



Association Française des Investisseurs en Capital

Mr. Fabrice DEMARIGNY
CESR
11-13, avenue de Friedland
75008 PARIS

Paris, 8 February 2005

Dear Mr. Demarigny,

At our meeting of 20 January 2005, we discussed the possible implementing measures of the Directive 2004/39/EC on Markets in Financial Instruments ("MiFiD"). Please find the comments of our Association relating to the consultation paper of October 2004.

Given the specificity of our activity (I), the present response will focus on the key issues (II). Accordingly, please allow that we have not followed the plan of your consultation.

I. Specificity of Private Equity activity

Activities of Private Equity may be briefly described as follows:

- Investors subscribe to funds:
 - o Investors may be retail or professionals according to the definition provided in annex II of the MiFiD. If they are retail investors, general rules of collective security investment institutions ("OPCVM") are applicable. Therefore, our comment will focus on professional investors.
 - o These funds can englobe various forms of organizations according to the Member State, such as purely contractual Limited partnerships in anglo-saxon countries or FCPR, assimilated to collective security investment institutions ("OPCVM") in France. Regardless of the form of organization, documents relating to the funds set forth that the funds collected will be mainly invested in unlisted companies. **Most often, an average fund only does 4 or 5 operations a year.**



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- The amounts collected by these funds are deposited with a depositary and managed by a portfolio company. Investors, depositary and portfolio companies are independent one from the other.

The portfolio company invests these funds in unlisted companies, as stated above.

- The funds, which have been subscribed, are called up as needed; disinvestments and profits are immediately distributed to the investors; the fund's life-span is limited (usually less than 10 years).

II. Comments

Given these specific characteristics, a large number of the MiFiD provisions and, by consequence, of the CESR consultation, are not concerned by private equity.

However, specific measures suited to private equity should be taken, concerning the following points:

- **Definition of the professional investor** (Annex II of the MiFiD)

Senior executives and managers of the portfolio company are encouraged by the investors to:

- personally subscribe to the fund,
- be given a share of the profits from the fund through the carried interest mechanism.

Therefore, it is necessary to authorize this specific category of investors to subscribe to the fund without this fund becoming a retail one. This is why they should be included into the category of « clients who may be treated as professionals on request ».

- **Possible renouncement of all protective rules**

Since these funds are solely subscribed to by professional investors, they should have the option to renounce, without any ambiguity, to all these protective rules, notably honesty, suitability and appropriateness which concern retail clients.



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- **Financial investment advice**

In the context of private equity, investment advice as defined by article 4, 4) of the MiFiD takes on a particular meaning. Indeed, throughout Europe, a large number of firms provide, on a daily basis, advice to portfolio companies to help them to select investments in unlisted companies, implement these investments and disinvest.

Accordingly, they should be considered as suppliers of investment services (“Prestataires de services d’investissement”) as defined in the regulation. However, they should only be regulated if they are brought to advise funds in other Member States than that of their establishment.

Therefore, European regulation should oblige each Member State which should not regulate investment advice to provide for an option so that these advisers could be regulated and therefore be eligible to the European passport.

- **Discussion of the legal structure of the funds**

In wider terms, an in-depth discussion of the legal structure of European private equity funds is necessary, as well as the elaboration of a common structure, recognized legally and fiscally in all member states.

Considering that these funds only concern professional investors, it seems more appropriate that they should not take on the structure of a collective security investment institution (“OPCVM”).

However, their portfolio company and their adviser should have the option to solicit an approval from a regulatory authority.

In this regard, your consultation paper is concerned.

Yours sincerely,

Dominique OGER
AFIC Chairman

Copy : Mr Carlo Comporti