

MiFID - Technical Briefing Note

An EVCA Special Paper

March 2008

On behalf of the
EVCA Tax and Legal Committee

EVCA Disclaimer

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About EVCA

The European Private Equity and Venture Capital Association (EVCA) was established in 1983 and is based in Brussels. EVCA represents the European private equity sector and promotes the asset class both within Europe and throughout the world. With over 1,200 members throughout Europe, EVCA's role includes representing the interests of the industry to regulators and standard setters, developing professional standards, providing industry research, organising professional development initiatives and forums, as well as facilitating interaction between its members and key industry participants. These key players include institutional investors, entrepreneurs, policymakers and academics. EVCA's activities cover the whole spectrum of private equity: venture capital (from seed and start-up to development capital), buyouts and buyins.

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1. Introduction

The following Technical Briefing Note has been prepared by the EVCA Tax and Legal Committee for EVCA members and is designed to give a summary overview of recent legal developments in Europe regarding the implementation of MiFID, the Markets in Financial Instruments Directive.

MiFID is arguably the largest and most complex piece of European Financial Services Legislation in recent years. It is designed to achieve a harmonised legal framework for wholesale and retail financial markets within the European Economic Area. It replaces the existing Investment Services Directive (ISD), extends the coverage of the current regime, and introduces new and more extensive requirements, notably in relation to conduct of business and internal organisation.

In view of its position as a long-term asset class and its specific business model, and although private equity and venture capital should not necessarily be regarded as being covered by MiFID, the evolution of MiFID and the complexities within it may have inadvertently created a number of 'grey areas' from the perspective of the industry. These would then need to be subsequently addressed in the practical implementation of MiFID to ensure clarity, certainty and consistency in legislation, and avoid unintended consequences.

Given the current status of MiFID, it will take some time for its practical effects to be seen, and for regulators to fully work out all the issues surrounding private equity and venture capital in its implementation.

The note is therefore structured into two parts:

- part one sets out in general terms, in the form of a summary overview, the key points surrounding MiFID and some general guidance for determining if your firm will be affected;
- part two provides an overview of the current status at the time of writing of regulatory changes in different EU Member States in relation to MiFID.

Given the nature of MiFID, individual and country-specific advice may also need to be sought by private equity and venture capital industry practitioners. Readers are also therefore reminded of the related Disclaimer that accompanies this note.

I would like to thank those committee members who have contributed to what is a very challenging topic and for helping to provide much needed pan-European clarity for EVCA members.

Ulf Söderholm
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Co-Founder and Partner, Andulf Advokat AB,
March 2008

2. Summary Overview

2.1. What is MiFID and where does it come from?

In 1999, the European Union (EU) launched its Financial Services Action Plan, with the aim of further integrating Europe's financial markets.

Although certain investment services were already permitted on a cross-border basis under the 1993 Investment Services Directive (ISD), individual EU Member States had a great deal of scope to impose their own rules, making it hard to operate on a pan-European basis. By 1999, a combination of technological advances and increasing complexity in the financial markets also meant that ISD no longer reflected the way financial markets operated in practice and was due for replacement.

The result is MiFID, the Markets in Financial Instruments Directive, which went live across Europe on 1 November 2007.

The core premise of MiFID is that an investment firm regulated in one European Member State to provide services covered by MiFID will be able to do so with relative freedom from local regulation in other Member States. Building on the Investment Services Directive which it replaces, MiFID's scope of services and activities are wider than before. For example, this includes the giving of investment advice, and where they are provided from one country across borders (for example, over the Internet) only that country's regulation will now apply to them.

MiFID has two key concepts behind it:

1. Investment firms should be able to operate throughout the EU on the basis of authorisation in their home Member States. MiFID allows authorised investment firms to provide cross-border investment services and establish branches in all Member States under a single "passport".
2. Investors should enjoy a high level of protection when employing investment firms, wherever they are located in the EU. MiFID lays down detailed conduct of business rules for investment firms, so that all firms are required to operate to the same standards.

In addition, firms that are subject to MiFID may also be subject to the Capital Requirements Directive, which This sets requirements for the regulatory capital a firm must hold to cover liabilities to clients, and takes effect on January 1st 2007 which should also be taken into consideration by the reader⁽¹⁾.

⁽¹⁾ http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm

2.2. Where do I find MiFID?

MiFID has been constructed under what is known in EU parlance as the ‘Lamfalussy process’, a four stage process with ‘Levels’ for creating, implementing and enforcing EU Financial Services legislation.

MiFID itself comes in three parts:

1. “Level 1” Directive⁽¹⁾, which sets out high level principles.
2. “Level 2” instruments⁽²⁾, containing more detailed requirements. These two instruments consist of an EU Directive (which must be implemented by each Member State and requires them to achieve a particular result without dictating the means by which that result is achieved), and a Regulation (which is directly applicable, so it automatically forms part of the law of each Member State without the need for implementation measures or ‘translation’ into national law).

2.3. Will my firm be subject to MiFID?

In order to determine whether MiFID applies to your firm, it is necessary to establish what activities are, in practice, being carried on by the firm, and also to review the firm’s scope of permission to see what activities the firm is permitted to carry on.

Broadly, MiFID applies to “investment firms”. An investment firm is defined as “any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis”. However, certain types of firms that would otherwise fall within this definition are expressly exempted from MiFID.

So, to determine whether a firm is subject to MiFID, it is necessary to answer two questions:

- Is the firm providing investment services to third parties and/or performing investment activities?
- Is the firm exempt?

The relevant “investment services and activities” are set out in Annex 1 to the main MiFID directive, and are as follows:

- reception and transmission of orders in relation to one or more financial instruments (a term which includes bringing together two or more investors thereby bringing about a deal between them);
- execution of orders on behalf of clients;
- dealing on own account;
- portfolio management;
- investment advice (which is the most important addition to the ISD list for many private equity firms);
- underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;
- placing of financial instruments without a firm commitment basis; and
- operation of Multilateral Trading Facilities.

⁽¹⁾ The main MiFID Directive (2004/39/EC)

⁽²⁾ The Level 2 implementing Directive (2006/73/EC), The Level 2 implementing Regulation (No 1287/2006)

2. Summary Overview

The exemptions are listed in Articles 2 and 3 of 'Level One' Directive.

For private equity firms, the most important exemptions are:

- collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings. So a private equity or venture capital firm whose activities consist solely of establishing, managing and operating its own private equity funds will be outside the scope of MiFID – although, as is currently the case in some Member States, it may still need to have local authorisation;
- persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings. However, there are different interpretations of this where the group member is itself acting for third parties; and
- persons which:
 - are not allowed to hold clients' funds or securities, and which for that reason are not allowed at any time to place themselves in debit with their clients; and
 - are not allowed to provide any investment service except the reception and transmission of orders to EEA investment firms and credit institutions, branches of equivalently regulated third country firms, UCITS and certain EEA listed investment companies, and the provision of investment advice, in each case only in relation to transferable securities and units in collective investment undertakings, provided that they are regulated at national level.

The last exemption is an optional exemption, and Member States may decide whether or not to exempt such firms from MiFID. It is not yet clear whether (or which) other Member States will do so. Furthermore, this exemption is very narrow in scope, and depending on the Member State, private equity and venture capital firms may find it impossible to operate within the boundaries of the exemption because they receive and transmit orders (in the extended MiFID sense) to a wider range of entities and/or act in relation to a wider range of instruments.

In some Member States, if the firm is permitted to carry out activities that are MiFID, but is not actually carrying on those activities, the firm will need to (or in some cases already have to had to) apply to its relevant national authority to have its scope of permission amended or limited to those activities that are actually being carried on and/or apply one of the new standard requirements, if it wants to be outside the scope of MiFID.

On a pan-European level, the European Commission has also issued some guidance and has also established an online 'Q&A' facility, which is regularly updated⁽⁴⁾. Furthermore, some national authorities have published practical guides to help firms with the notifications and applications they may need to make as a result of MiFID implementation and on related new standard requirements. However, for some firms, this assessment may not be straightforward, and specific advice may be needed.

⁽⁴⁾ http://ec.europa.eu/internal_market/securities/docs/isd/questions/questions_en.pdf

2.4. What does MiFID mean in practice for private equity and venture capital?

Some private equity and venture capital firms, primarily those with pan-European advisory structures, will be directly within the scope of MiFID and so will be directly affected, and thus on the one hand whilst they may benefit from a pan-European passport for their activities, will also be subject to a greater range of legal requirements and supervision, as well as increased capital requirements, which may not be appropriate for, or relevant to, their business.

However, even private equity and venture capital firms that fall outside the scope of MiFID may feel its effects, as implementation may require a fundamental rewrite of many parts of existing national legislative rules, as highlighted in some of the cases set out below.

Text prepared by EVCA with thanks to Simon Witney, *Partner, SJ Berwin*

3. Country Sections

(in Alphabetical Order)

- Austria
- The Czech Republic
- Denmark
- Finland
- France
- Germany
- Hungary
- Italy
- Poland
- Portugal
- Sweden
- The Netherlands
- The United Kingdom

3.1. Austria

Dorda Brugger Jordis Rechtsanwälte GmbH

DORDA BRUGGER JORDIS is a leading business law firm in Vienna, Austria. The firm has been growing consistently ever since its establishment in 1976. Our highly professional organization has proven to be efficient in meeting the individual needs of our clients and responding promptly to fast changing conditions in a flexible manner.

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3.1.1. Introduction

On 1 November 2007, the Austrian Securities Supervision Act 2007 (*Wertpapieraufsichtsgesetz 2007* – “WAG 2007”) entered into force, implementing MiFID in Austria. The WAG 2007 has replaced in its entirety the Securities Supervision Act (*Wertpapieraufsichtsgesetz* – “WAG”).

This overview comprises some of the most relevant amendments to present legislation through MiFID in Austria applicable to the provision of investment services. Furthermore, it considers potential impacts of the implementation of MiFID on the private equity and venture capital industry.

