



# Czech qualified investor definition: considering minimal requirements<sup>1</sup>

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## Abstract

In recent years, qualified investor funds have become increasingly popular in the Czech Republic. Those who manage these funds know that only investors who meet the legal criteria to be a qualified investor can become one. In other words, failure to meet the criteria excludes a potential investor from participation. This paper focuses on the criteria to become a qualified investor and their proper fulfilment. Moreover, this paper provides brief thoughts on whether the minimum initial investment sum, as one of the criteria, should be reviewed in the context of recent regulatory developments.

## Keywords

qualified investor funds, qualified investors, Alternative Investment Fund Managers Directive

## Introductory remarks

In recent years, qualified investor funds<sup>2</sup> have become increasingly popular in the Czech Republic. Their growing popularity is not too surprising in the light of market trends, which include the impact of economic growth and the virtually unlimited investment opportunities in a wide variety of alternative assets, such as real estate, private equity, works of art, and vintage wines,<sup>3</sup> as well as the increasing demand for such investment opportunities.

In addition, not only locals but also foreigners are attracted to qualified investor funds due to Czech tax mechanism. For example, the earnings of qualified investor funds in the Czech

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<sup>2</sup> In the Czech Republic, investment funds are divided into retail investment funds and qualified investor funds pursuant to Act No 240/2013 Coll., on management companies and investment funds (“AMCIF”) as the main law of the Czech Republic regulating the area of fund investment. For simplicity’s sake, qualified investor fund can be understood as alternative investment funds (AIFs) within the context of European legislation if their manager is authorised as such under the Alternative Investment Fund Managers Directive (“AIFMD”). In contrast, retail investment funds are funds under the Undertakings for Collective Investment in Transferable Securities Directive(s) (“UCITS”).

<sup>3</sup> Cf. Explanatory Memorandum to Act No 240/2013 Coll., on management companies and investment funds.

Republic may be taxed at five percent if certain conditions are met. This therefore reduces the operating costs of such funds, providing positive effects for investors. A further motivation for investors may lie in the good reputation and stability of the Czech capital market and/or its supervision by the Czech National Bank, which is a respected institution within Europe.<sup>4</sup>

Those who manage Czech qualified investor funds know that only investors who meet the legal criteria to be a qualified investor can become an investor in them. This seemingly banal conclusion has significant consequences. If these conditions are not met, the investor will not become a qualified investor, and their participation in the fund would not be considered. Their application will be legally ineffective.

The purpose of this paper is firstly to address how the requirements for becoming a qualified investor must be fulfilled, and identify their limits; in other words, to identify which limiting cases may result in not fulfilling the requirements of qualified investor status.

Secondly, this paper addresses brief thoughts on whether the minimum initial investment sum, as one of the criteria, should be reviewed in the context of recent regulatory developments, while being fully aware of possible inaccuracies or incompleteness in the reasoning. The aim is not to support these considerations with complex empirical studies but to highlight current regulatory trends.

## 1 Qualified investor in the Czech legal system

Section 272 of the AMCIF defines who is a qualified investor and distinguishes between two basic categories of qualified investors.

First, those entities that are directly provided for by law, regardless of the sum of their investment or any other additional criteria. These are in particular professional clients and professional clients upon request within the meaning of Article 4(1)(10) of the Markets in Financial Instruments Directive (“MiFID II”), i.e., credit institutions, investment firms, insurance undertakings, other collective investment undertakings and their management companies. In other words, entities in which it is reasonable to assume a high degree of professionalism exists, with no further conditions therefore needing to be met.<sup>5</sup> This part of the definition reflects the requirements of harmonized regulation, especially AIFMD.

Second, as an example of national discretion, persons who have made the relevant declaration of risk awareness and have either, at the same time, fulfilled the minimum investment requirement (EUR 125,000) or fulfilled the lower minimum investment requirement (CZK 1 million, approx. EUR 40,000), this in combination with a valid suitability assessment.<sup>6</sup>

The following passages address the second of these categories. Specifically, a case where an investor has made the relevant declaration of risk awareness and has, at the same time, fulfilled the above minimum investment.

