



PLACING OF FINANCIAL INSTRUMENTS WITHOUT A FIRM COMMITMENT BASIS, INVESTMENT ADVICE AND CONSULTANCY SERVICES PROVIDED TO FIRMS IN RELATION TO CAPITAL STRUCTURE, INDUSTRIAL STRATEGY AND MERGERS AND ACQUISITIONS

Reference texts: Articles L. 321-1, L. 321-2 and D. 321-1 of the Monetary and Financial Code

The purpose of this document is to clarify the scope of placing without a firm commitment basis and investment advisory services provided, as the case may be, within the limits of their respective authorisations or approvals, by investment services providers, financial investment advisers and crowdfunding advisers on the one hand, and the ancillary business advisory service with regard to capital structure, industrial strategy and mergers and acquisitions on the other hand.

Unlike the two investment services mentioned above, the ancillary service referred to in paragraph 3 of Article L. 321-2 of the Monetary and Financial Code is not defined by any regulatory text, particularly because it may cover a wide range of activities, from mergers and acquisitions in the strict sense to strategy consulting:

"3. Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings"

The AMF and the ACPR wish to specify to what extent and under what conditions persons who assist and advise natural or legal persons and their managers and/or shareholders or associates within the framework of a business assignment/transfer/acquisition, external growth operations, opening of capital or fundraising, and as the case may be, in the search for financing for these same operations¹ (hereinafter "**corporate finance advice**"²), provide a service that may not constitute investment advice on placing without a firm commitment basis that are subject to authorisation, but rather the ancillary service referred to in paragraph 3 of Article L. 321-2 of the Monetary and Financial Code, which may be freely performed.³

¹ It is recalled that in accordance with the provisions of Article R. 519-2 3° of the Monetary and Financial Code, the status of intermediary in banking transactions and payment services (IOBSP) is not required of "persons whose intermediation activity in banking transactions and payment services concerns the [...] ancillary services defined in paragraph 3 of Article L. 321-2 of the Monetary and Financial Code".

² This type of service is commonly referred to as "mergers and acquisitions advice" and "business transfer consulting".

³ Article L. 531-1 of the Monetary and Financial Code: "Providers of investment services are investment companies and credit institutions that have obtained authorisation to provide investment services as defined by article L.321-1 / The provision of related services within the meaning of Article L. 321-2 is unrestricted, consistent with the laws and regulations in force applicable to each such service. It does not, of itself, suffice to confer investment firm status."

This clarification is of particular interest to those who engage in this activity, either as a main or secondary activity and who, not coming under any status or regulated profession⁴, question the qualification and legal regime of their activity.

After describing the activities covered by this position and their legal qualification **(1)**, their boundaries with those coming under the investment advice service will be clarified **(2)** and then those of the placing without a firm commitment basis service **(3)**.

This position is not intended to lay down professional rules on the way in which players carry out their activity.

1. ACTIVITIES CONCERNED BY THIS POSITION AND ANCILLARY SERVICE REFERRED TO IN PARAGRAPH 3 OF ARTICLE L. 321-2 OF THE MONETARY AND FINANCIAL CODE

This position covers services that consist of advising and assisting natural or legal persons and their managers and/or shareholders or partners, in the design and implementation of entrepreneurial sale, acquisition and fundraising projects and the search for financing for these operations, referred to as "**corporate finance advice**". Therefore, this position is limited to these activities and does not concern the activities likely to come under the ancillary service referred to in Article L. 321-2 (3) of the Monetary and Financial Code.

These assistance and advisory services are provided on the basis of a signed contract between the client and the adviser, entailing a mission to assist and advise in connection with the completion of a project or a transaction with an entrepreneurial scope, such as the acquisition or sale of companies or areas of activity, including the search for adequate financing, or assistance with fundraising.

For such a mission, which might be a long-term mission (several months), divided into several phases, and where, as the mission progresses, the number of parties involved decreases, the information exchanged becomes more and more confidential, and the (pre-contractual) commitment ever stronger, the adviser's service generally comprises:

- an analysis of the client's needs, the possible solutions to meet them (acquisition, sale, opening of capital, fundraising), the market concerned, and the sector concerned;
- the production of documents conducive to the implementation of the project: "teaser"⁵, information memorandum, confidentiality agreements, offers;
- the search for, and due diligence on possible counterparties (acquisition targets, acquirers, whether natural persons or legal entities, financial partners);

⁴ In particular, the provision of corporate finance advice is carried out, on an ancillary basis, by legal and accounting professionals, such as accountants, lawyers and notaries. These professionals, acting within the framework of their status, are required, for this activity too, to abide by their own rules of ethics.