3.1.2. Scope of MiFID

The investment services that are subject to licensing requirements in Austria have been expanded. The description of such investment services in the WAG 2007 corresponds both substantively and terminologically to those contained in MiFID (in fact, the WAG 2007 is to a very big extent a verbatim copy of MiFID). Compared to the WAG, the WAG 2007 now contains the new investment service “operation of a MTF”. Furthermore, the WAG 2007 includes additional instruments within the definition of financial instruments, such as commodity derivatives. Dealing with commodity derivatives will now be regulated in the same way as activities dealing with other financial instruments. As a consequence, the scope of services that may benefit from an European Passport have also been expanded to include all the investment services and activities listed in MiFID.

Firms that only provide investment advice or the reception and transmission of orders in relation to one or more financial instruments exclusively within the territory of Austria (so called *Wertpapierdienstleistungsunternehmen*) will be subject to lighter requirements compared to other companies (so called investment firm – *Wertpapierfirma*) subject to the WAG 2007.

3. Country Sections

The concept of client classification did not have any corresponding concept in the WAG and it is therefore new in Austria with respect to investment firms. The definition of eligible counterparties, professional clients and retail clients in the WAG 2007 corresponds to the definition contained in MiFID. Local investment service providers were forced to adapt their internal procedures with regard to such client classification.

As a further result of the implementation of MiFID into Austrian law, investment firms are now confronted with numerous new requirements concerning the so called "Rules of Good Conduct"

(*Wohlverhaltensregeln*) that extend far beyond what was previously necessary under the WAG. Above all, in the execution of orders it must be complied with the principle of providing the best value for the client ("best execution"). Furthermore, there are also more stringent requirements regarding the permissibility of incentive payments.

3.1.3. Effects on private equity and venture capital

Since the WAG 2007 entered into force and due to the fact, that the WAG 2007 (as this has already been the case with the WAG) does not comprise any explicit reference to or general exemption for the private equity/venture capital industry, there has been an uncertainty in Austria as to whether the WAG 2007 is applicable on the private equity and venture capital industry and if so, to what extent. Furthermore, please note that no general guidelines from the Austrian Financial Supervisory Authority (*Finanzmarktaufsichtsbehörde* – "FMA"), which is responsible for providing licences and supervising the activities carried out under the WAG 2007, exist yet.

Nevertheless, in Austria the opinion prevails that the private equity and venture capital industry (above all management companies to private equity funds) is excluded from the scope of applicability of the WAG 2007, and thus, exempt from any licensing requirements for providing investment services. Please note that this might also be the consequence of the fact that the predominant part of all services provided within that sector in Austria relates to shares in limited liability companies (*Gesellschaft mit beschränkter Haftung* – "GmbH"), which do not fall under the definition of financial instruments. What regards shares (transferable securities) in stock corporations, which definitely are financial instruments according to MiFID, no guidelines from the FMA exist yet, but the FMA accepts the market practice.

To avoid uncertainties about possible licensing requirements in the future, it is currently discussed to clarify by law that the private equity and venture capital firms are exempt from the applicability of the WAG 2007.

3.2. The Czech Republic

CMS Cameron McKenna v.o.s.

CMS Cameron McKenna came to Prague over fifteen years ago, in 1991. During that time, the firm has built a reputation for advising international business not just in the Czech Republic but further afield in Bulgaria, Croatia, Serbia, Slovakia, Slovenia and Ukraine. Known predominantly for its work in real estate, private equity, corporate and energy sectors, the team combines both international expertise with local knowledge.

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3.2.1. Introduction

MiFID has not been implemented in the Czech Republic yet. The implementation is intended to consist primarily in substantial amendment of the Act no. 256/2004 Coll., on the conduct of business on the capital market, with subsequent issuing of implementing by-laws. The draft amendment law was prepared after quite thorough and lengthy discussions (of about one year) between the Ministry of Finance, the Czech National Bank and market participants. On 16 January 2008, the Czech government agreed on its final text to be submitted to the Parliament for adoption. It is expected that passing MiFID in the Parliament will take at least several months so that MiFID will probably will not be in force before mid-2008. Obviously, it is also unclear whether the Parliament will make any changes to the Government's draft.

3.2.2. Scope of MiFID

The Czech National Bank as the capital market regulator (and which is responsible for all financial services) is aware of the issue of the late implementation of MiFID and its consequences, in accordance with the European Union's *acquis communautaire*. However, it has not published any official guidelines in this respect.

However, it is our understanding that the Czech National Bank is generally willing to respect the vertical effect of MiFID. In practice, this should mean that the regulator applies directly provisions of MiFID where they deviate from Czech laws currently in force, and does not apply provisions of Czech laws currently in force deviating from those of MiFID. Obviously, this only applies to situations where MiFID's regulatory regime is more relaxed for the private party than current status of the Czech law. By no means will the regulator invoke vertical effect of MiFID where the MiFID approach is stricter.

3. Country Sections

At present, there is no full list of MiFID provisions available, which are currently applied directly in the Czech Republic. However the regulator is generally ready to provide comments regarding its position on applicability of specific provisions where questioned.

Perhaps the most important provision as an example of direct applicability of MiFID is a change of regulatory regime for foreign investment firms, based in other EU member states, passporting to the Czech Republic on a Freedom of Services (FOS) basis: Under Czech law currently in force, such investment firm is required to fulfil the following requirements of Czech law in relation to investment services provided in the Czech Republic:

1. Czech rules of conduct to customers; and
2. certain information duties to the Czech regulator.

As MiFID subjects FOS investment firms fully to regulation of its home country, the Czech regulator shall no longer require the above two requirements of Czech law to be complied with.

3.3. Denmark

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Accura is a Danish Law Firm which caters to businesses' demands for legal advice within M&A, real estate, banking and finance, insolvency, tax, employment, competition and intellectual property.

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3.3.1. Introduction

Act no. 108 of 7 February 2007 (the "Implementation Act") implemented the EU's Markets in Financial Instruments Directive ("MiFID") into Danish law. The Implementation Act, which entered into force on 1 November 2007, amended several existing acts, including the Danish Securities Trading Act (*lov om værdipapirhandel*) (the "Securities Trading Act") and the Danish Financial Business Act (*lov om finansiel virksomhed*) (the "Financial Business Act"). Several executive orders have been issued in connection with the implementation of MiFID. Some of these concerns include:

- investor protection in connection with securities trading;
- binding price quotations and market transparency;
- authorisation to perform services relating to securities trading;
- the issuer's duty of disclosure; and
- organisational requirements for securities traders.

The Danish Financial Supervisory Authority ("the Danish FSA") have prepared guidance notes for three of the executive orders issued (the issuer's duty of disclosure, investor protection and the securities traders' execution of an order).

3. Country Sections

3.3.2. Scope of MiFID

Prior to the implementation of MiFID, the services of investment advice was considered an ancillary service which only required licence from the Danish FSA if it was conducted by a company that also carried on another business that required a licence. If no such other business was conducted, it was possible to provide investment advice without an authorisation from the Danish FSA and also without being subject to the investor protection rules applicable to financial businesses found in Executive Order on Good Business Practice for Financial Undertakings (*bekendtgørelse om god skik for finansielle virksomheder*) and Executive Order on Good Securities Trading Practices (*bekendtgørelse om god værdipapirhandelsskik*).

After the implementation of MiFID, the activity consisting in providing investment advice is no longer considered an ancillary service but an investment service that requires the prior authorisation of the Danish FSA. The business of providing investment advice is therefore also subject the investor protection rules and a service that benefit from the passport rules contained in the MiFID.

For companies already conducting the business of providing investment advice before 1 November 2007, an application for authorisation must be filed with the Danish FSA before 1 February 2008 in order to continue this business.

In relation to the above, investment advice is defined as trade recommendations provided personally to a client concerning a specific instrument and shall be distinguished from a general investment advice which is not considered an investment service in MiFID.

At the end of 2006, the legislator estimated that, at that time, less than 10 companies in Denmark were performing activities consisting in investment advice which would be covered by these new rules.

The Danish investor protection rules implementing MiFID are more comprehensive and more detailed than before and can on a general basis be divided into:

- the duty of disclosure (information on the securities trader and his products);
- the consultancy rules (the know-your-client principle and the product's suitability to the client; and
- the best execution rules (ensure that the client's order is appropriately executed).

The client classification, dividing the clients into eligible counterparts (banks and other financial investors), professional clients (investors assumed to have more investment experience than private clients) and private clients/retail clients (covered by the highest protection level) is new to the Danish rules.

The principles of the suitability assessment are not new to Danish law, but the rules in the MiFID are more detailed than before.

It is a new aspect that MiFID allows for client orders to be executed without prior consultancy, if the orders concern non-complex products.

After the implementation of MiFID, the Copenhagen Stock Exchange's monopoly of receiving and publishing reported trades ceased, as the regulated markets and securities traders are obligated to publish the information on contracted trades. The Danish FSA now performs the market monitoring, which originally was performed by the Copenhagen Stock Exchange. Consequently, reports for the purpose of market monitoring and publication of post-trade information are now made separately.

3.3.3. Effects on private equity and venture capital

After the implementation of MiFID, the Securities Trading Act still applies to units in collective investment institutions that are not governed by Danish law, cf. section 2(1)(3) of the Securities Trading Act. This means that the Securities Trading Act still covers investments in companies with a view to be a part of the management and the operation of the company, e.g. equity funds, see the preparatory work to the provision. Thus, securities traders, according to section 4 of the Securities Trading Act, must observe the new rules on investor protection in connection with investments concerning equity funds.

The implementation of MiFID has resulted in more stringent rules for investment counsellors. According to section 343a (1) of the Financial Business Act, companies performing investment consultancy services must be authorised investment counsellors. However, "[collective investment schemes, etc., and pension funds whether or not coordinated at Community level, and the depositaries or managers of such institutions](#)" are exempt from this requirement, see section 343a (2)(2) of Financial Business Act.

In a consultation document, Danish Venture Capital and Private Equity Association asked the legislator whether private equity funds in the limited partnership set-up used by Danish and foreign venture capital companies and private equity companies are exempt according to section 343a (2)(2) of the Financial Business Act. The legislator confirmed that neither the limited partnership nor its management must obtain authorisation according to section 343a (1) of the Financial Business Act as they do not perform investment consultancy services.

