

Report on the public consultation on corporate finance advice

At the request of certain operators that offer corporate finance advice and are classified as financial investment advisors (FIAs), i.e. operators known as “Corporate Finance FIAs”, the AMF has tackled the issue of how they are regulated and how to best define their scope of operation. Asserting that FIA status was now inappropriate for their line of business, the Corporate Finance FIAs stressed that implementation of the second Markets in Financial Instruments Directive (MiFID II) and “similar”¹ measures planned for FIAs in January 2018 would serve only to accentuate this.

From the AMF's initial work, covering all corporate finance advisors, it can be seen that:

- as stated by some operators, the business of corporate finance advice generally falls under the umbrella of a related service as defined in article L. 321-2(3) of the French Monetary and Financial Code: “*Consultancy services provided to firms in relation to capital structure, industrial strategy and related subjects, as well as consultancy services relating to mergers and acquisitions*” (“Related Service no. 3”). Neither the French nor the EU legislator makes provision for approval, special authorisation or regulation of this related service, unless it is provided by an entity² that has been specifically authorised by law;
- the limits of this service nevertheless need to be clarified along with those for investment services requiring authorisation, i.e. non-guaranteed investments and investment advice.

As regards regulation of corporate finance advisors³ whose business is concerned solely with Related Service no.3, and in view of the economic and social challenges of financial advice, the AMF wanted to engage in a public consultation in order to get feedback from clients and their partners on their experiences so far, and to get their opinion on the AMF's two suggestions, namely:

- confirm that the business of corporate finance advice requires no specific framework, that it can be provided freely and that it is therefore concerned only by common law (**suggestion no.1**);
- allow operators to perform this activity under a specially adapted FIA status if they so desire, i.e. “optional” regulation (**suggestion no.2**).

The public consultation ended on 28 February 2017. The AMF received 62 responses in total, which break down as follows:

- 32 responses from corporate finance advisors, of which 20 have FIA status and 12 have no particular status;
- 30 responses from other stakeholders: employers’ organisations, professional associations, banks, law firms, public-sector economic actors, etc.

Section I of this document reports on respondents’ comments about the business of corporate finance advice, Section II on the opinions and suggestions provided with regard to how the activity should be regulated, and Section III on how the AMF believes this work should be followed up in light of the above.

¹ MiFID II allows the existing French FIA regime to remain in place, but some of its measures, including the suitability test and product governance, now oblige FIAs to comply with requirements that are at least as strict.

² Investment services providers (ISPs), crowdfunding investment advisors (CIAs) and regulated legal and accounting professions (lawyers, chartered accountants, notaries).

³ This concerns only professionals who provide corporate finance advice (Related Service no. 3) and do not also provide investment services requiring authorisation (ISPs) or belong to a regulated profession (lawyers, chartered accountants, notaries).

I. The business of corporate finance advice

Clarification on the scope of operation of corporate financial advisors

- In addition to the description of corporate finance advice that appears in the consultation, corporate finance advisors (both with and without FIA status) were at pains to stress the fluid nature of their business. Since each service can be provided independently of one another, this business can range from purely strategic advice to the presentation of counterparties, possibly including the drawing-up of legal and financial packages.
- They also revealed that the activity tends to be conducted internationally and as a result of links forged with local professionals via networks.
- The corporate finance advisors reaffirmed that the client remains the sole and ultimate decision-maker at every stage.
- While traditional advisors to companies (lawyers, chartered accountants, etc.) tend to be involved right from the initial stages of considering the project, they have to be involved in its implementation (due diligence, drafting deeds, etc.). While corporate finance advice tends to involve providing strategic advice and then establishing contact, the finalisation of the transaction is usually entrusted to regulated professionals owing to legal restrictions (labour laws, tax laws, corporate laws, etc.).

This means that it would be extremely rare for corporate finance advice to be provided in isolation and exclusively by a corporate finance advisor without the intervention of a legal or accounting professional. Indeed, several lawyers mentioned that corporate finance transactions can be considered an excellent example of interprofessionalism.

Clearer identification demanded by corporate finance advisors and certain economic actors

- There was broad consensus for clarification of the scope of the corporate finance advice business, particularly its boundaries with non-guaranteed investment services and investment advice, with a view to reducing the legal uncertainty associated with the risk of reclassification that surrounds this activity.
- Corporate finance advisors want to become more visible, particularly to managers of very small, small and medium-sized businesses⁴: they feel this would make business transfers more fluent and secure, which in turn would protect jobs and the economic fabric. This could also help to break down psychological barriers to decisions regarding business transfers, thereby enabling better preparation (anticipating valuations, financial packages, etc.)

