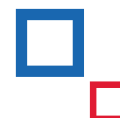


THE AMF'S VIEWS ON THE FORTHCOMING REVIEW OF THE ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE (AIFMD)



The AMF welcomes the opportunity to contribute to the discussions on the upcoming review of the Alternative Investment Fund Managers Directive (AIFMD). Following the AMF's detailed response to the public consultation of the European Commission¹, this paper sets out the AMF views and recommendations on key aspects of the review.

Summary of the AMF proposals

We believe some key issues merit specific attention in the AIFMD review and should be addressed holistically with the necessary mirror amendments in the UCITS directive:

- **cross-border supervision:** we propose an enhanced organisation of responsibilities between NCAs to address the challenges of supervising AIFM/UCITS managers that operate under the management passport regime and where supervision is fragmented between several NCAs.
- **delegation:** while fully acknowledging the benefits of delegation, we believe certain types of delegation models should be further scrutinized to ensure AIFM/UCITS managers remain ultimately in charge of the key business functions and decisions.
- **reporting:** the AIFMD reporting framework should be reviewed in the interest of completeness and efficiency and ultimately extended to UCITS.
- **liquidity management:** the liquidity management framework for investment funds should be complemented with an EU common framework on the availability and use of liquidity management tools for AIF/UCITS funds.
- **further harmonisation and consistency should be introduced between AIFMD, UCITS and MIFID** to reduce unnecessary differences and level the playing field between firms providing the same services.

AMF's overall appraisal of the Alternative Investment Fund Managers Directive

AIFMD : a successful framework

AIFMD has been successful in creating an efficient internal market for Alternative Investment Funds (AIFs) and setting out robust and competitive standards recognised internationally. The AIFMD passport successfully supports the EU cross-border fund management and raising of capital, while the use of delegation facilitates access to international expertise. Risk management is at the heart of AIFMD, with a robust framework to apprehend various types of risks (e.g. liquidity, macro-prudential and fraud risks), including the key oversight role of the depositary. Since the application of AIFMD in 2013, EU regulation of investment funds has been further strengthened with amendments to primary and secondary legislation, such as the 2019 legislative package facilitating cross-border distribution of collective investment undertakings.

¹ The AMF submitted on 29 January a detailed response to the 102 questions raised by the European Commission in its public consultation on the review of AIFMD (the responses to the consultation are available at the following link: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12648-Alternative-Investment-Fund-Managers-review-of-EU-rules/public-consultation>). This position paper focuses on key recommendations and does not cover exhaustively the positions put forward in the AMF response to the consultation.

Nevertheless, there is still scope for improvement and lessons to be learnt from the vulnerabilities highlighted by the COVID crisis. The AMF therefore agrees with the European Commission that an overhaul of the directive is not warranted, yet significant improvements in certain areas should be considered with the objective to promote a safe, efficient and competitive EU environment for investment funds.

The AMF does not support revisiting the scope and functioning of the AIFMD passport, which already provides the right balance to promote a vibrant internal market. In particular, AIFMD being designed as a directive for fund managers which does not prescribe product rules for the wide variety of AIFs managed by AIFMs, the **AMF strongly opposes the introduction of a marketing passport for retail AIFs**. The AMF believes that the parallel review of the European Long-Term Investment Funds Regulation (ELTIF) already provides an opportunity to devise a secure framework for a specific type of retail AIFs. In addition, **the AMF does not support the introduction of a depositary passport** which would further complexify the supervision of cross-border activities, and which, in the absence of harmonisation of national laws on securities and insolvency between EU jurisdictions, is not warranted.

➤ Areas for improvement that should be considered in the AIFMD review

We hereby put forward several suggestions to address inefficiencies in the cross-border supervision of investment funds, strengthen the regulatory toolbox to monitor and mitigate risks (in particular liquidity risk) and enhance the level-playing field. Finally, we would like to note that several of our recommendations are also relevant for managers of UCITS funds. While acknowledging that AIFM and UCITS directives cater for different purposes, we indeed see merit in reducing the unnecessary differences between the two directives and exploring, where relevant and appropriate, the application of the same rules to collective investment fund managers, with the objective of streamlining the EU rulebook.