The selection of this category, or rather part of it, is possibly rationalized by the fact that this part of the definition is located at the imaginary boundary between who is a qualified investor

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<sup>4</sup> For these reasons, the offer can also be seen as attractive within a cross-border context, especially with regard to the marketing of investing in qualified investor funds in other member states.

<sup>5</sup> Cf. Section 272 (1) (a) to (g) of the AMCIF.

<sup>6</sup> Cf. Section 272 (1) (h) and (i) of the AMCIF; it is this second category that makes it clear that the qualified investor in the sense of the AMCIF must be understood more broadly than in the sense of the AIFMD, with reference to MiFID II.

and, conversely, who is not and is generally considered a retail investor.<sup>7</sup> At the same time, with respect to the lowest requirements, this definition is often preferred in the statutes of individual funds, although I acknowledge that the fund manager may set stricter criteria.

## 2 Declaration of risk awareness – thinking fast or slowly?

First, the potential investor must sign a declaration that they are aware of the risks involved when investing in a qualified investor fund.<sup>8</sup>

The purpose of this declaration is clear; to prevent the fund manager's exploitation of investors' behavioral biases, and in turn to activate their long-term cognitive functions through targeted requirements regarding the content, form and presentation of information.<sup>9</sup>

Logically, this declaration must be made at the latest before the actual investment is made. However, the time element of when the declaration is to be made is not expressed in the referenced provision. It may therefore be concluded that, in order to fulfil its purpose, the declaration should not be made too far in advance of the investment (e.g., several months), but it should be made in good time before the investment<sup>10</sup> is made, otherwise it may be difficult for the investor to acquire a realistic understanding of the rights and obligations (including the associated risks) arising from the investment in question.

Within this context, the Czech legislator has decided at least to specify the format of the declaration. It must therefore be made in writing and separately, i.e., not as part of the terms and conditions governing the (investment) contract between the parties.

In written form and separately is in fact a classic demonstration of the warning function. Its purpose is to warn the investor against ill-considered and rash decisions and to arouse vigilance in the investor. It is based on, among other things, the premise that one thinks more carefully about a matter before signing something than one does when only speaking (Veselý, 2022). This is how the distinction is made between slow thinking and fast thinking – as Kahneman (2011) understands it. In other words, because of the separate document which must be signed, the investor gradually moves from fast – which is linked to behavioral biases and is usually quick, automatic and intuitive – to slow thinking (better for decision-making), which is deliberate and deliberative.

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<sup>7</sup> For simplicity's sake, those who do not meet the defined legal criteria for being a qualified investor are retail investors.

<sup>8</sup> Sometimes this requirement is known as the sales or distribution regulation, whereby the manager must ensure that key information relating to the investment, including the associated risks, is disclosed (these obligations are referred to as "Type 1 rules"). Cf. Zetzsche & Preiner (2019).

<sup>9</sup> This is in line with studies showing that the most common causes of customer vulnerability, which may affect qualified investors, are sophisticated marketing practices, which should generally be countered, inter alia, by adopting legal measures. Cf. e.g., European Commission, Directorate-General for Justice and Consumers (2022).

<sup>10</sup> This criterion is generally recognised, especially in the field of investment services and credit products, but also in the communication of key information and other information regarding complex products and services in general. However, the term "good time before" must always be assessed according to the circumstances of the specific business case, in particular the complexity of the product. In general, it is a period within which the consumer can properly and without hurry familiarise him or herself with the information or terms and conditions provided or compare them with those of other products. The investor must neither be prevented from making use of this time, nor be put under any pressure. To do otherwise could constitute a violation of professional care.

The text of the provision also specifies the content of the declaration. The declaration is made against the risks associated with investing in a (specific) qualified investor fund. In other words, the name of the qualified investor fund must be clearly stated for all to see.