⁵ A teaser is a document that briefly (one to two pages) and anonymously describes the company whose sale is contemplated or which is contemplating raising funds or making an acquisition (sector of activity, size, turnover). It indicates the nature of the proposed transaction (sale, fundraising, etc.). This document is sent by the board of the company to a number of natural or legal persons or financial investors likely to be interested in the transaction.

- support with negotiations (organisation of exchanges between the parties, creation of a data room, coordination with other professionals), comparison of offers (analysis of strengths/weaknesses).

These assistance, advice and support services for natural or legal persons, their managers and/or shareholders or partners concern projects or operations having an entrepreneurial or corporate finance purpose, and involve issues that are not exclusively financial, which are sources of risk, and which cannot be reduced to the conclusion of a transaction involving financial instruments, to which they may or may not lead.

They generally entail a strong *intuitu personae* character between the parties: between the adviser and his client on the one hand, and between the client and his future partner, transferor, transferee or buyer on the other hand. In addition, the adviser has no decision-making power: the client is the sole decision maker at each stage, he decides which counterparties to send the teaser to, to whom the information memorandum will be sent, and which offer(s) will be selected. He can terminate the project at any time up to the point the final agreement is signed.⁶

Rendered under the conditions described above, these services come under the ancillary service referred to in Article L. 321-2, paragraph 3, of the Monetary and Financial Code, the exercise of which does not require authorisation, in accordance with Article L. 531-1 of the Monetary and Financial Code.

This qualification does not exclude the possible provision of other investment services or ancillary services by the corporate finance adviser or other providers before, after, or in connection with the same transaction.

2. CORPORATE FINANCE ADVICE AND INVESTMENT ADVICE

2.1. What is the investment advice service?

According to paragraph 5 of Article D. 321-1 of the Monetary and Financial Code, the investment advice service referred to in paragraph 5 of Article L. 321-1 is defined as the provision of personalised recommendations to a client, either at the request of that client or at the initiative of the firm providing the advice, in relation to one or more transactions involving financial instruments.

In accordance with the terms of Article 9 of Commission Delegated Regulation (EU) 2017/565⁷, a recommendation refers to any recommendation concerning the completion of a transaction such as the purchase, sale, subscription, exchange or holding of a particular financial instrument. It is "personal" when it is:

- made to a specified person, in his capacity as an investor or potential investor, or an agent for an investor or potential investor;
- presented as suitable for that person or based on a consideration of the circumstances of that person.

The investment advice service may only relate to financial instruments.

⁶ Step known as the signing stage.

⁷ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, in force as from 3 January 2018; formerly Article 314-43 of the AMF General Regulation.

This investment advice service may only be provided by regulated professionals⁸: Investment Services Providers (ISPs)⁹, Financial Investment Advisers (FIAs) and Crowdfunding Advisers (CAs).

In order to provide investment advice services, ISPs, FIAs and CAs collect the necessary information regarding the knowledge and experience of their clients, and notably of their potential clients, in matters of investment, their financial situation, including their ability to bear losses, and their investment objectives, as well as their risk tolerance, so that they can recommend appropriate financial instruments¹⁰. They provide clients, prior to the transaction, with a statement on suitability on a durable medium specifying the advice given and how that advice meets the preferences, objectives and other characteristics of the clients.¹¹

2.2. How to distinguish between corporate finance advice and investment advice

Since those who provide corporate finance advice, as described in the first part of this document, actually provide "advice" to their client for the entire duration of the project, and since the project may culminate in a purchase or sale of a particular financial instrument, the question arises as to the boundaries between the corporate finance advice coming under the relevant service referred to in paragraph 3 of Article L. 321-2 of the Monetary and Financial Code and the investment advice service referred to in paragraph 5 of Article L. 321-1 of the same code.

As recommended by CESR, the AMF and the ACPR consider that the **client's objective**¹² should be taken into account:

If the objective is entrepreneurial and industrial in nature - such is the case when the client is seeking to finance its development, external growth or new industrial synergies, or to break into new markets within the framework of a defined project or to organise the sale or acquisition of a branch of activity, then the advice provided is that referred to in paragraph 3 of Article L. 321-2 of the Monetary and Financial Code.

If the objective is patrimonial in nature - such is the case when the client is looking to build up savings, obtain a regular financial return, or to hedge against a risk - then the advice provided is investment advice within the meaning of paragraph 5 of Article L. 321-1 of the same Code.