In the preparatory work for section 343a (2) of the Financial Business Act, the legislator states that the provision implements article 2(h) of the MiFID directive. Further the exemption is also mentioned in the Executive Order no. 440 of 11 May 2007 listing the persons allowed to perform services relating to securities trading without authorisation according to the Financial Business Act.

3. Country Sections

3.4. Finland

Attorneys at law Borenius & Kempainen

Established in 1911, Borenius & Kempainen is one of the largest and most experienced law firms in Finland. Its mission is to provide high quality legal services in all areas of corporate law. Seamless cross border legal services are provided through Borenius Group offices in Tallinn, Riga and Vilnius. Borenius & Kempainen advises private equity and venture capital houses both in their fund formation and deal making activities and represents a number of institutional investors in their global venture capital and private equity funds investment programmes.

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3.4.1. Introduction

The implementation of the Markets in Financial Instruments Directive (the “MiFID”) in Finland took place on 1 November 2007, as planned. The aim of MiFID is to integrate the European financial markets by introducing a system in which an operating license granted in one home member state would be valid throughout the European Economic Area. In connection with the Finnish implementation of MiFID several acts were amended or totally revised, such as the Act on Investment Firms (revised in its entirety), the Securities Markets Act, the Act on Trading in Standardized Options and Futures, the Act on Mutual Funds and a number of other acts covering the functioning of financial markets.

3.4.2. Scope of MiFID

Perhaps the most notable revision was the adoption of the new Act on Investment Firms (922/2007). One of the most central amendments was to include investment advisory services under the definition of investment services, which means that a license granted by the Finnish Financial Supervision Authority (the “FIN-FSA”) is needed in order to allow the provision of such services.

The providing of investment advice is defined as 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. The definition corresponds to the definition in the MiFID.

According to the Act on Investment Firm and to the recent guidelines issued by the FIN-FSA, license will be required when the following elements are fulfilled:

- the investment advice takes into consideration the specific circumstances relating to the client;
- the advice concerns the selling, buying, subscribing, trading, redeeming or keeping of a financial instrument; and
- the advice is given upon the request by the client or at the initiative of the investment firm.

Conversely no investment firm licence is required if the company:

- gives general recommendations i.a. relating to a specific asset class;
- gives recommendations to a larger group of people through the use of mass media (e.g. newspaper, internet, radio or television);
- markets its (financial) products;
- advice is given occasionally in connection with the providing of other services, such as legal or accounting services; and
- the subject of the investment advice is not a financial instrument but, for example, art (please note, however, the shares in unlisted companies are considered as financial instruments).

The implementation of MiFID also introduced new structures on client categorization. Clients are now categorized as professionals and non-professionals and, in certain cases, as eligible counterparties. In addition, securities intermediaries are obliged to make more extensive inquiries about their clients' financial position and investment experience, and other important matters concerning client protection. At the same time, the obligation of securities intermediaries to provide information is also more specific. The new Act on Investment Firms also includes provisions on how to deal with conflicts of interest and clients' assets.

The most material amendment to the Securities Markets Act relates to the division of public trading into trading on official list and other public trading. The stock exchange is now able to decide itself whether to keep an official list on the securities that are traded publicly. The provisions encourage trading in publicly traded securities in parallel trading systems. Publicly traded securities can, for example, be admitted to multilateral trading facilities organized by securities intermediaries or traded on another regulated market in the European Economic Area.

In connection with the implementation of MiFID, some minor amendments to the Finnish tax system were made. The liability to pay 1.6 per cent transfer tax on share transactions made on alternative multilateral market places outside the stock exchange (e.g. on the First North) was abolished in order to promote trading on such markets.

3. Country Sections

3.4.3. Effects on private equity and venture capital

For the Finnish private equity and venture capital industry, the main concern in connection with the implementation of the MiFID has been uncertainty concerning the impacts MiFID will have on the industry. As noted above, perhaps the most significant change introduced by MiFID is that the providing of investment advice has become an investment service subject to permission of the FIN-FSA.

After the implementation of MiFID, the Finnish Venture Capital Association requested the FIN-FSA to issue an interpretation regarding the impacts MiFID will have on advisory relationships between private equity funds and their managers/advisors.

On 24 January 2008 the FIN-FSA issued its interpretation (the "Interpretation") in which it evaluates the advisory relationships within private equity fund industry in the light of the "investment advice" premise in the new Act on Investment Firms.

The Interpretation sets out that advisory services provided in connection with private equity activities (which includes also fund of funds activities), which fulfil the exemption parameters set out in MiFID Article 2, Paragraph 1 Subsection h, are not subject to FIN-FSA permission (Paragraph 4). FIN-FSA is of the opinion that providing services to a management company (or general partner) or to the fund(s) managed by the manager within the same group of companies as the advisor is not "providing of investment advice" subject to permission of the FIN-FSA. The FIN-FSA points out, however, that the exemption does not apply when an advisory company provides advisory services to a management company that is not a member of the same group of companies as the advisor (or to funds managed by such management company or directly to investors) or directly to investors (Paragraph 3.2). The exemption also applies to advisory services provided directly to a fund managed by a manager within the same group as the advisor although the fund and the advisory company are not technically part of the same group of companies.

3.5. France

Proskauer Rose LLP

Proskauer Rose LLP is a leading international law firm, providing a wide range of legal services to clients worldwide. Founded in 1875 in New York City, the firm employs over 750 lawyers in ten offices (Boca Raton, Boston, London, Los Angeles, New Orleans, New York, Newark, Paris, Sao Paulo and Washington, D.C.).

Our Private Equity Group consistently ranks as a top tier private equity law practice. Our lawyers have established themselves as leaders in the private equity sector and practice in strategic office locations that allow us to actively represent sponsors and institutional investors worldwide in a broad range of activities, from fund formation, internal governance and succession planning, investment transactions, acquisition or sale of interests on the secondary market, liquidity events, distributions, tax planning, regulatory compliance, portfolio company dispositions through mergers and acquisitions or initial public offerings, management buyouts and leveraged recapitalizations, to compensation and estate planning for partners.

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3.5.1. Introduction

The main purpose of the Markets in Financial Instrument Directive (known as the “MiFID”) of 21 April 2004 is to open up the various methods used to execute financial instrument orders, while affording investors greater protection.

MiFID was transposed into French law by an Order of 12 April 2007, a Decree of 15 May 2007, and by the amendment of the Autorité des marchés financiers’s General Regulation (*règlement general*), the new version of which took effect on 1 November 2007.

In France, the venture capital vehicles reserved for institutional investors usually take the form of Private Equity Investment Funds (*Fonds commun de placement à risques*” or “FCPR”), which are OPCVMs (“UCITS”).

The application of the principles of the MiFID to management companies managing FCPRs results from a commitment communicated by the *Autorité des marchés financiers* (“AMF”) to standardise the status of portfolio management companies (*sociétés de gestion de portefeuille*).

Accordingly, the MiFID’s application has also had consequences for management companies managing private equity funds.

3. Country Sections

This summary examines the most relevant amendments made through the implementation of MiFID in France and its potential consequences in the private equity area.

3.5.2. The European passport

New Articles L.532-18 and L.532-18-1 of the French financial and monetary code set out the rules for the European passport. In accordance with MiFID, they distinguish the provisions applicable to the freedom to provide services (*libre prestation de services*) from the provisions governing the freedom of establishment (*liberté d'établissement*).

The exercise of the European passport is simplified by the establishment of the principle of the competence of the initial authority of the State of the investment services provider.

The European passport provided by the articles exists solely for investment services providers (*prestataires de services d'investissement*), it being recalled that managing an OPCVM is not deemed an investment service (*service d'investissement*).

In a press release dated 13 October 2007, the AMF stated that any investment services provider active in France, having the freedom to provide services and having its registered office or its effective senior management in another Member State of the European Community or in a State that is a party to the agreement on the European Economic Area and that has not transposed the provisions of said Directives by 1 November 2007 shall be required to comply with the rules of good conduct in effect in France since this date.

3.5.3. Marketing of OPCVMs

The marketing of OPCVMs, more specifically, of dedicated private equity funds, is analysed by the AMF in two phases: (if applicable) an initial phase that involves contacting the client that may be qualified as the provision of investment advice, and a second phase, which entails the processing of an OPCVM unit subscription order, which is perceived as an order receiving/transmission service.

As these two services are investment services, the marketing of FCPR units are therefore subject to compliance with the rules of good conduct arising from MiFID.

The rules of good conduct concern notably the classification of unit holders and the need to ensure the appropriateness of the services and products offered to clients.

- **The classification of unit holders**

In general, distributors are required to follow appropriate written procedures when classifying their clients.

Accordingly, this has led to the definition of three categories of clients (professional clients, eligible counterparties and non-professional clients), each of which has its own information obligations and "best execution" criteria.

Distributors are required to inform their clients of the category in which they have been classified and the latter's right to request a different classification, as well as the resulting consequences with respect to their degree of protection.

The AMF has stipulated that the classification of unit holders (and, in general, the rules of good conduct) would not be imposed in certain cases on those management companies that market units of OPCVMs that they manage.

On 16 November 2007, the AMF began a public consultation with a view to amending the current Article 411-53 of the AMF's General Regulations, in order to ensure that the management companies that market units of the OPCVMs they manage also comply with the rules of good conduct during the marketing phase.

- **The need to ensure the appropriateness of the service and the products offered to clients**

Marketers of OPCVM units must ensure the product offered to the client is consistent with the client's expertise.

In practice, this is reflected in the fact that prior to subscription, marketers of fund units must have collected certain information that proves that the product or service offered is tailored to the client in question. The nature of the marketer's actions and the client classification as a professional (or non-professional) client will have an impact on the nature and quality of information to be collected from the subscriber.

The aforementioned public consultation begun by the AMF also covers the extension of this obligation to include management companies that market the units of OPCVMs they manage.

- **Information obligations**

Although the new rules for providing information to OPCVM unit holders are not new, they are much more specific than they were previously. These rules cover the overall information to be provided to clients, promotional communications and the timing of the delivery of information.

3.5.4. Modifications affecting the management of assets

- **The concept of "best execution" applied to order execution**

In consideration of the opening up of services and competition between different order execution markets, MiFID established a "best execution" obligation, which means that investment services providers must do everything in their power to obtain the best possible result in filling clients' orders on shares traded on a regulated market, based on price, cost, speed, execution and settlement probability, the size of the order, and other factors.

