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Asset segregation: the AMF believes that a balanced requirement is possible

European regulators are currently working to specify the conditions of implementation of the asset segregation requirements provided for by the AIFM Directive on alternative investment fund managers. The AMF revisits the fundamental principles that it believes should be taken into account.

An important issue for European lawmakers

The European Alternative Investment Fund Managers (AIFM) Directive, which was adopted in response to the 2008 financial crisis and the Madoff case, sets out the duties of investment fund depositaries and increases their accountability. The directive therefore defines a set of obligations relating to the custody of fund assets that are applicable even if the depositary delegates these functions to a third-party sub-custodian. Segregation, which allows the assets belonging to a fund to be identified at any time, is one obligation in particular.

The segregation requirement was one of the key political issues during the negotiation of this text between the European Council and the European Parliament. To meet the need to protect investors, highlighted by the financial crisis, as effectively as possible, the AIFM Directive requires that sub-custodians keep their records and accounts in a way that allows them to distinguish between:

- The assets deposited by every depositary for which it acts as a delegate, and

- For the same depositary, the assets belonging to UCITSs and those belonging to AIFs.

Work to specify the conditions of implementation

The European authorities, within the ESMA, are working to specify the conditions of implementation of these requirements. This work was started in 2014 and is still ongoing, given the practical difficulties raised by some securities custodians and the differences in approach observed among Member States of the European Union. The public consultation launched from 15 July to 23 September 2016 should allow the ESMA to clarify the obligations in this regard by the end of 2016.

The AMF is taking part in these discussions and wants to find a solution that reconciles a high level of investor protection, efficient and robust organisation of the markets and the ability of asset management professionals to cater for the markets' increased need for cash.

Three fundamental principles

In this context, the AMF is guided by three fundamental principles:

Maintaining a common approach within the EU

The AMF believes that it is desirable to harmonise the level of segregation applied in every country in the European Union. To avoid differences in interpretation and prevent any regulatory arbitrage within the EU, a common approach must be maintained to ensure a level playing field for all operators and a high, harmonised level of investor protection. For these reasons, the AMF is opposed to any idea that would consist of leaving it up to each asset manager to determine a level of segregation for their assets. Such a solution would mean that the level of investor protection would depend on the bargaining power of asset managers with regard to their depositary banks.

Equal regulations for equal services

The AMF believes that operators that offer the same asset custody services should meet the same requirements in terms of segregation. Central securities depositaries, and especially international central securities depositaries (ICSD), that offer custody services for investment funds on the same terms as depositary banks, must introduce the obligation to segregate assets.

Not overestimating the operational effects of strict segregation

Some operators have pointed out the operational difficulties that would arise from the regulatory requirements if these demanded the segregation of the UCITS and AIF assets in each depositary's custody all along the custody chain. Some particularly stress the large number of financial instrument accounts that would need to be opened to meet such an obligation.

The AMF has noted, however, that this degree of requirement is already being met by some depositaries and their delegates. The possibility of grouping together, in a single account opened with the sub-custodians, the assets of all the AIFs, or all the UCITSs whose assets are in the same depositary's custody, also enables a significant reduction in the number of accounts to be opened, starting from the first sub-custodian.

Given this situation, the European authorities must define an appropriate level of segregation, and not be guided by an overestimation of the costs arising from this measure, which is vital for investor protection.

Reminder of the timetable

Entry into force of the AIFM Directive: July 2013

First consultation of the ESMA aimed at producing a Q&A: December 2014- January 2015

Second consultation of the ESMA in preparation for an opinion paper to be sent to the European Commission: July-September 2016

Indicative date for the submission of the opinion: December 2016

Glossary

> Depositary: depositaries play a key role in investor protection, being the intermediaries to whom funds entrust the custody of portfolio assets and the supervision of the transactions affecting these assets.

> Sub-custodian: a depositary may decide to delegate their custody activity to a third party, known as a sub-custodian. The depositary retains responsibility for custody activity.

Keywords

AIFMD

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