Thus, corporate finance transactions are generally entrepreneurial and industrial in nature, unlike savings or cash management operations, which generally pursue patrimonial objectives. In the first case, as noted by CESR, the client acts as issuer/entrepreneur; in the second case, he acts as a saver/investor.¹³

⁸ Except as provided by Article L. 531-2 of the Monetary and Financial Code.

⁹ Including when acting through a related agent.

¹⁰ Articles L. 533-13, L. 541-8-1 and L. 547-9 of the Monetary and Financial Code.

¹¹ Articles L. 533-15 II, L. 541-8-1 and L. 547-9 of the Monetary and Financial Code.

¹² CESR/10-293: Questions & Answers - Understanding the definition of advice under MiFID.

¹³ CESR/10-293: Questions & Answers - Understanding the definition of advice under MiFID: (79) "It is important to consider that investment advice will be provided only where a recommendation is made to a person in his capacity as an investor or potential investor (or in his capacity as an agent for an investor or potential investor). **It follows from this that advice to an undertaking to issue securities is not investment advice.**"

However, it may happen that the same transaction seems to pursue two objectives: this could be the case when a manager sells his undertaking when he retires or when the heirs of a partner or shareholder wish to sell the shares of the family business.

In this case, the qualification of the advisory mission offered to the client (investment advice service or provision of corporate finance advice) requires a concrete analysis of its nature, based on the identified criteria. As mentioned in (1.), the mission of the corporate finance adviser is very different from that of an investment adviser. The main differences are as follows.

1. **The tasks to be carried out to ascertain the needs of the client.** In the case of corporate finance advice, the tasks concern the fundamentals of the undertaking, the analysis of the sector, its possible developments and recent operations in order to specify the entrepreneurial project of the client; with investment advice, due diligence will focus on the client's investment knowledge and experience, financial situation, including the ability to bear losses, his investment objectives, and risk tolerance, so as to be able to issue a personalised recommendation within the meaning of paragraph 5 of Article D. 321-1 of the Monetary and Financial Code.
2. **The tasks to be carried out to fulfil it, that is to say the research mission strictly speaking.** In the case of corporate finance advice, the adviser assists his client in finding counterparties (target companies, branches of activity), new partners or shareholders or investors likely to be interested in the client's entrepreneurial project; with investment advice, the adviser looks for financial instruments that meet the client's investment needs and objectives (regular returns, liquidity requirement, acceptable level of risk, etc.).
3. **The existence of a multilateral or bilateral negotiation process for determining the terms and conditions of the transaction:** with corporate finance advice, the adviser assists the client with a project whose terms and conditions will be defined at the end of an iterative process of negotiation with selected counterparties until agreement is reached on the subject-matter and price (nature and financial characteristics of the financial instruments, governance pacts, warranty clause, conditions precedent); ultimately, the agreements concluded are private agreements. Conversely, in the case of investment advice, the adviser proposes financial instruments whose characteristics are determined or determinable quickly. These characteristics are not negotiable: the contract entered into (usually a subscription form) is a standard contract of adherence.
4. Given the stakes of corporate finance transactions, a strong *intuitu personae* relationship exists, between the client and his adviser, but also between the client and the counterparties who will meet, exchange and collaborate if necessary. On the contrary, in the case of investment advice, the *intuitu personae* relationship existing between the client and his adviser is not usually found between the client and the company making the investment offer: the investor will be mainly interested, as part of a global approach, in the brand and the reputation or performance history of the undertaking in question.

The analysis of these 4 criteria should make it possible to accurately assess the nature of the consulting mission.

Example 1: the heirs of a majority shareholder director wish to sell the shares of the company as quickly as possible in order to divide up the proceeds of the sale. They consult an adviser to find a buyer.

- Objective of the operation:

None of the heirs have ever invested in the company, nor do they wish to take over the management. On the contrary, they intend to benefit from the cash succession to meet their own financial needs. They are looking for an interested buyer to take over the family business, hoping to get the best price.

Given the circumstances, doubt exists as to the purpose of the sale of the business (patrimonial or entrepreneurial).

It is therefore necessary to assess in concreto the nature of the advisory mission based on the four criteria relating to the advisory mission above.