In the area of private equity, this new obligation does not concern direct investments made in unquoted companies by "SGPs" (portfolio investment companies) in the name and on behalf of managed FCPRs.

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In practice, this is expected to lead SGPs to establish for the activity other than unquoted companies a procedure describing a policy for choosing entities with information in the annual management report, and a description in the basic activity programme.

- **The possibility of making transfers of interests between funds managed by the same management company**

Transfers of interests between funds managed by the same management company are no longer prohibited, in accordance with the conditions that are expected to be laid down by the new Code of Ethics adapted by the AFIC (France's Private Equity Association). This Code, which is in the process of being approved by the AMF, provides that inter-fund transfers shall only be allowed subject to the intervention of an independent expert (who will provide an opinion on the price), or another investor, in the case of a significant amount.

3.6. Germany

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3.6.1. Introduction

In Germany, the provisions of the EU Markets in Financial Instruments Directive (MiFID) were implemented mainly by enactment of the German Act Implementing the Markets in Financial Instruments Directive and its Level-two Directive (*Finanzmarkttrichtlinie-Umsetzungsgesetz, FRUG*) which came into force on 1 November 2007. Amongst other things it introduced amendments to the German Banking Act (*Kreditwesengesetz, KWG*) which regulates in particular the licence requirement and the capital requirements applicable to investment firms and the German Securities Trading Act (*Wertpapierhandels-gesetz, WpHG*) which regulates *inter alia* the business conduct rules applicable to investment firms.

Whereas the private equity industry traditionally had not been covered by the rules of the Banking Act and the Securities Trading Act, the scope of these provisions was extended by a change to the definition of financial instruments as well as by the introduction of investment advice as a financial service. However, although these changes have led to some discussion whether private equity funds and the private equity industry became subject to the regulatory regime applicable to financial services, the provisions of MiFID as implemented in Germany still apply to the private equity industry only in very limited circumstances. The borderlines are, however, not clear-cut and may be shifted by future developments.

3.6.2. Financial instruments

The term 'financial instruments' under the FRUG covers securities as well as units in collective investment undertakings, as is the case under MiFID.

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3.6.3. Securities

The definitions of securities under the KWG and under the WpHG were amended upon implementation of the MiFID by inclusion of a reference to partnerships. Securities under these acts now basically include all classes of transferable securities which are negotiable on the capital markets such as shares in stock corporations and shares in other companies, partnerships or enterprises that are comparable to shares in stock corporations.

Securities therefore are transferable, standardised, tradable and comparable to shares in stock corporations.

In its explanations to the FRUG, the German legislator stated that comparability with shares in stock corporations requires the possibility to acquire a financial instrument in good faith (*gutgläubiger Erwerb*). This condition is presently not met in the case of shares in German companies with limited liability (*Gesellschaften mit beschränkter Haftung*), participations in German partnerships (*offene Handelsgesellschaften*) and participations in German limited partnerships (*Kommanditgesellschaften*). However, this legal situation is not static. A draft Act on the Modernisation of the Law on Limited Liability Companies and for the Combat of Malpractice (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen*) is currently in the legislative procedure. One of the main amendments under this act will be that shares in limited liability companies can be acquired in good faith under certain circumstances.

With regard to units in closed-end funds, the legislator specifically stated that they would not qualify as securities because of a lack of comparability with shares in stock corporations, of standardisation and of suitability to be traded on the capital markets. This analysis is generally correct as regards closed-end funds organised in Germany which are normally set-up in the form of a limited partnership. However, because participations in closed-end funds or private equity funds are not explicitly exempt from the definition of securities, it needs to be examined in every single case whether they fall under the definition of securities, in particular where they are organised under foreign law or not as limited partnerships.

3.6.4. Units in collective investment undertakings

The FRUG has not amended the definitions of units in collective investment undertakings under the KWG and the WpHG. Both definitions refer to units in collective investment undertakings issued by German investment management companies (*Kapitalanlagegesellschaften*) under the German Investment Funds Act (*Investmentgesetz, InvG*) or issued by foreign investment companies when covered by the scope of the InvG. The scope of application of the InvG as regards foreign funds has been amended as of 28 December 2007 by the Act on the Amendment of the Investment Funds Act (*Investmentänderungsgesetz*). This led to indirect changes to the scope of application of the KWG and the WpHG as regards units in foreign collective investment undertakings.

Units in German collective investment undertakings are regulated under the InvG if they are organised in compliance with this act. Due to limitations on the assets in which funds organised under the InvG may invest, private equity funds cannot be set up under the InvG. Consequently, units in German private equity funds do not qualify as units in collective investment undertakings under the KWG and under the WpHG.

The public distribution of units in foreign collective investment undertakings is covered by the InvG if the collective investment undertaking qualifies as a collective investment of assets on the basis of the principle of risk diversification in the types of assets listed in the InvG (including participations in private companies) and either the investors have the right of redemption of their units (i.e. the funds are open-end) or the foreign investment management company is subject to investment supervision in its country of domicile.

3.6.5. Financial services

Various activities in relation to the management and distribution of private equity funds may qualify as investment services regulated under the KWG and the WpHG. The following entities may in particular provide investment services in connection with private equity funds: (i) managers of private equity funds, (ii) advisors to the managers of private equity funds, and (iii) distributors of participations in private equity funds.

3.6.6. Managers of private equity funds

The management of private equity funds by its general partner or a limited partner (authorised under the statutes of the fund) does not qualify as any of the financial services regulated under the KWG and the WpHG. In particular, such management does not constitute portfolio management because the manager as a body of the fund acts for the own account of the private equity fund (organised as a commercial partnership or a company) and not for the account of the investors.

When raising funds, managers of private equity funds may provide investment advice regarding the acquisition of units in the private equity fund to the potential investors. Investment advice is defined under the KWG and the WpHG as the provision of personal recommendations in relation to transactions in financial instruments based on the individual circumstances of the investor or on an assessment of suitability. There is, however, an exemption for investment advice from the application of the KWG and the WpHG where the investment advice is only an element of a range of activities offered by an advisor and is not specifically remunerated. This exemption may apply to investment advice provided by managers of private equity funds.

The general exemption of collective investment undertakings, their depositaries and managers from the application of MiFID under Art. 2 para. 1 (h) of the MiFID has been implemented in Germany only in favour of German investment management companies regulated under the InvG and investment management companies domiciled within the European Economic Area and organised in compliance with the UCITS Directive (85/61/EEC). Managers of all other types of collective investment undertakings including private equity funds therefore do not benefit from this general exemption. Nevertheless, based on the considerations set forth above and depending on the services they provide, they fall under the application of the KWG and the WpHG only under certain limited conditions.

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3.6.7. Advisors to the managers of private equity funds

An advisor to the manager of a private equity fund provides advice to the manager with regard to the acquisition of participations of target companies by the private equity fund. Where the participations in the target companies qualify as securities under the KWG and the WpHG, the advice provided to the managers of private equity funds by external advisors qualifies as investment advice. However, these external advisors may benefit from the exemption of investment advice from the regulations under the KWG and the WpHG if the advice is only an element of a range of activities offered by the advisors and is not specifically remunerated. This is normally the case in the case of M&A advisors who provide advice to undertakings on capital structure, industrial strategy as well as services relating to mergers and acquisitions of undertakings and do not receive a specific remuneration for investment advice rendered in connection with such transactions (as recently confirmed by the German regulator, the Federal Financial Supervisory Authority, BaFin).

In addition, provided the preconditions are met, the exemption of persons who provide financial services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings from the scope of application of the KWG and the WpHG may apply to the advice granted to the managers of private equity funds.

3.6.8. Distributors of participations in private equity funds

The distribution of participations in private equity funds may qualify as an investment service in the form of a reception and transmission (intermediation) of orders in relation to financial instruments, a purchase or sale of financial instruments in the name and for account of others, underwriting or placement of financial instruments with or without a firm commitment basis or investment advice – in each case provided the participations in the private equity funds qualify as financial instruments under the KWG and the WpHG.

The optional exemption for fund intermediaries under Art. 3 para. 1 of the MiFID applies under the KWG and the WpHG to investment advice and to the reception and transmission of orders (intermediation) in relation to financial instruments from customers to licensed credit institutions and financial services institutions as well as investment management companies where units in German or foreign collective investment undertakings are concerned that are subject to the provisions of the InvG. This exemption therefore does not apply to the distribution of participations in German private equity funds or foreign private equity funds that do not qualify as units in collective investment undertakings but as securities under the KWG and the WpHG.

3.7. Hungary

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In Hungary, Act CXXXVIII of 2007 on Investment Companies, Commodities Exchange Service Providers and their Activities (the "Investment Services Act") was passed with the aim of fully implementing Directive 2004/39/EC on Markets in Financial Instruments ("MiFID Directive") and Directive 2006/73/EC implementing the MiFID Directive.

The Investment Services Act regulates the investment services provided by Hungarian entities. Furthermore, the Investment Services Act also regulates the cross-border services provided by any licensed investment enterprise registered in an EEA country. In accordance with the MiFID Directive, such cross-border services of licensed investment enterprises registered in an EEA country may be performed in Hungary without the license of the Hungarian Financial Supervisory Authority.

Of course, the Investment Service Act also covers the other issues as set out in the MiFID Directive.

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3.8. Italy

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3.8.1. Introduction

On 1st November 2007, the Legislative Decree issued the 17 of September 2007 no. 164 entered into force, implementing MIFID in Italy^(f). On the regulatory side, in compliance with the legislation that has implemented MIFID, the Commissione Nazionale per le Società e la Borsa ("Consob") and the Bank of Italy issued (*inter alia*) the following main regulations:

- resolution no. 16190 issued by Consob the 29 of October 2007, that amended the rules on intermediaries^(g);
- resolution no. 16191 issued by Consob the 29 of October 2007, that amended the rules on markets^(h); and
- resolution issued jointly by Consob and the Bank of Italy, on the 29 Of October 2007, that provides for the rules concerning the organization and the procedures applicable to intermediaries authorised to provide for investment services and collective portfolio management.