Assessment of the quality of corporate financial advisors

- Corporate finance advisors would be assessed not only on their knowledge of the case or sector in question or their technical expertise in company valuations, but also on their availability, responsiveness and human qualities.
- One corporate finance advisor said that competition and multiple dealings with investment banks had made the mergers and acquisitions (M&A) market considerably more professional and more mature.
- From the point of view of the stakeholders in contact with the users of the service (employers' organisations, public-sector economic actors, etc.), there has been no bad practice and they have not been made aware of any instance of a serious lack of professionalism, ethics or expertise. Indeed, the stakeholders said they were satisfied with the quality of service provided by the corporate finance advisors.

⁴ Some corporate finance advisors said that managers of very small, small and medium-sized businesses tended not have experience of dealing with them because the transfer of their business is often a one-off event. With costs making it hard to turn to the big investment banks, not all these firms have the information and knowledge they would need to assess and verify the quality of service provided by corporate finance advisors.

The risks associated with the business of corporate finance advice

- Three FIA professional associations and some FIA corporate finance advisors mentioned the risk associated with the legal uncertainty of the regulatory framework that governs their activity (in light of the possible reclassification of this activity as an investment service requiring authorisation). No other respondents mentioned any specific risk associated with the business of corporate finance advice.
- As regards claims, some stakeholders (insurance companies, lawyers) stated that the main disputes surrounding corporate finance transactions involved chartered accountants and lawyers, whom clients find it easier to accuse because they are responsible for certain checks and deeds (e.g. auditing the balance sheet, writing the liability guarantee clause, etc.). Since corporate finance advisors are not decision-makers (all strategic decisions being taken by the client), they are less exposed to professional liability disputes. The only disputes mentioned involving them related to fees.

II. Regulation

Regarding the suggestion of free provision of the service – **Suggestion no.1**

- Some FIA corporate finance advisors (including two major operators) said they felt that common law was sufficient to govern their activity, particularly if a document clarifies the scope of the business of corporate finance advice⁵ and its limits compared with investment services requiring authorisation.
 - The majority of non-FIA corporate finance advisors shared this opinion, stating that the agreement between the parties was sufficient to ensure compliance with commitments.
 - Most of the other stakeholders (professional associations from the financial sector⁶, employers' organisations, lawyers and associations of lawyers) also said that the business of corporate finance advice should still be able to be exercised freely, based on the following:
 - ✓ The lack of a European framework that is conducive to a regulation, given that:
 - (i) MiFID I and MiFID II both state that authorisation cannot be granted just for provision of a related service⁷, meaning that the sole performance of corporate finance advice does not require MiFID authorisation⁸;
 - (ii) the CESR⁹ previously commented on this free exercise as part of a question concerning the possible accumulation of investment advice and corporate finance advice, underlining that a company can structure itself as a corporate finance advice specialist and therefore not be subject to MiFID requirements¹⁰.
- As such, specific regulation in France governing the activity of corporate finance advice that is performed freely at EU level would distort competition (by creating a barrier to entering the profession) and could prompt EU operators to engage in regulatory arbitrage. This could make the financial marketplace less competitive and attractive, even though such regulation is not justified by the bad practice observed among some corporate finance advisors.

⁵ Particularly fundraising consultancy.

⁶ Except for three FIA professional bodies that include FIA corporate finance advisors.

⁷ Article 6 of MiFID I and MiFID II: "Authorisation shall in no case be granted solely for the provision of ancillary services".

⁸ Thereby making this activity free in each EU member state, which does not however preclude each member state from regulating a related service as it sees fit at national level.

⁹ Committee of European Securities Regulators, the successor to ESMA (European Securities and Markets Authority).

¹⁰ CESR/10-293: *Questions & Answers - Understanding the definition of advice under MiFID*, Q&A no. 87, extract "...this may occur with respect to the same client in circumstances where both the strategic and patrimonial purposes are equally important for the client. However, CESR understands that it is possible for a firm to structure itself as a specialist corporate finance firm and fall outside of the remit of MiFID. When a firm wishes to do so, it has to ensure that its documentation, internal structure, organisation, training and personnel are very clear as to what services the firm can and cannot perform" / [CESR: Committee of European Securities Regulators].