- Analysis of the nature of the advisory mission:
 1. **The tasks to be carried out to ascertain the needs of the clients:** in this case, the idea is to sell the family business at the best price. It is not relevant to inquire about the heirs' investment experience or knowledge. In addition, the decision to sell has already been taken by the heirs. No advice is therefore provided on whether or not to sell.
 - *An examination of this criterion would suggest that this is a corporate finance advisory mission.*
 2. **Regarding the steps to be taken to accomplish it, that is to say, the research mission itself:** the search for an interested buyer begins with an analysis of the sector concerned, an analysis of the firm's accounts, its strengths (clientele, know-how, assets) and its weaknesses (debts, recent difficulties).
 - *An examination of this criterion would suggest that this is a corporate finance advisory mission.*
 3. **The existence of a multilateral or bilateral negotiation process for determining the terms and conditions of the transaction:** the sale of the undertaking will certainly take the form of a sale of the securities that make up its share capital. The transferors will estimate a transfer price, the potential transferees will make counter-offers, until agreement is reached on the terms of the transfer (overall price, price of each share, payment terms, guarantee clauses).
 - *An examination of this criterion would suggest that this is a corporate finance advisory mission.*
 4. **Intuitu personae:** it may be strong or weak depending on the interest of the heirs in the future of the firm. This criterion might not be decisive here.

In view of these considerations, the service therefore constitutes corporate finance advice and not investment advice.

The qualification of the advice provided in connection with this mission does not determine the qualification given to the subsequent recommendations concerning the proceeds of the sale of the firm.

Example 2: The company director sold his company when he reached retirement age. He wants to invest the proceeds of the sale in developing companies in his region and consults an adviser for his investment.

- Objective of the operation:

As a former entrepreneur, the client has shown a keen interest in developing companies in his region rather than those whose securities are listed on regulated markets or investment products. However, he does not want to take too many risks, since the proceeds of the sale of his business, the fruits of his labour, are an essential part of his assets which he must be able to rely on in future years.

Given the circumstances, doubt exists as to the objectives of his investment (patrimonial or entrepreneurial).

It is therefore necessary to assess this objective concretely on the basis of the four criteria above.

- Analysis of the nature of the advisory mission:
 1. **The tasks to be carried out to ascertain the needs of the client:** here, it is a question of investing the proceeds of the sale of a firm in companies that meet the wish of the client, a former manager, to assist his peers, albeit subject to a security imperative and the requirement of regular additional income. It is relevant to inquire about the client's investment experience or knowledge, his overall financial situation, and to try to determine what he expects from his investment (regular return in the short, medium or long term).
 - *An examination of this criterion would suggest that this is an investment advice mission.*
 2. **The tasks to be carried out to fulfil it, that is to say the research mission strictly speaking:** the search for companies likely to meet the client's needs starts with an analysis of the business fabric of the region, and also requires an analysis of the historical accounts, prospects and projected returns of each selected company.
 - *Since these tasks relate to corporate finance advice as much as investment advice, the examination of this criterion is not determining.*
 3. **The existence of a multilateral or bilateral negotiation process for determining the terms and conditions of the transaction:** if the client confirms that he does not particularly want to invest in the conduct of the business of the target companies, the investment takes the form of a subscription of units or shares in firms that offer securities.
 - *An examination of this criterion would suggest that this is an investment advice mission.*
 4. **Intuitu personae:** insofar as the client does not wish to involve himself personally in the affairs of the selected companies, this criterion is rather weak (with regard to the investment targets envisaged).
 - *An examination of this criterion would suggest that this is an investment advice mission.*

The service therefore constitutes investment advice and not corporate finance advice.

When the professional is determining whether his activity qualifies as investment advice or corporate finance advice, the criteria set out above must be assessed in concreto.

The terms of the contract concluded between the adviser and his client, in particular the purpose of the mission, the capacity of the client, the duration of the mission, its sequencing in different phases, the method of remuneration of the adviser, but also the duties actually carried out, the nature of the documents prepared by the adviser for his client or third parties as the case may be, the nature, frequency, intensity, and type of the dealings between the client and the adviser, between the client and his future co-contracting parties, minutes of meetings, if any, etc. are all pointers that should make it possible to qualify the service provided.

After qualifying the service, the professional must ensure that he has the appropriate professional authorisation or status to provide it. He is also required to inform his client of the nature of the service he proposes to provide, and thus to ensure they both agree on the services that the professional can provide.¹⁴

3. CORPORATE FINANCE ADVICE AND PLACING OF FINANCIAL INSTRUMENTS WITHOUT A FIRM COMMITMENT BASIS

3.1. What is the placing without a firm commitment basis service?

In accordance with paragraph 7 of Article D. 321-1 of the Monetary and Financial Code, the placing without a firm commitment basis service referred to in Article L. 321-1, 7, is defined as "the act of seeking subscribers or purchasers on behalf of an issuer or a transferor of financial instruments without guaranteeing it any amount in subscriptions or purchases".