This summary considers some of the most relevant amendments made "by Mifid"^(f), to the present legislation applicable to the carrying on of investment services and their potential impact on the private equity and venture capital industry.

^(f) The Legislative Decree no. 164/2007 amended many part of the Legislative Decree no. 58 of 24 February 1998 ("Consolidated Financial Act").

^(g) Such Regulation was adopted pursuant to articles 6.2, 6.2-quater, 6.2-quinquies, 19.3, 23.1, 25-bis.2, 27.3, 27.4, 28.3, 30.2, 30.5, 31.6, 32.2, 33.2 letter e-bis, 117-ter and 201.8 of the Legislative Decree no. 58/1998.

^(h) This Regulation is adopted pursuant to article 61.2, 61.6-bis, 61.6-ter, 62.1-ter, 62.1-quater, 61.3-bis, 64.1, 61.1-quinquies, 65, 70-ter.2, 74.2, 77-bis.1, 77-bis.6, 78.2, 79-bis, 79-ter, 180.1, letter c), 181.2, 187-ter.7 and 187-nonies of the Legislative Decree no. 58/1998.

^(f) Mifid was implemented in Italy by Legislative Decree n. 164/2007 and implementing regulations.

3.8.2. Scope of MiFID

According to the provision of article 18, paragraph 1 of the Legislative Decree no 58/1998, the provision of investment services and activities to the public on a professional basis are reserved to investment companies and banks (i.e. to “entities” that are under the control of the Italian Authorities – Bank of Italy and Consob).

According to the provision of article 1 of the Legislative Decree no 58/1998 (as amended by the Legislative Decree no 164/2007), “Investment services and activities” mean the following activities where they concern financial instruments:

- a) dealing for own account;
- b) execution of orders for clients;
- c) subscription and/or placement, with company commitment underwriting or standby commitments to issuers;
- c-bis) placement, without company commitment underwriting or standby commitments to issuers
- d) management of investment portfolios;
- e) reception and transmission of orders;
- f) investment advice;
- g) management of multilateral system of negotiation.

One of the most important news of MIFID is the addition of the “investment advice⁽⁹⁾” among the “investment services and activities”. With regard to the investment advice it has to be underlined that, before the implementation of Mifid in Italy, such activity was substantially provided (for by article 1, paragraph 6, letter e) of the Legislative Decree n. 58/1998) as an “ancillary service”. The mere carrying out of advisory activity didn’t seem to require any kind of authorisation. Therefore companies whose business purpose consisted only in supplying advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings as well as investment advice concerning financial instruments usually didn’t require any authorisation⁽¹⁰⁾. As a consequence of the coming into force of the Legislative Decree no 164/2007, companies that were not previously subject to a licence obligation may be obligated to obtain a licence from Consob (that gives the authorisation after consulting the Bank of Italy).

With regard to the scope of the provision in matter it has to be noted that according to a literally interpretation of article 18 of the Legislative Decree no 58/1998 the investment services and activities (including the investment advices) are reserved to investment companies and to banks on the condition that they are carried out [to the public on a professional basis](#).

⁽⁹⁾ The Italian law adopted the definition of “investment advice” provide by MIFID, with some specification adopted by the directive of second level (2006/73/CE). Consequently according to article 1, paragraph 5-septies of the Legislative Decree no 58/1998 (as amended by the Legislative Decree no 164/2007), the investments 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. A recommendation is personalized when it is presents as suitable for the client or it is based on a consideration of the circumstances of that client. A recommendation is not a personal recommendation if it is circulated to the public through distribution channels.

Generically, according to the provisions of whereas no 81 and 82 of the directive 2006/73/EC and to the definitions provided by the “explanatory note” to the Legislative Decree no 164/2007, generic advice about a type of financial instrument is not investment advice as well as preparatory acts are not deemed to be investment advices. Acts carried out by an investment firm that are preparatory to the provision of an investment service or carrying out an investment activity should be considered as an integral part of that service or activity. This would include, for example, the provision of generic advice by an investment firm to clients or potential clients prior to or in the course of the provision of investment advice or any other investment service or activity.

⁽¹⁰⁾ This has been confirmed by CONSOB, which, in various communications (see for example one of the first enacted, Communication no DI/98080600 of October 14, 1998), stated that the advisory activity on financial instruments ... wasn’t subject to reserve.

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In this context the exemptions provided by MIFID find their application. According to such exemptions no authorisation has to be required (inter alia) by persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings.

Further exemptions might be provided according to article 18, paragraph 5, letter b) of the Legislative Decree no 58/1998 that entitles the Minister for the Economy and Finance to adopt (after consulting the Bank of Italy and the Consob) rules implementing and integrating the reservations of investment services and activities, in compliance with the provisions of Community law. Such Decree is not yet issued.

3.8.3. Client classification

The concept of client classification provided by Mifid hadn't any corresponding concept in the previous Italian Legislation and regulations (i.e. Legislative Decree no 58/1998 and implementing regulations). For the present Italy that has adopted the same classifications and definitions provided by Mifid Directive:

- “eligible counterparties⁽¹¹⁾”;
- “public professional costumers⁽¹²⁾”;
- “private professional costumers⁽¹³⁾”; and
- “retail customers”.

⁽¹¹⁾ The notion of “eligible counterparties” is provided by article 6 of the Legislative Decree no 58/1998, according to such provision “eligible counterparties” mean: 1) investment companies, banks, insurance companies, UCITS and their management companies, pension funds and their management companies, financial intermediaries entered in the lists referred to in articles 106, 107 and 113 of the Consolidated Law on Banking, companies listed in article 18 of the Consolidated Law on Banking, institutions of electronic money; bank foundation; national governments and their corresponding offices including public bodies that deal with public debt, central banks and supranational organisations. 2) Enterprises whose principal business is the dealing for own account; 3) ...

⁽¹²⁾ The notion of “public professional client” is provided by article 6 of the Legislative Decree no 58/1998, which has to be implemented by a Ministerial Decree that has not been issued yet.

⁽¹³⁾ The notion of “private professional customer” is provided by article 6 of the Legislative Decree no 58/1998, as implemented by article 64 and Annex III of the regulation no 16190/2007 issued by Consob. A “professional customer” shall mean a customer in possession of the experience, awareness and competence necessary to make his own informed decisions on investments and to correctly evaluate the risks assumed.

I. Professional customers by law

This shall mean professional customers for the purpose of all investment services and instruments:

(1) persons authorised and regulated to operate in financial markets, both Italian and foreign, i.e.: a) banks; b) investment firms; c) other authorised and regulated financial institutions; d) insurance companies; e) collective investment undertakings and management companies for such undertakings; f) pension funds and management companies for such funds; g) dealers acting on their own account on commodities and commodity-based derivatives; h) persons dealing exclusively on their own account on financial instruments markets with indirect membership of clearing and settlement services and the local compensatory and guarantee system; i) other institutional investors; l) stockbrokers; (2) large companies which at individual company level meet at least two of the following requirements: a) balance sheet total: 20,000,000 Euro; b) net revenues: 40,000,000 Euro; c) own funds: 2,000,000 Euro. (3) institutional investors whose main activity is investment in financial instruments, including companies dedicated to the securitisation of assets and other financial transactions.

II. Professional customers on request

II.1. Identification criteria

Intermediaries may treat customers differently from those indicated in section I, where specific request to be classed as professional customers is submitted, provided the criteria and the procedures indicated below are observed. It is not, however, presumed that such customers possess an awareness and experience of the market comparable to those of the categories described in section I.

The disregard for rules of conduct envisaged for the provision of services to non-professional customers shall be permitted when, after appropriate evaluation of the customer's competence, experience and awareness, the intermediary can reasonably consider, given the nature of the planned transactions and services, that the customer is capable of making his own informed decisions on investments and of understanding the risks assumed.

The possession of professionalism requirements envisaged for managers and directors of persons authorised under the terms of EU directives for the financial sector may be considered as a reference for the evaluation of customer competence and awareness.

For the aforementioned evaluation, at least two of the following requirements must be met: a) the customer has executed significant transactions on the market in question, averaging 10 transactions per quarter in the previous four quarters; b) the value of the customer's financial instrument portfolio, including cash deposits, must exceed 500,000 Euro; c) the customer works or has worked in the financial sector for at least one year in a professional capacity which presumes awareness of the transactions and services envisaged.

In the case of legal persons, the above evaluation is conducted with regard to the person authorised to execute transactions on their behalf and/or said legal person.

With regard to the classification of Investors it has to be underlined that the Ministerial Decree of 24 May 1999, no 228, at article 1, letter h), provides for a definition of “qualified investors” that is relevant for the determination of the nature of the funds (“reserved to qualified investors”)⁽¹⁴⁾. According to such provision are deemed qualified investors: investment firms, banks, stockbrokers, asset management companies, SICAVs, pension funds, insurance companies, financial companies heading banking groups and companies entered in the lists referred to in articles 106, 107 and 113 of the Consolidated Law on Banking; foreign intermediaries authorized under the law in force in their home country to perform the same activities as those performed by the intermediaries specified immediately above; banking foundations; natural and legal persons and other entities possessing specific expertise and experience in transactions involving financial instruments expressly declared in writing by the natural person or the legal representative of the legal person or entity.

The list of persons provided by the Ministerial Decree no 228/1999 doesn't correspond to the classification of professional clients/investors (relevant for the offer of investment services and of funds units) as provided by Legislative Decree no. 58/1998⁽¹⁵⁾ and by regulation of Consob no 16190/2007 (see the definitions under footnotes no 5, 6 and 7). With regard to such misalignment⁽¹⁶⁾ an Italian association of category asked Consob to consider the persons provided as “qualified investors” for the purposes of the Ministerial Decree no 228/1999, as “professional client by right” to the aim of MIFID.

The reason of the request borne by the consideration that persons (like individuals, or some entities) that are “qualified investors” according to the provision of the Ministerial Decree no 228/1999 could not be deemed “professional client” according to MIFID (for its the purposes) because they haven't the requirements provided by the paragraph II.1 of the Annex no 3 of the regulation Consob no 16190/2007 (see footnote no 7).