However, it may also be appropriate to consider a summary declaration for a nominal list of several funds related to a given investment.<sup>11</sup> On the other hand, taking into account the material features of the declaration, in particular its separation, clarity and visibility, it cannot be considered appropriate for the declaration to include several dozen funds in respect of which the qualified investor is not even interested in acquiring them at a given moment (or within a short period of time).<sup>12</sup>

The question that remains is whether the content of the declaration must also include a list of named risks regarding the qualified investor fund in respect of which the declaration is made. The language of the referenced provision does not indicate this (its title is merely “declaration on being aware of the risks involved in the investment in this qualified investor fund”). This is even though there is empirical evidence that an abstract and non-specific disclaimer (respectively declaration) generally reduces its efficacy.<sup>13</sup> In contrast, a warning that has been couched in much stronger language<sup>14</sup> is able to eliminate most unwanted effects and prevent investor behavioral biases from being exploited, or to activate investors’ long-term cognitive functions. The current wording may therefore indicate that the decision-making process may be distorted by external influences, with the efficacy of such a measure being proportionally diminished as a result.<sup>15</sup>

### 3 Suitability assessment as a key protective measure

A further requirement under the definition of a qualified investor is that the fund manager (or a person authorized by them)<sup>16</sup> must confirm in writing that, on the basis of the information obtained from the person who wants to invest *mutatis mutandis*, as is the case under the MiFID II suitability assessment,<sup>17</sup> it is reasonable to believe that the investment corresponds to the investor’s financial background, investment objectives and expert knowledge and experience.<sup>18</sup>

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<sup>11</sup> This will be typical in cases where investors meet the minimum investment sum by investing in several investment funds managed by the same manager under Section 272(1)(h) of the AMCIF.

<sup>12</sup> Studies show that bombarding investors with information can have the opposite effect. In fact, when more information is available, individuals generally do not focus on the most important information but may be distracted by less relevant information. Cf. Paredes (2003).

<sup>13</sup> It is argued that the warning that past performance is not indicative of future results is ineffective when consumer investors have limited attention and lower processing abilities Brenncke (2018).

<sup>14</sup> For example, “Do not expect the fund’s quoted past performance to continue in the future. Studies show that mutual funds that have outperformed their peers in the past generally do not outperform them in the future. Strong past performance is often a matter of chance” Brenncke (2018).

<sup>15</sup> Cf. Delias et al., (2022).

<sup>16</sup> However, such a person cannot be a person who is not authorised to provide investment services or to manage or administer the fund; for example, managers under Article 3 (2) of the AIFMD who are unable to assess the test with sufficient competence.

<sup>17</sup> The information to perform the suitability test is most often obtained through an investment questionnaire with a set of standardized questions, although other means (e.g., a demonstrable record of assets under management) are not excluded.

<sup>18</sup> Sometimes this approach is also referred to as “Type 2 rules”, which are a later evolution of the informative “Type 1 rules”. Cf. Zetzsche & Preiner (2019).

Although the suitability assessment is about recognizing the participation of an investor in a qualified investor fund, it may also include a statement not to buy.<sup>19</sup> In other words, if the investment being considered is deemed unsuitable or the investor does not provide sufficient information, the fund manager will not recommend the investment (and they will confirm in writing that the investment is not suitable when taking these factors into consideration).

The arrangement of this requirement suggests that if the conclusion is negative, the investment cannot even take place. Indeed, it is a prerequisite that the fund manager (or another sufficiently qualified person) makes a positive written declaration.

However, even if the investment matches the financial background, investment objectives, and investment expertise and experience of the potential investor, the qualitative and quantitative aspects of the information sought need to be considered,<sup>20</sup> otherwise, the suitability assessment may be weak.

To serve as a theoretical definition (but with practical implications), the fundamental areas determining the requirements for the substantive scope of the information to be collected can be understood as its qualitative aspect, while the quantity thereof, the quantitative aspect, which ultimately influences the detail of the information to be collected and its individualization.

The qualitative aspect of the information to be collected, or the minimum standard thereof, is firmly established in Article 25 of the MiFID II and Article 55 of the MiFID II Delegated Regulation.<sup>21</sup>

These divide the information to be collected into three categories, namely information on the investor's investment knowledge and experience, their financial situation (including their capacity to bear losses), and their investment objectives (including risk tolerance and sustainability preferences).