- ✓ The fluid nature of corporate finance advice (ranging from purely strategic advice to the presentation of counterparties or even the preparation of legal and financial packages, given that each phase can be carried out independently of one another) is not conducive to a single, homogeneous and consistent regulation.
 - ✓ Any regulation of the activity could have consequences for operators that already have a regulated status (ISPs) or work in a regulated profession, since these operators - which make up a significant share of the corporate finance advice business - already comply with their own rules¹¹.
- The majority of FIA corporate finance advisors, three FIA professional associations and some stakeholders are not in favour of free performance of corporate finance advice, which they feel should be regulated as a sign of professionalism and ethics.

Regarding “optional” regulation of operators via adapting the FIA status – **Suggestion no.2**

- Some corporate finance advisors (with or without FIA status) and one association of M&A advisors said they were in favour of this suggestion, which fulfils their requirement of being recognised and identified by managers of very small, small and medium-sized businesses, and would help the business transfer market to flow more smoothly.
- Many corporate finance advisors (with or without FIA status) and stakeholders (lawyers) stated nevertheless that such a solution would distort competition among those that opt in, and therefore incur additional costs and resources, and those that choose not to. Furthermore, this opt-in system with a non-compulsory status would only make managers of very small, small and medium-sized businesses even more confused as to the regulatory framework governing corporate finance advisors.
- Professional associations from the financial sector¹², associations of lawyers and non-FIA corporate finance advisors also stressed that this suggestion would create confusion and uncertainty: on the one hand, such a regulation could legitimately be expected of all professionals, even those who have not opted in; on the other, the “optional” nature of the regulation could be contested in a court of law.
- One FIA professional association (which doesn't include FIA corporate finance advisors), a lawyers' association and some non-FIA corporate finance advisors stated that regulation of corporate finance advisors via the FIA status would be neither consistent nor comprehensible. Indeed, the FIA status was originally designed for wealth management advisors, and it would be hard to adapt it to other professionals without confusing their respective (and different) clients.

A request for all corporate finance advisors to be subject to compulsory regulation (not put forward in the consultation)

- Three FIA professional associations and some FIA corporate finance advisors have advocated compulsory regulation of all corporate finance advisors in order to ensure that the activity is performed in accordance with certain skills criteria, best practice, rules of ethics and rules relating to the fight against money laundering and terrorist financing. This would serve as a guarantee to clients of the quality of the professionals they encounter and help to secure corporate finance transactions, particularly for small and medium-sized businesses. Such compulsory regulation would also enable corporate finance advisors to operate in a secure legal framework.

¹¹ Indeed, the courts may interpret regulation of corporate finance advice as “professional rules” associated with this activity.

¹² Excluding FIA professional associations.

- A few other stakeholders also expressed a desire for compulsory regulation, including accountants' associations, which felt that any corporate finance advisor should be bound by at least the same set of rules and obligations incumbent upon chartered accountants when they are involved in corporate finance advice.

Another option: self-regulation (not put forward in the consultation)

One non-FIA corporate finance advisor and some stakeholders (lawyers) advocated a form of soft regulation whereby corporate finance advisors work together to draw up their own code of ethics and promote a set of professional rules that is tailored to their business.

Other respondents also pointed out the need for a code of conduct including a base of shared services for corporate finance advisors, claiming this is vital for injecting some confidence back into the business transfer market.

III. AMF's conclusions

- The AMF Board has taken into consideration the responses to the public consultation on corporate finance advice. It has been decided that the effort to educate about and explain this activity, undertaken as part of the consultation, should continue and be stepped up by way of publishing an educational guide that will clarify the scope of corporate finance advice by explaining its status as ancillary service (3) under MiFID I and MiFID II and helping to clarify the boundaries between this service, which is performed freely, and services requiring authorisation, i.e. non-guaranteed investment services and investment advice.

In this way, operators will have useful information helping them to better identify the investment or related service that their own particular activity falls under and request any necessary authorisations or stabilise their organisation to ensure their business falls solely under the corporate finance advice related service no.3, which requires no authorisation.

This guide could be published during the final quarter of 2017, which would enable operators to choose the necessary measures as part of MiFID II being implemented on 3 January 2018.

- The AMF has duly noted the arguments against Suggestion no. 2, which put forward an optional regulation of corporate finance advisors by way of adapting the FIA status, and decided not to proceed with this suggestion.
- In the absence of any proof of significant risk regarding the business of corporate finance advice or European restriction on the subject, and in view of its limited resources, the AMF Board has decided not to support plans for compulsory regulation of corporate finance advisors, and to retain Suggestion no.1 of the consultation.
- The AMF nevertheless encourages any initiative aimed at developing a "professional label" or code of conduct for corporate finance advisors that may be brought about by one or more professional associations.