

## AMF Position n° 2012-08 Placement services and marketing of financial instruments

### Reference texts: article D. 321-1 of the Monetary and Financial Code

The purpose of this document is to clarify the scope of placement services in relation to the marketing of financial instruments. Its aim is not to deal with questions related to any placement service rendered by the regular adviser of companies for business operations including disposals, mergers and takeovers.

It clarifies the extent to which persons attempting to find subscribers or purchasers of financial instruments, either in conjunction or not with an investment services provider providing an investment service, themselves provide a placement service to an issuer or a vendor of financial instruments.

This clarification is important for distributors whose activity involves the marketing of financial instruments: investment services providers (including, as the case may be, their tied agents), asset management companies, and financial investment advisers.

### 1. What is a “placement” service?

In financial law, three investment services within the meaning of article L. 321-1 of the Monetary and Financial Code correspond to what is known as a “placement”. These are “non-guaranteed placements”, “guaranteed placements” and “underwriting”.

- The non-guaranteed placement investment service is defined as “the act of finding subscribers or purchasers on behalf of an issuer or vendor of financial instruments without making a guarantee regarding the amount of the subscription or acquisition.”
- The guaranteed placement investment service is defined as “the act of finding subscribers or purchasers on behalf of an issuer or vendor of financial instruments to whom a guarantee is made regarding the minimum amount of subscriptions or purchases through an undertaking to subscribe or purchase any unplaced financial instruments”.
- The underwriting investment service is defined as “the act of subscribing to or acquiring directly from the issuer or vendor of financial instruments with a view to their sale.”

Each of these three investment services is thus characterised by the presence of two cumulative conditions: one is the existence of a service rendered to an issuer or vendor of financial instruments; and the other is the act of finding subscribers or purchasers, either directly or indirectly. The latter condition is the result of the former, in that subscribers or purchasers are only sought for the requirements of the service rendered to the issuer or the vendor. The service rendered to the issuer or vendor is thus central and is a prerequisite to the provision of one of these three placement investment services.

At all events, if either of these two conditions is not met, there is no placement service (guaranteed or otherwise), nor is there an underwriting service.

### 2. Who can provide “placement” investment services?

To be able to provide placement services (guaranteed or otherwise), service providers must be accredited investment services providers.<sup>1</sup> Persons with the status of tied agent are also permitted to participate in the provision of placement services (guaranteed or otherwise) within the framework of a mandate given by the investment services provider under the conditions laid down by articles L. 545-1 et seq. of the

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<sup>1</sup> in France this accreditation is issued by the Autorité de Contrôle Prudenciel

Monetary and Financial Code. As regards financial investment advisers, their accreditation<sup>2</sup> does not in any way allow them to provide a placement (guaranteed or otherwise) or underwriting service.

**3. Can the marketing of investment products (collective investment schemes or structured debt instruments) be analysed as tantamount to providing a “placement” service?<sup>3</sup>**

Investment products – financial securities issued by CIS, real-estate collective investment funds, real-estate investment trusts, SEF, SICAF or securitisation schemes, or structured debt instruments issued by credit institutions or investment firms headquartered in a European Union member State or another State party to the Agreement on the European Economic Area (for example negotiable debt securities or structured bonds) – are products whose primary purpose is to offer investors a savings solution.

Consequently, when an investment services provider or a financial investment adviser distributes such investment products (without guaranteeing a minimum amount for the subscriptions or purchases or without directly subscribing the said financial instruments with the issuer), this distributor is not providing a non-guaranteed placement service to the issuer. However, this distributor generally provides one or more investment services to the investor, for example investment advice or order reception and transmission on behalf of third parties. In such cases, one of the two cumulative conditions characterising placement services (finding subscribers or purchasers) is present, but the central prerequisite condition for a service to be rendered to the issuer is not fulfilled.

Nonetheless, it should be considered that when the marketing of such products leads the distributor to make an undertaking directly or indirectly to the issuer regarding a minimum subscription or purchase amount, for example when the distributor commits to subscribing or purchasing the financial instruments not subscribed or purchased by investors, the service provider is actually providing a placement service (guaranteed or non-guaranteed).