Article 55 of the MiFID II Delegated Regulation provides for a relatively detailed extension of the information to be collected on the investor's knowledge and experience in the field. This includes the provision of information on the investor's knowledge of types of services, trades and investment instruments (here a qualified investor fund), experience regarding the nature, volume and frequency of trades in investment instruments carried out by them, including the time period, as well as information on their education and profession.

Although there are additional, more or less binding, written indications required concerning the qualitative aspects of the information to be provided,<sup>22</sup> its use is influenced by the quantitative aspect. It is therefore left to the discretion of the fund manager to decide, with reference to their duty of professional care, what quantity of information will be required.

The initial determinant is that the quantity and quality of the information provided must correspond to “the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including the complexity and the risks thereof.”<sup>23</sup>

A different granularity of information will therefore be required in the case of an investor with whom a fund manager has no existing relationship, and a different scope of information required in

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<sup>19</sup> Cf. Recital 87 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU (“MiFID II Delegated Regulation”).

<sup>20</sup> Cf. Merenda & Šoural (2017).

<sup>21</sup> Cf. Brenncke (2017).

<sup>22</sup> Article 54 (4) and (5) of the MiFID II Delegated Regulation; also European Securities and Market Authorities (2022).

<sup>23</sup> Article 55 (1) of the MiFID II Delegated Regulation; also Guidelines on Certain Aspects of the MiFID II Suitability Requirements.

the case of a further investment in the fund managed by the fund manager after a certain period of time. However, the complexity, riskiness or liquidity of the fund must also be taken into account. For example, if a fund invests in high-risk, volatile and illiquid assets, more detailed information will need to be collected than if the fund purchases, for example, government bonds, which are generally not that risky. Only in this way can the manager make the (sufficiently qualified) assessment of the customer's (actual) ability to understand the risks associated with these instruments and to bear any financial losses. As a result, for complex or risky funds, the manager is expected to carry out a thorough suitability assessment, and the converse also holds (Herbst, 2015).

The aforementioned is reflected in the wording of the Regulation, which uses the phrase “where relevant”. The following are examples of how the phrase is applied:

- i) the information regarding the financial situation of the investor shall include, where relevant, information on the source and extent of their regular income, their assets, including liquid assets, investments and real estate, and their regular financial commitments;<sup>24</sup>
- ii) the information regarding the investor's objectives shall include, where relevant, information on the length of time for which the client wishes to hold the investment, their preferences regarding risk taking, their risk profile, and the purposes of the investment.<sup>25</sup>

It is evident that the quantitative aspect is not only achieved by the broader granularity of the information to be collected. Equally crucial in this case is its credibility, ensured, for example, by a sophisticated internal structure that detects whether the answers are mutually exclusive, whether the investor is guessing the answers,<sup>26</sup> or whether there is an absence of self-assessment.<sup>27</sup> It is also inappropriate to use vague and indefinite terms that make it unclear what is truly meant,<sup>28</sup> and much more.

The arrangement of the qualitative and quantitative conditions suggests that it is crucial for the fund manager to formulate correctly, for example, the questions in the investment questionnaire to fulfil their duty of professional care. Once the questions have been answered, it is the responsibility of the fund manager to ensure that the investor's answers also have sufficient informational value to show that the investor is sufficiently well qualified to make competent decisions and invest in the qualified investor fund. Failure to do so implies the fund manager has neglected to act in line with their duty of professional care, which can have a negative impact on both them and the investor.

#### **4 Time trigger to meet the legal minimum initial investment sum**

The final requirement is the minimum paid-up investment sum or minimum threshold. This requirement can, by its very nature, only be met at the time of the investment, in other words, at the time when the amount corresponding to the minimum investment sum (or the in-kind value corresponding to the minimum value) is credited to the account of the relevant trustee or fund.

