2017/565*, Article 45(2)[24]) requires firms to provide information on this issue.

In order to prevent opportunistic use, without any real benefit to the client or exposing them to products that are not suited to their situation, this possibility could be regulated by a procedure ensuring that the proposal to change category is reserved for clients for whom this new category is appropriate.

Improving the criteria for reclassification as a professional client

AMAFI supports the increased flexibility of the rules for reclassification as professional clients envisaged in the *Retail Investment Strategy* (RIS).

However, we have the following comments:

- in order to foster investment in the real economy and support the long-term financing of European major transitions highlighted in the Draghi report, it is essential not to hinder private investments in capital markets and to enable access to assets—such as private equity or corporate bonds—for investors who possess sufficient expertise. Contrary to that objective, none of the proposals on the transaction frequency that are currently on the table properly address the concern that the transactions on such financial instruments are usually rare, or even inexistant as being prohibited for non-professional clients for certain asset classes.
- Assets held in the form of insurance-based investment products (IBIPs), including certain life insurance contracts ("*assurance-vie*") that are very similar to those held in financial accounts, should be included both:
  - in the calculation of the portfolio size which is one of the criteria used in the "opt-up test";
  - in the frequency of the transaction calculation.
- Such financial products are comparable, all the more so as regulation between financial instruments and IBIPS is becoming increasingly consistent. In some countries like for instance, in France, where households invest a significant part of their savings in IBIPS, taking into account such savings can have a major impact.

[23] Annex II, II (1), 3rd paragraph.

[24] *"Investment firms shall inform clients in a durable medium about any right that client has to request a different categorisation and about any limitations to the level of client protection that a different categorisation would entail."*

- The understanding of the characteristics and risks of financial instrument may be acquired through professional experiences in a wider range of positions, not limited to those in the financial sector, or be demonstrated by diploma, examination or certification.

Deletion of the provision that professional client on option should not be treated as per-se professionnal clients

T**he provision stating that professional clients on option "*shall not, however, be presumed to possess market knowledge and experience comparable to that of the categories listed in Section I "*** *(Directive 2014/65/EU, Annex II, II.1, 2nd paragraph*) **should be deleted.** This provision, which is ineffective because its implementing rules are not specified, poses a legal risk to firms who struggle to implement it.

Firms are already required to make "*an adequate assessment of the expertise, experience and knowledge of the client, [giving] reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making investment decisions and understanding the risks involved*" before accepting the upgrading. Therefore, such a distinction should not be made, as it jeopardizes the value of the assessment required from firms.

PRODUCT GOVERNANCE

Primary market

Institutions that advise issuers on the issuance of financial instruments (e.g. during initial public offerings) are subject to product governance requirements, which include the obligation to review the target market for the instruments issued over time. However, this type of advice is, by its nature, ad hoc and does not involve any long-term commitment or responsibility. **It should therefore be clarified that the product governance responsibility of the advising institution ends at the end of the offering period on the primary market.**

Products distributed outside Europe

The product governance obligations relating to the determination of the MiFID target market applicable to manufacturers of financial instruments should not apply to instruments marketed exclusively outside the European Union. These provisions are intended to ensure that financial instruments are marketed to clients whose characteristics correspond to those of the instruments. However, limiting the application to manufacturers alone, and not to distributors, does not achieve this objective and is therefore unnecessary. This is particularly true given that these target markets are determined according to criteria based on concepts (in particular customer categorisation) that are not relevant to non-European distributors.

The texts should therefore clarify that manufacturers of financial instruments are not subject to the obligations to determine a target market for product governance for products marketed exclusively outside the European Union.

ESG characteristics of bonds and shares

As those products are not managed, issuers of shares or bonds, except for dedicated products such as green bonds, do not commit to any sustainability characteristics, and sometimes, for the smaller issuers, do not even provide any information on such matters. Therefore, when defining their target market or advising on such products, many distributors consider that they have no sustainability characteristics. However, when distributing these products, they are still required to assess their clients' sustainability preferences and their possible amendments, and to define their ESG target markets. This creates unnecessary complexity, which hampers the aim of directing client investments toward the real economy.

Therefore, as long as regulation on information to be provided by issuers on ESG matters and on the way investment firms should assess it is not stabilised, ESG criteria should be removed from the target market definition and from the suitability assessment of bonds and shares, except for specific green issuances such as green bonds.