Lastly, at all events, any inducement mechanism (for example one accompanied by a threshold effect in terms of the amount subscribed or purchased by investors) must be examined in light of the legal provisions relating to benefits and fees (articles 314-76 and 325-6 of the AMF General Regulation) and those relating to conflicts of interest (articles L. 533-10 of the Monetary and Financial Code and 325-8 of the AMF General Regulation) and the requirement to act in a manner that is conducive to clients' interests (articles L. 533-11 and L. 541-8-1 of the Monetary and Financial Code and 314-3 of the AMF General Regulation).

**4. Does the activity of finding subscribers or purchasers in conjunction with an accredited service provider in order to provide the placement service(s), and providing this service to an issuer or vendor of financial instruments, also require accreditation for the placement service?**

An investment services provider providing placement (guaranteed or otherwise) or underwriting services to a third party<sup>4</sup> may ask other distributors (investment services providers or financial investment advisers) who are authorised to provide order reception and transmission services on behalf of third parties or of investment advisers to find potential investors among their clients for the financial instruments in the issue or the sale.

<sup>2</sup> The status of financial investment adviser is governed by articles L. 541-1 et seq. and D. 541-1 et seq. of the Monetary and Financial Code, and by 325-1 et seq. of the AMF General Regulation.

<sup>3</sup> This question is really only relevant to non-guaranteed placement services, because if the service provider guarantees a minimum amount of subscriptions or purchases by undertaking to subscribe or purchase the unplaced financial instruments, the placement is guaranteed. Similarly, if the service provider subscribes or purchases the financial instruments directly from the issuer with a view to selling them, this is underwriting.

<sup>4</sup> When the issuer markets his own securities directly, he is not deemed to be providing a non-guaranteed placement service himself.

In order to qualify the activity performed in this way by these distributors, as mentioned above it is necessary to establish whether the two cumulative conditions determining the provision of one of the placement services is present or not.

Because of this, these distributors may be called upon to canvass their clients, provide investment advice or transmit subscription orders<sup>5</sup> to the investment services provider in charge of the placement under the agreement they have signed with it.

These distributors are not acting on behalf of the issuer or vendor of financial instruments, and unlike the investment services provider accredited for underwriting or placement (guaranteed or otherwise) services, they do not have to be accredited to provide the placement investment services.

As indicated in question 3, this is no longer the case when investment services providers or financial investment advisers who market financial instruments directly or indirectly make an undertaking to the issuer or the vendor as regards a minimum subscription or purchase amount. In such cases these service providers should be considered as actually providing placement (guaranteed or otherwise) investment services.

At all events, when providing investment services to investors, these distributors are compelled to comply with the provisions that apply to such services, most notably those on fees laid down in article 314-76 or article 325-6 of the AMF General Regulation.

##### **5. Can placement investment services lead to the provision of other investment services?**

When a placement (guaranteed or otherwise) or underwriting investment service is provided to an issuer or vendor of financial instruments, other investment services are generally provided correlatively to the investor.<sup>6</sup> These investment services – for example the investment advice service or the order reception and transmission service on behalf of third parties – may be provided by the provider responsible for the placement (guaranteed or otherwise) or underwriting service. They may also be provided by another distributor (investment services provider or financial investment adviser) subject to compliance with the applicable rules.

Naturally, the investment services provider responsible for providing the placement (guaranteed or otherwise) service or the underwriting service on behalf of an issuer or vendor must comply with the rules applying to the provision of each of these other investment services when it provides them, especially those rules relating to conflicts of interest (articles L. 533-10 of the Monetary and Financial Code and 325-8 of the AMF General Regulation), and with the requirement to act in a manner that is conducive to clients' interests (articles L. 533-11 and L. 541-8-1 of the Monetary and Financial Code and 314-3 of the AMF General Regulation).

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<sup>5</sup> In accordance with article 325-13 of the AMF General Regulation, a financial investment adviser may, for the purposes of transmission agree to receive an order concerning one or several units or shares in collective investment schemes (UCITS, real-estate CIS, securitisation schemes, REIT, SEF and SICAF) that a client to whom it has provided advice proposes to subscribe or sell.

<sup>6</sup> See § IX, Inducements under MiFID Recommendations, Ref: CESR/07-228b.