As mentioned in the common position of the AMF (DOC-2012-08) and of the ACPR (2012-P-02), it is thus recognisable by the presence of two cumulative conditions:

- the existence of a service rendered to an issuer or transferor of financial instruments;
- the search, whether direct or indirect, for subscribers or purchasers. This second condition is the result of the first insofar as the search for subscribers or purchasers is carried out solely for the purposes of the service rendered to the issuer or transferor.

In any case, if either of these two conditions is not met, then there is no investment service.

The placing without a firm commitment basis service may only relate to financial instruments.

Where assistance is provided to firms for the acquisition of interests (whether majority or minority), the client is neither transferor nor issuer, he is not looking for potential subscribers or buyers.

3.2. How to distinguish corporate finance advice from the placing without a firm commitment basis service

If the risk of confusion between the two services is eliminated when the adviser acts alongside a buyer, it may arise when the adviser acts alongside a seller: the corporate finance adviser renders a service to an issuer or transferor of financial instruments (1st condition characteristic of the investment service), and at the beginning of his service, he looks for relevant counterparties who will, at the end of the mission, be subscribers or purchasers of the financial instruments issued or transferred.

As indicated in (1), however, the mission of corporate finance advice may be differentiated from that of the placing without a firm commitment basis. The main differences are as follows.

1. **The potential buyers and subscribers.** With corporate finance advice, as has been stated, the adviser assists his client in the search for potential buyers and subscribers interested in his client's entrepreneurial project; these new shareholders include natural or legal persons, companies of the

¹⁴ CESR/10-293: Questions & Answers - Understanding the definition of advice under MiFID: (87) "[...] 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."

sector (competitors, partner-producers, partner-distributors ...), or private equity institutions willing to make a medium or long-term commitment alongside him; the party who provides the placing without a firm commitment basis service will, on behalf of his client, either solicit professional investors (banks, investment firms, asset management companies) or the public (public offering regime and its derogations¹⁵), interested in the investment proposal and the prospects for a shorter-term return on investment.

2. **The existence of a multilateral or bilateral negotiation process for determining the terms and conditions of the transaction:** in the case of corporate finance advice (see above), the client and his future co-contractor jointly determine the terms and conditions of the future transaction, particularly with regard to the characteristics of the financial instruments, they also negotiate the conclusion of statutory or extra-statutory pacts governing their relationship for the future. Conversely, the provider of the placing service undertakes to search for subscribers for the financial instruments whose characteristics have been determined (or are determinable) by the issuer or transferor, in order to enable potential investors to decide to buy or subscribe for those instruments.
3. **The *intuitu personae* aspect** is very strong in the case of corporate finance advice and is generally less so in the case of placing service. The primary objective of the client and of the placement agent is then to ensure the greatest number of securities are subscribed by investors who will not be involved in the day-to-day management of the company. The client, without disregarding completely the identity of the subscribers selected by the placement agent, generally does not develop special relationships with each of the subscribers listed in the order book prior to the subscription. On the contrary, with corporate finance advice, the objective of the client, assisted by his adviser, is to look for prospective buyers and subscribers to whom he will present his entrepreneurial or industrial project, prior to any subscription or acquisition. These potential buyers and subscribers are likely to closely monitor the development of the company and to take an interest in the management of the company (active shareholders, etc.).

When the professional is determining whether his activity qualifies as placing of financial instruments without a firm commitment basis or corporate finance advice, the criteria set out above must be assessed in concreto.

The terms of the contract concluded between the adviser and his client, in particular the purpose of the mission, the capacity of the client, the duration of the mission, its sequencing in different phases, but also the duties actually carried out, the nature of the documents prepared by the adviser for his client or third parties as the case may be, the nature, frequency, intensity, and type of the dealings between the client and the adviser, between the client and his future co-contracting parties, minutes of meetings, if any, etc. are all pointers that should make it possible to qualify the service provided.

After qualifying the service, the professional must ensure that he has the necessary professional authorisation, if any, to provide it. He is also required to inform his client of the nature of the service he proposes to provide, and thus to ensure they both agree on the services that the professional can provide.

¹⁵ Articles L. 411-1 et seq. of the Monetary and Financial Code.