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<sup>24</sup> Article 54 (4) of the MiFID II Delegated Regulation; also Guidelines on Certain Aspects of the MiFID II Suitability Requirements.

<sup>25</sup> Article 54 (5) of the MiFID II Delegated Regulation; also Guidelines on Certain Aspects of the MiFID II Suitability Requirements.

<sup>26</sup> This can be ensured, for example, by asking a sufficient number of validating or eliminating questions, but also through the number of individual choices, including an “I don't know” option.

<sup>27</sup> An example would be asking “Are you familiar with qualified investor funds?” with the option of answering “Yes” or “No”, which in no way verifies actual knowledge.

<sup>28</sup> An example is the use of the term “alternative investment” without any further specification thereof.

Until recently, it was widely debated whether a qualified investor could lose their status as a qualified investor if, for example, the minimum value of the sum invested fell as a result of market movements (volatility of investment instruments).<sup>29</sup>

Although Czech law originally linked an investor's qualification to the initial acquisition of a qualified investor fund, a change was made at the beginning of 2015. The language of the provision was adapted to indicate that the conditions for being a qualified investor must be met for the entire duration of the investor's investment in the fund.<sup>30</sup>

Interpretive issues were removed by a 2022 amendment, whereby the subject part of the definition of a qualified investor reverted to its original form. According to the explanatory memorandum, the amendment emphasizes the active role of the investor at the moment of becoming a qualified investor, as only at that moment do the mandatory conditions for acquiring this status apply.<sup>31</sup> In order to eliminate any further doubt, an addition was also inserted, stating that the aforementioned shall also apply historically. This updated interpretation certainly best suits the meaning and purpose of this rule, which undoubtedly deters retail investors from participating in qualified investor funds.

This interpretation is also extremely practical. After all, it is difficult to require the fund manager or the investor to estimate market volatility and to set the initial investment sum sufficiently high (e.g., > CZK 1 million) so that it will never fall below the minimum threshold in the future. At the same time, it is also unthinkable that the fund manager should have to make the equivalent of margin calls and ask the investor to add additional resources.

Nevertheless, it is appropriate to address the question of whether the interpretation – that this condition is met (only) when wanting to participate in a qualified investor fund – should be a blanket one without taking into account the circumstances of the individual case. Indeed, there may be cases where an investor subsequently (in the short term) makes an (albeit partial) exit from the fund with a view to entering another qualified investor fund, with this process repeating itself time and again. This may be the case, for example, when lower costs and the need for gradual portfolio diversification play a role.<sup>32</sup>

Here, when taking into account the material characteristics, which may include, for example, the closeness or similarity of the investor's conduct, it may be appropriate to consider assessing the absence of the cumulative condition even over time, since such conduct serves to circumvent the minimum threshold. It goes without saying that only those who have the incentive to remain a qualified investor should be so, even though their initial investment may fall below the minimum threshold due to market movements (more or less independent of their will). This, however, is not expressed in the referenced provision. It is therefore more or less left to the fund manager of a given qualified investor fund to state the above in the contract in order to avoid a potential conflict with their duty of professional care.

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<sup>29</sup> A similar question can be applied, for example, to the cases of individual investors who meet the minimum holding value by investing in another investment fund managed by the same manager or whose assets, of the required amount, are already managed by the manager under individual portfolio management with reference to Section 272(1)(h) of the AMCIF.

<sup>30</sup> Czech literature tends towards the possible loss of status of a qualified investor, likely due to the text of the law (Šovar et al., 2015).

<sup>31</sup> Explanatory Memorandum to Act No. 96/2022 Coll., on the draft Act amending certain financial market laws in particular in connection with the implementation of European Union regulations relating to the Capital Markets Union, No. 96/2022 Dz.

<sup>32</sup> Even a (non-serious) advisor can be motivated by entry fee rewards.

Another area that can be addressed in relation to the timing of a qualified investor's status is legal succession – typically inheritance. This may be the case where the original qualified investor passes away and their heir becomes the person who is to be classified as a retail investor (e.g., because they may not have been assessed as suitable).