In substance this might mean for example that a number of professional, sophisticated individuals who would previously invested in PE/VC funds might in future invest with more difficulties in such markets (for example because even regular investor in PE/CV funds are highly likely to reach the required transaction frequency of 10 per quarter). Notwithstanding the aforesaid, as far as we know, Consob hasn't accepted the above mentioned request.

3.8.4. Effects on private equity and venture capital

In Italy the activity of private equity and venture capital is substantially executed through the instrument of the closed-ended funds reserved to qualified investors (as defined by articles 15 and 1, letter h) of the Ministerial Decree no 228/1999) or the instruments of the hedge funds (as defined by article 16 of the above mentioned Decree no 228/1999).

Such entities must be managed by an Italian management company that is structured as a limited liability company in the form of an S.p.A. and that must be authorised by the Bank of Italy and registered in a special register (kept by the Bank of Italy). The Bank of Italy gives, its authorisation after consulting Consob, only if the requirements provided by the law are met. Furthermore the funds are regulated by by-laws that have to be approved by the Bank of Italy too. Consequently the “instrument” that is used for PV/VC in Italy is under the control of the Supervisory Authorities.

⁽¹⁴⁾ See article 15 of the Ministerial Decree no 228/1999.

⁽¹⁵⁾ As amended by the Legislative Decree no 164/2007.

⁽¹⁶⁾ The misalignment concerns the definition of the Ministerial Decree no 228/1999 and the one provided by laws and regulations implementing MIFID.

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Therefore the abovementioned structures (authorised management companies and funds) fall within the exemption of article 2, paragraph 1, letter h) of the Mifid Directive applicable to the collective investment undertakings funds whether coordinated at Community level or not and the depositaries and managers of such undertakings.

Furthermore article 18, paragraph 2 of the Legislative Decree no 58/1998 (as amended by the Legislative Decree no 164/2007) expressly provides that the management companies may supply the service referred to in Article 1 paragraph 5, letters (d) (i.e. management of investment portfolio) and (f) (i.e. investment advice activity) to the public on a professional basis⁽¹⁷⁾.

The final and transitional provision of Legislative Decree no 164/2007 provides that the management companies authorised at the date of 31st October 2007 are deemed to be authorised to the investment advice⁽¹⁸⁾.

Mifid would have an impact also on the organization of the Italian teams of managers that make advices to "international funds". From the Italian law as well as from MIFID, it is clear that as long as investment advices are given to an undertaking within the same group as the entity providing the advice, the restriction provided by the Italian law for the investment firm are not applicable. However, to the extent that advice is given to an entity outside of a group the provision of MIFID may be applicable. On this matter it could be useful to underline that according to the final and transitional provisions of the Legislative Decree no. 164/2007, until the issuance of the regulations provided by article 18-bis of the Legislative Decree no 58/1998 and however not beyond the 30th of June 2008, notwithstanding the reservation of activity provided by article 18, the persons that at the date of 31 of October 2007 supply for the advisory services may continue the execution of such services without holding moneys or financial instruments pertaining to the clients.

⁽¹⁷⁾ The Italian law provides with an EU passport. In fact according to article 18, paragraph 2, harmonized management companies may provide the service referred to in Article 11 paragraph 5, letters (d) and (f) to the public on a professional basis, provided they are authorized to do so in their home country.

⁽¹⁸⁾ The regulation issued jointly by Consob and the Bank of Italy on the 29 of October 2007 provides (inter alia) for specific rules concerning the organization of the management company, the conflict of interests and the conservation of the registration applicable to management company.

3.9. Poland

CMS Cameron McKenna Dariusz Greszta Sp. k.

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The Directive 2004/39/EC of 21 April 2004 on Markets in Financial Instruments (MiFID) should have been implemented in Poland before 31 January 2007. However, the Polish Parliament did not manage to make all necessary amendments to the existing legislation before that date and even until now, and therefore the MiFID has not been implemented into the Polish legal system.

Although some provisions of the directive have been implemented, the majority are yet to be transposed (this includes *inter alia* provisions on investment services, on access to regulated markets, on central counterparty as well as on suspension and removal of instruments from trading).

Since 1 November 2007 the provisions of MiFID that have not been implemented may be applied in Poland directly (i.e. like national legislation, although they were not adopted by the Parliament). The list of provisions that may be applied directly is available on the website of the Polish regulator – Financial Supervision Commission (*Komisja Nadzoru Finansowego*).

Also the Commission Directive 2006/73/EC of 10 August 2006 (“MiFID Level II”) implementing MiFID has not been fully transposed into the Polish legal system. Thus, the aforementioned list provided by the Polish regulator includes provisions of the MiFID Level II Directive.

Although the bills that should be adopted in order to implement the MiFID Level I and Level II directives into the Polish legal system are already in the Parliament, it is impossible to predict when Poland will be in full compliance with the directives. However, the implementation is likely to be hastened due to the fact that Poland has been referred by the European Commission to the European Court of Justice for non-implementation of MiFID Level I and MiFID Level II.

The Commission Regulation No 1287/2006 of 10 August 2006 implementing MiFID is already in force (since 1 November 2007) and may be applied directly by definition.

3. Country Sections

3.10. Portugal

Abreu Advogados

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3.10.1. Introduction

On 31 October 2007 Decree-Laws 357-A/2007, 357-B/2007, 357-C/2007, n.º 357-D/2007 were enacted, implementing MiFID in Portugal.

Although in the last 3 years significant amendments had been introduced to the rules governing the carry on of investment services (specially related to internal organisation requirements and conduct of business) MiFID still involves a significant compliance effort from local investment firms and local branches of credit institutions/investment firms with head offices in other EU Member States.

This summary considers the most relevant amendments introduced to local requirements applicable to carry on of investment services pursuant to the implementation of MiFID.

3.10.2. EU Passport

As of the implementation of MiFID, investment firms providing services in Portugal through free provision of services regime shall not be required to comply with local business of conduct rules. Portugal, as Host Member State will however, retain the responsibility for enforcing certain rules in relation to business conducted through a branch.

The scope of services that may benefit of the EU Passport, has also been expanded, now including the investment services and activities listed under Section A and B of Annex I of MiFID, when provided in relation to financial instruments listed under Section C of Annex 1.

One of such services is investment advice. In order to avoid local entities being subject to a less favourable legal frame, Decree-law 357-B/2007 was enacted, which governs the registration before the Securities Market Commission of companies carrying on investment advice services. Until the implementation of MiFID investment advice could only be provided by financial intermediaries authorised to carry on an investment service under Section A of Annex 1 of Investment Services Directive, or by individuals registered as investment advisers before the Portuguese Securities Market Commission (CMVM).

Such companies shall not be authorised to hold clients' funds or securities, but may carry on the activity of reception and transmission of orders in transferable securities and units in collective investment undertakings, provided the orders are transmitted only to entities duly authorised to investment firms and credit institutions authorised to carry on trading activities.

Companies that provide only investment advice, and that are incorporated in Portugal, will be subject to a lighter prudential regime. Such companies shall only be required to have a minimum share capital of €50.000 or to maintain an insurance agreement to cover professional negligence in the amount of €1.000.000 per claim and globally per year of up to €1.500.000.

Pursuant to the implementation of MiFID it is now clear that companies that provide investment services in relation to commodity derivatives with cash settlement shall be entitled to benefit of EU passport, as well as in the case where such services are carried out in relation to derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF or are cleared and settled through recognised clearing houses or are subject to regular margin calls.

3.10.3. Client classification

Until the implementation of MiFID Portuguese law only provided for a close list of professional investors (although the CMVM was entitled, by Regulation, to set the criteria that would allow entities that evidenced to have the required skill and expertise in securities, to be deemed professional clients, it never did so). Thus, it was not possible for wealthy individuals or large undertakings to apply for treatment as professional clients [although for purposes of public offer rules, and pursuant to the implementation of the Prospectus Directive large undertaking that meet two of the following criteria: i) an average number of employees during the financial year equal to or greater than 250; ii) a total balance sheet exceeding €43 million; iii) a net turnover exceeding €50 million, already qualified as professional clients].

Local firms (and local branches of EU firms) were required to adapt their internal procedures relating to client classification (including know your customer tests), and to adopt internal procedures and the terms under which the services were provided up to now to clients, in order to adapt to the new requirements set by MiFID.

EU investment firms, providing services from their head offices under the freedom to provide services regime, will be entitled to rely on their home-country rules on client classification, for purposes of targeting their services to clients resident in Portugal.

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3.10.4. Tied agents

Up to the implementation of MiFID, local firms were only authorised to retain the services of individuals to act as tied agents. Pursuant to MiFID it will be possible for companies to act as tied agents. In addition, local firms may carry on promotion activities in other EU countries through tied agents registered before the CMVM. Investment firms with head offices in other EU countries and authorised to operate in Portugal under the freedom to provide services regime will be entitled to carry on promotion activities in Portugal through tied agents registered before the supervising authority of their home Member State. If such foreign investment firm retains the services of a Tied Agent registered before the CMVM, it will amount to the carry on of investment services through a branch, and local rules shall apply.

3.10.5. Best execution and inducements

Pursuant to the implementation of MiFID local rules have been amended to replicate MiFID requirements. This involved significant effort to local investment firms, as the pre-existing legal frame only replicated high level requirements set by the Investment Services Directive.

3.10.6. Effects on venture capital

In Portugal venture capital is subject to a specific legal frame, which sets the rules applicable to venture capital funds. In order to qualify as a venture capital fund in Portugal, the fund investment policy must comply with requirements set by law, which only allows investment in financial instruments on limited scenarios (since it is only deemed investment in venture capital the holding for a limited period of time of equity in companies with a high development potential).

The CMVM has confirmed that the management services provided to venture capital funds by management companies do not qualify as investment advice and therefore the activity of such companies is not subject to the rules that implemented MiFID in Portugal.

3.11. Sweden

Andulf Advokat

Andulf Advokat AB covers the full range of private equity related legal issues and has an extensive network within the private equity industry. Andulf has participated in about one hundred establishments of, and investments in, private equity funds, including the majority of the funds active in Sweden. The firm's team of legal practitioners have experience in all relevant fields within private equity such as corporate law, contract law, securities and capital markets law, tax law, and mergers and acquisitions.