PRIIPs

Vanilla bonds are currently included in the scope of PRIIPS. However, they are financial instruments designed to raise finance rather than meet savings needs. Furthermore, as they are not "*packaged*", they should not be covered by PRIIPS. This currently hinders their marketing to retail customers because, in order to avoid having to draft a PRIIPS KID, issuers of vanilla bonds usually reserve their issues for professional customers. **AMAFI would like to see this anomaly, which runs counter to the objectives of the Savings and Investment Union to promote access for households to the Union's financial markets, corrected.**

MAR

INVESTMENT RECOMMENDATIONS

The sales and trading departments of investment service providers exchange significant amounts of information with investors, mainly professional investors, on a daily basis, particularly in the form of *sales notes*. These notes are produced by sales teams to **draw clients' attention to a market idea, financial instrument or investment opportunity**. Although not intended for a wide audience, they could nevertheless be considered investment recommendations within the meaning of MAR when distributed to several people. Indeed, MiFID investment recommendations are " *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.* "[25].

[25] MAR, Art. 3(35).

However, the obligations attached to investment recommendations under MAR impose strict rules on their quality and presentation. These rules aim, in the interests of market integrity, which is the central concern of MAR, to ensure the objective presentation of widely disseminated information. They are not suited to *sales notes*, which are distributed on a limited basis and have profoundly different characteristics.

Indeed, the analysis produced within a dedicated organisational structure, the financial analysis department of investment service providers, is the result of in-depth reflection by the financial analyst and follows a strict and predetermined process of drafting, approval and dissemination.

In contrast, the information flows relayed by sales representatives and traders in wholesale trading rooms to professional clients are, by their very nature, instantaneous and reactive and could not be prepared in a framework similar to that used for investment research without losing their value to clients.

However, MAR did not include a very important criterion from the definition of investment recommendation contained in the MAD Directive, according to which " *Likely to become publicly available information' shall mean information to which a large number of persons have access*" (*Directive 2003/125/EC, Article 1, paragraph 7*). Without this necessary clarification, the definition of investment recommendation is interpreted by some as not requiring the information to be sent to a wide audience and may even refer to a communication sent to a very small number of people. This has the effect of subjecting almost all commercial interactions with clients to the MiFID rules on investment recommendations, which was certainly not the intention of the regulation, which aims, in this respect, to combat insider trading.

AMAFI therefore **recommends that the definition of investment recommendations within the meaning of MAR be amended to explicitly exclude *sales notes* from its scope and that the reference to the "public" be clarified in the same way as in MAD.**

INSIDERS LIST

ESMA recently consulted on a draft technical standard extending the use of a simplified format for drawing up insider lists. This draft aims to align the level of detail of insider lists under the general regime (*MAR, Art. 18(1)*) and under the regime specific to the SME growth market with *opt-out*[26] (*MAR, Art. 18(6) para. 1*) on the obligations specific to the SME growth market without *opt-out* (*MAR, Art. 18(6) para. 2*), which are simplified obligations. The following information should therefore no longer be required in these lists: the name and address of the company, private telephone numbers and addresses, and the birth name and date of birth of the persons included in these lists.

[26] The general insider list regime for SME growth markets is a simplified regime. However, Member States have the option of not applying this simplified regime and applying the general regime instead: *"where justified by specific national concerns relating to market integrity, Member States may require issuers whose financial instruments are admitted to trading on an SME growth market to [*apply the general regime]*"* (*MAR, Art. 18(6) para. 2)*.

AMAFI, which has long advocated for the simplification of insider lists, welcomes this upcoming simplification, while regretting the fact that, given the timeframes involved in the European regulatory process, these simplifications will not take effect for many months.

The Association would therefore like to see these simplifications take effect immediately through the publication of a *no-action letter* by ESMA.

Annex: Investment advice AMAFI amendment Proposal

Modification to Article 4 (1) (4) of MiFID II

Current MiFID II	*AMAFI Amendment*
(4) '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;	(4) '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; **Professional clients within the meaning of Section I. of Annex II shall not be considered as being provided an investment advice service unless they explicitly requested it or it has been previously agreed on with the investment firm.**