There are basically two possible solutions to this dilemma, namely, to exclude the heir from further participation in the qualified investor fund, or to allow their continued participation. The answer depends on the phrase “a share in a qualified investor fund may be contractually acquired only by (...)”. The wording implies a distinction between the method of acquisition. If it concerns the statutorily envisaged method of acquisition, without any further contractual intervention, it seems obvious to conclude that the heir may continue to participate in the qualified investor fund without having to be a qualified investor themselves.<sup>33</sup>

## 5 Minimum initial investment sum

The discussion concerning the time trigger is related to the condition of the minimum required initial investment sum for a specific qualified investor fund. In order to acquire the status of a qualified investor and to be permitted to participate, the investor must invest (pay) at least CZK 1 million.<sup>34</sup>

It is this requirement that – unlike the previously stated conditions – may be subject to criticism in light of recent discussions within Europe regarding it being an unjustifiably restrictive barrier to accessing interesting investment opportunities.

An example is the recent initiative in the area of so-called alternative investment funds, specifically their sub-type - European Long Term Investment Funds, which are similar in nature to qualified investor funds.<sup>35</sup> These funds could only be provided to investors subject to, among other things, a minimum initial sum, specifically 10,000 EUR.

Recently the European Commission has come with the argument that the minimum sum condition has shown to be very discouraging for investors and administratively burdensome for fund managers.<sup>36</sup>

On the other hand, the European Commission itself states that the suitability test and the written warning that the product is long-term and illiquid should be sufficient to protect inves-

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<sup>33</sup> A consideration may be that inheritance does not constitute disposition of such a thing. Cf. Schuhmann & Schubert (2015).

<sup>34</sup> Ignoring investors who have already invested the required amount in another investment fund managed by the same manager or whose assets, of the required amount, are already managed by the manager under individual portfolio management; see Section 272 (1) (h) of the AMCIF.

<sup>35</sup> These funds are usually illiquid and invest in riskier projects, similar to most qualified investor funds. After all, these funds are a special type of funds or a kind of fund within the meaning of the AIFMD.

<sup>36</sup> Recital 47 of the Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules (“ELTIF II”) states “When applied together, the EUR 10 000 initial minimum investment and the 10 % limit on aggregate investment create a significant obstacle to investments in ELTIFs for retail investors, which conflicts with the goal of ELTIFs to establish a retail alternative investment fund product.”



tors.<sup>37</sup> In this way, even in the case of these less liquid and generally riskier funds, the minimum initial investment sum has been completely removed.<sup>38</sup>

Indeed, the approach that differentiates between the investor's wealth and their fulfilment of prerequisites to make competent decisions on investments is also supported by the literature (Šovar et al., 2015). In other words, the investors who are capable of making competent decisions on investments are assumed to be aware of the risks involved.

The specific need for an imagined doubling of protective elements is furthermore not even evident from the accompanying materials. Within the context of Czech law, no further justifications for the introduction of a minimum required (entry) investment sum can be found in the accompanying explanatory memorandums to the AMCIF, even in cases where a suitability test and written notice are given.<sup>39</sup>

Even Luxembourg law, which provides the inspiration for the Czech definition of a qualified investor, is not helpful in this respect. Luxembourg law defines a qualified investor as either someone who has sufficient resources to conclude that the possible loss of an investment would not affect their existence, or, on the contrary, someone who possesses the capacity to make sufficiently competent investment decisions, as verified by the suitability test. Both of these must be supported by a declaration of risk awareness.<sup>40</sup> It does not combine these elements.<sup>41</sup>

However, the opposite is the case in Germany, where the term semi-professional investor is. These are understood to be (individual) persons who have made the relevant declaration of risk awareness and have fulfilled the lower minimum investment requirement of EUR 200,000, in combination with fund manager declarations that the investor possesses sufficient experience and knowledge and is capable of making their own investment decisions, and also understands the risks involved and that such a commitment is appropriate for the investor concerned.<sup>42</sup> This is perhaps a stricter approach than the Czech one.