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3.11.1. Introduction

On 1 November 2007, the Swedish Securities Market Act (SFS 2007:528) (the "Act") entered into force, implementing MiFID in Sweden, replacing in its entirety both the Securities Business Act and the Securities Exchange and Clearing Operations Act.

This summary considers some of the most relevant amendments to present legislation in Sweden applicable to the carrying on of investment services made through the implementation of MiFID and its potential impact on the private equity and venture capital industry.

3.11.2. Scope of MiFID

The investment services that are subject to a licence obligation for the investment firms contained in MiFID closely corresponds with what constituted a securities undertaking subject to a licence obligation according to the Securities Business Act. Similarly, ancillary services referred to in MiFID correspond to the ancillary operations referred to in Securities Business Act. However, as they did not correspond in their entirety, the description in the Act of services that are subject to licence obligation have been adjusted so that each service corresponds both substantively and terminologically to those contained in MiFID. Compared to the Securities Business Act, the Act contains the new investment services investment advice and the operation of a MTF.

As a consequence, the scope of services that may benefit from the passport rules, have also been expanded to include all the investment services and activities listed in MiFID.

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In the Securities Business Act, investment advice was listed as an ancillary service, and therefore only subject to a licence obligation to the extent a company carried on some other services that required a licence. As an effect, companies that provide investment advice but none of the main services listed in the Securities Business Act, were not required to obtain a licence to conduct its business. As a consequence of the entry into force of the Act, companies

that were not previously subject to a licence obligation may now be obligated to obtain a licence from the Swedish Financial Supervisory Authority.

Firms that only provide investment advice in Sweden, will be subject to lighter requirements compared to other companies subject to the Act in that they are only required to have a minimum share capital of €50.000 and to maintain an insurance agreement to cover professional negligence in the amount of €1.000.000 per claim and globally per year of up to €1.500.000.

As the Act, compared to the Securities Business Act, includes additional instruments within the definition of financial instruments, such as, commodity derivatives, the conduct of business activities falling within the scope of the Act, dealing with commodity derivatives will now be regulated in the same way as activities dealing with other financial instruments (with respect to commodities that can be physically settled only if they are traded on a regulated market and/or an MTF or are cleared and settled through recognised clearing houses or are subject to regular margin calls).

The concept of client classification contained in MiFID did not have any corresponding concept in the Securities Business Act and it is therefore a new concept in Sweden with respect to investment firms. The definition of professional clients has been implemented through a reference in the Act to the definition contained in MiFID.

3.11.3. Effects on private equity and venture capital

Since the adoption of the Act and due to the introduction of investment advice as one of the services that fall within the scope of the Act, there has been an uncertainty in Sweden as to whether the Act is applicable on the private equity and venture capital industry and if so, to what extent.

In the preparatory work to the Act, it has been specifically stated that the conduct of providing investment advice within the private equity and venture capital industry may fall outside the scope of the Act but that no general exemption for this industry will apply.

From the Act as well as MiFID, it is clear that for as long as investment advice is given to an undertaking within the same group as the entity providing the advice, the Act will not be applicable. However, to the extent that advice is given to an entity outside of a group the Act may be applicable. In addition it should be noted that we have been informed that if investment advice is provided to a parent company and thereafter to an investment undertaking then the parent company has to conduct a real review of or additional work, such as drawing conclusions based on advice from several sources, on the advice rather than simply passing it on to avoid the Act being applicable. Already in the official report given by a committee appointed by the Swedish Government in April 2006, it was made clear that the exemption in Article 2(h) of the MiFID directive for collective investment undertakings, did not present any changes as compared to the previous directive from 1993 (ISD) and that this exemption therefore did not relate to private equity firms or their funds.

According to the preparatory works to the Act, it has been said that companies that only provide advice to funds that invest in portfolio companies over which operations it has a significant influence should not be considered to be providing investment advice falling within the scope of the Act as this would be advice given in connection with the acquisition and development of companies rather than providing advice in relation to financial instruments.

Further, the preparatory works to the Act states that the exemption in Article 2.1.j in MiFID may be applicable to investment advisors within the private equity and venture capital industry if the investment advice relating to financial instruments are given as part of other professional business activities not covered by the Act and provided that no specific consideration is paid for advice given with respect to financial instruments. In this respect it should be noted that the definition of financial instruments in the Act does not cover shares in private companies, only public companies (as those are defined in the Swedish Companies Act).

In Sweden it is the Swedish Financial Supervisory Authority that is responsible for providing licences and supervising the activities carried out under the Act. After discussion with the Swedish Financial Supervisory Authority, it has stated that if a major part of the business activities conducted by an advisor to a venture capital fund, consist of other activities than providing advice with respect to financial instruments (for example by providing advice with respect to shares in private companies) and if the provision of such advice only represents a limited part of the advisors entire activities and if no specific consideration is received for advice with respect to financial instruments, the advisory activities should fall outside the scope of the Act based on the exemption in Article 2.1.j in MiFID (as implemented in Chapter 2 Section 5, paragraph 12 of the Act).

Based on the above, at least some of the advisors to venture capital funds may be excluded from an obligation to obtain a licence to conduct its business. However, it remains uncertain to what extent the exemption in 2.1.j may be relied upon. Further it is yet to be resolved whether advisors to buy out funds, may rely on the exemption with respect to advice given in connection with the acquisition and development of portfolio companies mentioned above.

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3.12. The Netherlands

Loyens & Loeff N.V.

Loyens & Loeff is an independent full service law firm specialised in providing legal and tax advice to enterprises, financial organisations and governments. The firm has an experienced fully integrated private equity team that employs approximately 50 dedicated fund lawyers exchanging their tax, corporate, regulatory and banking expertise and experience on a daily basis and that covers practically all aspects of the private equity and investment management industry. The team operates from Amsterdam and Luxembourg, as well as various financial centres in the world and is therefore able to service clients in multi jurisdictional transactions. Our private equity practice consistently ranks as a top tier law practice.

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3.12.1. Introduction

The Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EU) was implemented in the Dutch Act on financial markets supervision (*Wet op het financieel toezicht* or 'FSA') on 1 November 2007. MiFID aims to further integrate the European financial markets into a "single" European financial market, within which investment services and activities are relatively easily provided cross border and within which investors benefit from "equal" protection.

MiFID affects to those that provide investment services or investment activities ("investment firms") such as brokers/dealers, underwriters or placement agents and portfolio managers (*vermogensbeheerders*). In accordance with the provisions MiFID (section 2(1)(h)), investment institutions or their managers or depositaries generally fall outside the scope of MiFID whether coordinated at Community level or not. In recital 15 of MiFID it is considered that this is the case "since they are subject to specific rules adapted to their activities".

This summary addresses the most important circumstances under which investment institutions, and their managers and/or depositaries, may nevertheless find themselves within the scope of MiFID in the Netherlands, and the effects of MiFID on the Dutch private equity and venture capital industry.

3.12.2. Scope of MiFID

MiFID aims to achieve a further integrated European financial market – in short – by harmonising licensing, organisational requirements and conduct of business rules (client classification, transparency, transaction reporting, duty of care (best execution, know your customer, etc.)) for investment firms and by expanding the scope of an EU passport for investment firms with *inter alia* rendering of investment advice, the operation of MTFs and investment services and activities in relation to commodity futures.

Investment activities and services are formulated as:

- (a) the receipt and passing on of orders in relation to financial instruments in the course of a profession or trade;
- (b) the carrying out of orders in relation to financial instruments in the course of a profession or trade;
- (c) the dealing on own account;
- (d) the rendering of portfolio management;
- (e) the rendering of investment advice in the course of a profession or trade;
- (f) the underwriting or placing of financial instruments on a firm commitment basis in the course of a profession or trade;
- (g) the placing of financial instruments without a firm commitment basis in the course of a profession or trade; and
- (h) the operating of a Multilateral Trading Facilities or “MTFs” in the course of a profession or trade.

Investment services are services performed for third parties. Dealing on own account (such as market making) and operating a MTF qualify as investment activities and – as opposed to investment services – investment activities are not performed for third parties. Investment activities are not discussed in further detail herein.

(Order) brokerage. In accordance with the provisions of FSA, the receipt and passing on, and the carrying out of, orders to buy or sell a right of participation or unit in an investment institution by the investment institution’s manager or the investment institution itself, falls outside the scope of MiFID in the Netherlands.

Portfolio management. Pursuant to FSA, investment institutions that qualify as an undertaking for collective investment in securities (‘UCITS’) or their respective managers may absent a specific license to that effect provide portfolio management services to their investors, provided that these activities are subject to certain conduct of business rules that apply to these services under the MiFID.

Investment advice. A new element in the definition of investment services is the rendering of investment advice. Investment advice is described as the making of personalised recommendations to a specific person in its capacity as (proposed) investor in respect of one or more transactions in financial instruments. The licensing requirement is triggered only to the extent the advice is given relating to the buying, selling, subscription or exchange of one or more specific financial instruments; general advice given to the public at large does not qualify as investment advice. In this respect it is important to note that advising companies on their capital and financing structure, mergers and acquisitions qualifies as a so called ancillary service that may be performed by licensed investment firms absent a specific license to that effect. Where ancillary services are performed by a non-investment firm, this will not trigger an investment service licensing requirement in the Netherlands.

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In accordance with FSA, investment institutions that qualify as an undertaking for collective investment in securities ('UCITS') or their respective managers may without a specific license to that effect give investment advice to their in announced investors in relation to the rights of participation in said investment institutions, provided that these activities are subject to certain conduct of business rules that apply to these services under the MiFID. The same applies to the rendering of investment advice by (other) FSA regulated non-UCITS investment institutions or their managers.

3.12.3. Effects on private equity and venture capital

The venture capital and private equity industry is active on Europe's financial markets; it provides services to the financial markets but it consumes them as well. To assess the effects of MiFID to the venture capital and private equity industry a distinction should be made to the services provided by, and those provided to, venture capital and private funds and their managers.