Nevertheless, it should be mentioned that this approach is specific, even compared to other areas of financial market law. A typical example is the area of investment services, in particular the distribution of often generally higher-risk corporate bonds. In this case, the set of protective measures is often dependent on the distribution channel chosen (Hobza, 2021), where even in

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<sup>37</sup> Recital 42 of the ELTIF II even states “in cases where the result of the suitability assessment is that an ELTIF is not suitable for a retail investor and such investor nevertheless wishes to proceed with the transaction, the express consent of that retail investor should be obtained before the distributor or manager of the ELTIF proceeds with the transaction.” This further reduces the protection of potential investors.

<sup>38</sup> Comf. Article 30 of the ELTIF II, where is stated: “The units or shares of an ELTIF may only be marketed to a retail investor where an assessment of suitability has been carried out (...) and a statement on suitability has been provided (...).”

<sup>39</sup> This limit was introduced in the AMCIF in 2016, but the explanatory memorandum on the reasons for the introduction of this minimum sum, together with the suitability test and the risk statement, says nothing.

<sup>40</sup> Cf. Article 2 (1) Law of 13 February 2007 relating to specialised investment funds, which states that these investor include, inter alia, any investor who has confirmed in writing that they adhere to the status of a well-informed investor, and (i) they invest a minimum of EUR 125,000 in a specialised investment fund, or (ii) they have been the subject of an assessment and it has been confirmed that their experience and knowledge are adequate.

<sup>41</sup> Poland, for example, takes a similar approach. It must be properly assessed whether the investor has the knowledge and experience to make appropriate investment decisions. Cf. Act of 27 May 2004 on Investment Funds and Alternative Investment Fund Management from Poland.

<sup>42</sup> Cf. German Kapitalanlagegesetzbuch (KAGB).

their (strictest) form they do not include a minimum investment sum condition. This is set autonomously by the issuer or the nominal value of the bond or other instrument.

If the general purpose of the concept of the definition of a qualified investor is then to prevent (usually less knowledgeable or inexperienced) retail investors from participating in fund structures in general, which, unlike retail investment funds intended for them, are by their very nature riskier, should this objective not be met if it meets the suitability test? The suitability test, among others, also examines the investor's financial background, including liquidity needs.

A (proper) suitability assessment, combined with a declaration of risk awareness, may be effective by itself. At least this is the general principle of the rule introduced at other levels of financial market law. An additional condition of a minimum required (initial) investment sum creates a barrier to accessing interesting investment opportunities.

It should be further mentioned that this does not exclude the consideration of at least a minimum limit for the invested sum, but not creating discouragement for investors.<sup>43</sup> Maintaining a certain limit would make sense, for example, in order to exclude potential participants who would like to invest small sums on a periodic basis, for which these funds are generally not suitable,<sup>44</sup> mainly, just because these funds are generally illiquid. However, the limit should certainly not be tens of thousands of euros but rather several thousand.

## 6 Closing remarks

The purpose of this paper is firstly to address how the requirements of the definition of a qualified investor are to be properly fulfilled, and discuss their limits.

Even though there is empirical evidence suggesting that an abstract and non-specific disclaimer (more specifically a declaration) generally reduces its efficacy, the declaration of risk awareness does not have to include a list of the main risks in relation to the particular qualified investor fund in respect of which the declaration is being made. Consideration should be given to whether the content of the declaration should be modified to include at least the main risks to eliminate adverse effects and prevent the exploitation of biases in investor behavior or long-term cognitive functions from being activated.

Secondly, the quality of the suitability assessment arrangement often depends on the fund manager (or another person compiling and evaluating the assessment). In order for this assessment to work properly, it is necessary to address both the qualitative aspects of the information to be gathered and its quantitative aspects (which depend on the degree of relevance to the nature of the customer, the nature and extent of the service to be provided, and the type of product or business envisaged, including its complexity and the risks involved). Failure to do so may result in the fund manager not acting in line with their duty of professional care, which can have a negative impact on both them and the investor.