To the extent venture capital and private funds and their managers perform services that remain within the scope of collective portfolio management these would seem to fall outside the scope of MiFID in the Netherlands. Collective portfolio management includes investment management, administration (including redemption and sale of rights of participations/units) and marketing. UCITS (and their managers) as well as FSA regulated non-UCITS investment institutions or their managers have broader authorities: they may – subject to compliance with certain MiFID conduct of business rules – absent an investment services license engage in portfolio management and/or investment advice, see Chapter I "Portfolio Management" and "Investment Advice".

Services provided to venture capital and private equity funds and their managers that qualify as an investment service, are generally within the scope of MiFID. This is different if the service is provided to an entity (or company) that is subsidiary of the investment firm, or to its subsidiaries or to another subsidiary of the entity (or company) of which the investment firm is a subsidiary. There are other exemptions available to remain outside the scope of MiFID in the Netherlands (including an exemption for a specific category of investment advisors that will be subject to the forthcoming Dutch national regime announced by the Dutch Ministry of Finance), but the scope of these exemptions is narrow and seem of limited use to the private equity and venture capital industry. Outsourcing of services (other than intra-group) by venture capital and private funds should therefore be carefully considered; outsourced services may qualify as investment services and hence trigger an investment services license in the Netherlands.

The most important effect caused by MiFID in the Netherlands is that prior to the implementation of the MiFID, the rendering of investment advice was a so called ancillary service which could be performed by licensed investment firms absent a specific license to that effect. Investment advisors that did not render investment advice as an ancillary service to their core investment services could rely on an exemption from the licensing requirement under the FSA if the advice was given to individuals acting in the scope of their profession or trade. Since the implementation of MiFID this exemption is no longer available.

3.13. The United Kingdom

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3.13.1. Implementing MiFID in the UK

The Financial Services Authority (“FSA”) in conjunction with HM Treasury were responsible for implementing the Markets in Financial Instruments Directive (“MiFID”). They produced a number of consultation papers and drafts of the relevant instruments, achieving technical implementation by 31 January 2007 and full implementation on 1 November 2007 in accordance with the MiFID time limits. Primary legislation was not required.

3.13.2. Will my firm be subject to MIFID?

Whether a private equity firm is within the scope of MiFID will depend on the particular activities carried on by that firm and the authorisation it holds, as evidenced by the scope of permission granted to it by the FSA. The FSA communicated with venture capital, corporate finance and private equity firms and issued Perimeter Guidance (PERG) on its interpretation of certain aspects of MiFID and the Capital Requirements Directive (“CRD”) as they apply to private equity activities. Existing permissions continued in force but where firms wish to ensure that they fall outside MiFID and/or the CRD new standard requirements can be imposed on their FSA scope of permission.

Firms which only act as managers of collective investment undertakings are outside MiFID. This is the case for most UK private equity fund managers which are wholly responsible for running their funds.

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Other firms which advise and arrange transactions or manage the fund's investments without running the fund itself are normally subject to MiFID. If a firm brings together two or more investors thereby bringing about a transaction between those two, the FSA recognises the

MiFID recital which deems this activity to be the investment service of reception and transmission of orders. The effect is that most private equity advisory firms are subject to MiFID because of their activities in sourcing and negotiating transactions, at least whenever the transactions involve existing securities (new issues are not caught unless an application for the new shares is in fact handled, because the transaction in question is between investor and issuer, not between two or more investors).

Some private equity firms also have to consider carefully whether they are engaged in the placing of financial instruments. If they are it is an additional MiFID service which may affect their regulatory capital status. In PERG the FSA stated that associates placing of financial instruments with situations where a company or business vehicle wishes to raise capital for commercial purposes and in particular with primary market activity. FSA also states that where a firm distributes units in a UCITS fund to investors, it is of the view that this does not amount to placing, although it may on the facts involve the reception and transmission of orders, and it has indicated that it regards the distribution of interests in other collective investment undertakings in a similar way.

Although the UK Treasury implemented (on an optional basis so that firms carrying on the relevant type of business can choose whether or not to fall within MiFID) the MiFID Article 3 exemption for FSA authorised firms which:

- are not allowed to hold clients' funds or securities, and which for that reason are not allowed at any time to place themselves in debit with their clients; and
- are not allowed to provide any investment service except the reception and transmission of orders to EEA investment firms and credit institutions, branches of equivalently regulated third country firms, UCITS and certain EEA listed investment companies, and the provision of investment advice, in each case only in relation to transferable securities and units in collective investment undertakings.

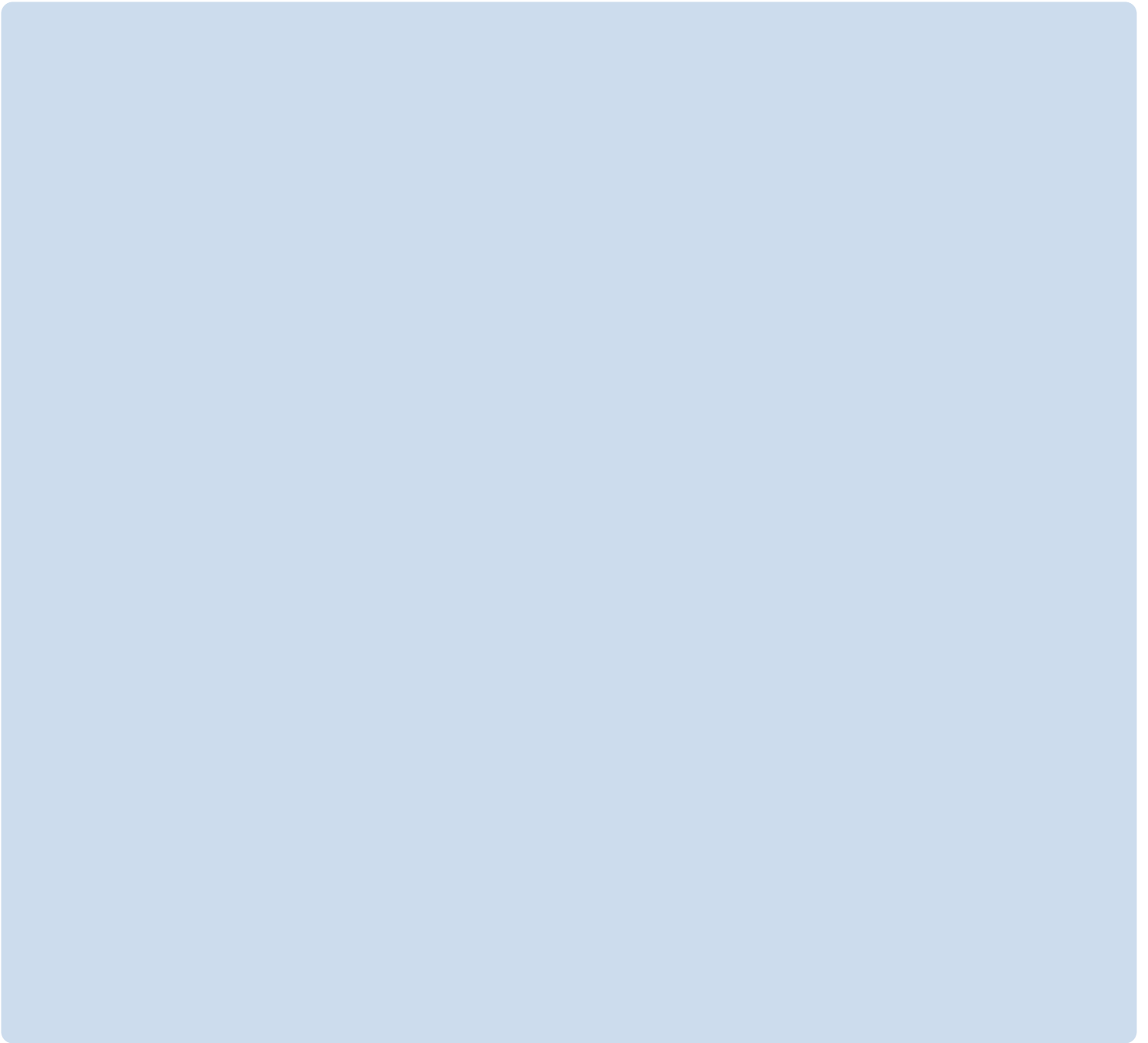
This exemption is not generally of relevance to private equity firms since they arrange transactions (receive and transmit orders) between a much wider range of entities.

Some private equity advisory firms may be able to claim exemption from MiFID by reason of the exemption in MiFID for firms which only provide services to group undertakings. The group exemption in UK domestic legislation is narrow and, except in relation to pure advice, does not exempt services where the group recipient of the services is itself providing services (e.g. as manager or GP) to third parties. Although no guidance has been issued by the FSA on the question it is understood that the FSA may be willing to recognise the guidance in the European Commission's Q&As indicating that the MiFID group exemption can apply more widely to situations where the group member is itself a service provider.

3.13.3. Applicable rules

At the same time as implementing MiFID the FSA substantially rewrote its rulebook including its rules on conduct of business, client money and assets and systems and controls. For the most part the same rules apply to authorised firms whether or not they are subject to MiFID. Nevertheless, in doing so it did distinguish in a number of respects between MiFID business and non MiFID business. For example the expert client classification rules and the financial promotion provisions differ depending on the type of business (which is of considerable importance since the MiFID based expertise tests do not fit well with private equity investors and its performance information rules are out of line with normal private equity IRR statements), client money rules can still be disapplied for professional clients in relation to non-MiFID business and managers of collective investment undertakings with only professional investors are not subject to best execution obligations.

However the FSA will be reviewing the rules applicable to non-MiFID business over the next year. The first step in this review was that in CP 07/23 it has proposed extending the much more detailed systems and controls provisions (including outsourcing provisions) originally only imposed on “common platform” firms (i.e. those which are subject to MiFID or the Banking Consolidation Directive) to firms which are subject to neither directive such as many venture capital and private equity firms. It states that it will still allow non-MiFID firms some flexibility by extending the requirements mainly as guidance rather than full scale rules but in practice firms may find this flexibility somewhat illusory since good reasons will be required for failing to follow guidance. It is planned that these proposals will take effect on 1 October 2008. It will be important over the next year for private equity firms to remain vigilant about further extensions of MiFID based rules beyond the types of business for which they are mandatory.





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