Thirdly, the active role of the investor is sufficient at the moment when they make the initial investment in the qualified investor fund. The language used suggests that even possible "circumvention" of the rule, or a different method of acquisition, without closer contractual intervention (e.g., from an inherited share), does not result in failure to fulfil the condition.

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<sup>43</sup> Indeed, this is proposed by the Ministry of Finance of the Czech Republic in the context of the ELTIF proposal (Ministry of Finance of the Czech Republic, 2022).

<sup>44</sup> Qualified investor funds often have a limited signing period and are then almost illiquid until maturity, which is not quite the same as the open-ended UCITS funds.

Finally, this paper addressed brief thoughts on whether the minimum initial investment limit, as one of the criteria, should be reviewed while being fully aware of possible inaccuracies or incompleteness in the reasoning. This discussion seems relevant in the context of recent regulatory trends while respecting general principles of financial market law. It was shown that the threshold condition is sometimes mentioned as an unjustifiably restrictive barrier to accessing interesting investment opportunities. To fulfil the principle of the effective functioning of the market, including adequate protection of investors, even the suitability assessment and declaration of risk awareness mentioned may be sufficient. However, both must be of sufficient quality. In other words, it might be enough if the approach where the investor is wealthy enough or fulfils the prerequisites for competent investment decision-making is accepted. However, it must be added that these brief thoughts in the context of recent regulatory developments certainly deserve further empirical analysis to be fully correct.

## References

- Brenncke, M. (2017). Commentary on MiFID II Conduct of Business Rules, Arts 21-30 MiFID II. In M. Lehmann, & C. Kumpan (Eds.), *Financial services law: a commentary*. Beck/Hart/Nomos. <https://doi.org/10.5771/9783845279893>
- Brenncke, M. (2018). The Legal Framework for Financial Advertising: Curbing Behavioural Exploitation. *European Business Organization Law Review*, 19(4), 853–882. <https://doi.org/10.1007/s40804-018-0111-9>
- Delias, D., Farghly, F., Hayes, L., Ng, Ch., & Spohn, M. (2022). *Going beyond 'capital at risk': Behaviourally informed risk warnings for high-risk investment products*. Financial Conduct Authority: Research Note. Online: <https://bit.ly/45WCGcE>
- European Commission, Directorate-General for Justice and Consumers. (2022). *Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation: final report*. Publications Office of the European Union. <https://doi.org/10.2838/859030>
- European Securities and Market Authorities. (2022). *Guidelines on Certain Aspects of the MiFID II Suitability Requirements*. Online: <https://bit.ly/469tLOW>
- Herbst, J. (2015). *A Practitioner's Guide to MiFID II*. (2nd ed.). Sweet & Maxwell.
- Hobza, M. (2021). Korporátní dluhopisy: černé ovce kapitálového trhu? *Bulletin advokacie*, 3, 19–28.
- Kahneman, D. (2011). *Thinking, fast and slow*. Farrar, Straus and Giroux.
- Merenda, D., & Šoural, A. (2017). Investiční dotazník. *Obchodněprávní revue*, 3, 80–84.
- Ministry of Finance of the Czech Republic. (2022). *Framework position on the ELTIF proposal*.
- Paredes, T. A. (2003). *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*. Washington University in St. Louis, School of Law, Faculty Working Papers Series, Paper No. 03-02-02. <http://dx.doi.org/10.2139/ssrn.413180>
- Schuhmann, A., & Schubert, L. (2015). *Die Kategorie des semiprofessionellen Anlegers nach dem Kapitalanlagegesetzbuch*. BKR.
- Šovar, J., Králík, A., Bebran, J., Doležalová, D. et al. (2015). *Zákon o investičních společnostech a investičních fondech. Commentary*.
- Veselý, T. (2022). Pár poznámek k formě smlouvy o smlouvě budoucí. *Právní rozhledy*, 30(18), 627–631.
- Zetzsche, D. A., Preiner, Ch. (2019). Cross-Border Crowdfunding – Towards a Single Crowdfunding Market for Europe. *EBI Working Paper Series*, No. 8. <https://doi.org/10.2139/ssrn.2991610>