□ Strengthening cross-border supervision

We believe a smoother organisation of responsibilities between NCAs would be instrumental to a more efficient supervision of the cross-border activities of AIFMs within the EU. A key challenge is the fragmentation of supervisory responsibilities amongst several NCAs in the case of AIFMs acting under the management passport and the resulting fragmentation of the information required to have a full picture of the cross-border activities of AIFMs. The partition between rules applicable to fund managers and rules applicable to funds is indeed not always clear-cut and often generates some overlap when a fund and its manager are domiciled in different EU jurisdictions. For instance, according to AIFMD/UCITS, the NCA of the fund manager ('Manager NCA') is responsible for the supervision and enforcement of risk management, liquidity management and valuation requirements that AIFMs have to comply with. In parallel, the NCA of the fund ('Fund NCA') is also responsible for supervising and sanctioning any investment breach or valuation issues within the fund.

The current fragmentation in the supervision of cross-border activities means that none of the NCAs involved enjoys a comprehensive picture of the asset manager's activity, which might be detrimental when emergency supervisory actions are needed in times of crisis. For example, the Manager NCA may need access to information related to that manager's funds domiciled in other jurisdictions for the purpose of carrying out its supervisory responsibilities. Although information may be accessed through cooperation arrangements with other NCAs, experience shows that NCAs have different priorities and due to resource and time constraints, they may not be in a position to cooperate at the level and speed required by the circumstances.

In order to remedy the sub-optimal effects of fragmentation and to ensure there are no supervisory gaps, we believe one NCA should be granted a leading role and equipped with appropriate tools to monitor the activities of the asset manager across the EU. In our view this 'Lead Supervisor' role would be best awarded to the Manager NCA, who is already responsible for the supervision of the fund manager and its funds domiciled locally.

Therefore, we propose to enhance the Manager NCA supervisory responsibilities when the manager activates the management passport to operate cross-border, without adjusting downwards the responsibilities of other NCAs.

This would entail granting the Manager NCA direct access to all fund information held at the level of service providers (such as the depositary and auditor), in full transparency with the Fund NCA. This could include for example the breach reports produced by depositaries in the course of their oversight functions.

In addition, NCAs should be required to report to ESMA all notifications they receive regarding the use of the management passport, as well as all instances where portfolio or risk management is fully delegated to third parties. This would serve to complement the information on the marketing passport that will be reported to the future ESMA central database required by Article 12 of Regulation (EU) 2019/1156, thereby centralizing at ESMA level all relevant data on cross-border activities by AIFMs.

□ Mitigating the risks that certain types of delegation may pose

Delegation offers efficient means to source expertise and structure businesses in an efficient manner. AIFMD already provides specific safeguards to avoid that delegation is used to circumvent AIFMD requirements. Nevertheless, as outlined in ESMA's letter to the EU Commission² (the ESMA Letter), extensive delegation arrangements have developed, where portfolio management functions are largely or even entirely delegated to third parties. Situations where fund managers solely provide middle and back-office services without retaining any portfolio management expertise or front IT system are not desirable: they question the capacity of UCITS/AIFM managers to remain ultimately in charge of the key business functions and decisions of a fund as per the directives. In our view, two particular situations require additional scrutiny: (i) where portfolio management is entirely delegated to a third party outside of the group; and (ii) where portfolio management is partially or entirely delegated to a third party outside the EU.

We would encourage a clarification that the AIFM and UCITS directives, together with their delegated acts, apply regardless of the organization of the portfolio management of an AIF or a UCITS fund (with or without delegation). We also support elevating the guidance developed in ESMA's 2017 opinion on substance requirements in the legislation³. We also share ESMA's concerns that extensive delegation arrangements might further develop and we support ESMA's objective to ensure that entities authorised and supervised in the EU as AIFM or UCITS managers remain ultimately in charge of the key business functions and decisions as per the directives. This would help enhancing supervisory convergence amongst NCAs and in turn offering the same protection to all investors, regardless of the structure of the management of the fund in which they invest.

□ Improving the information available to authorities via an enhanced reporting framework

In our view, **a thorough examination of the current reporting requirements is necessary** to enhance NCA's capacity to supervise investment funds and monitor the different types of risks that may arise from their activities, both from a micro and macro perspective. In our view, the reporting template should better differentiate between the types of funds and assets to ensure that the information reported is sufficiently complete without imposing an excessive regulatory burden on firms⁴. We also see merit in mandating the use of the Legal Entity Identifier for AIFs and requiring additional details where appropriate (e.g. more granular portfolio breakdown, additional data on leverage, reporting on the use and availability of Liquidity Management Tools), while pursuing further supervisory convergence work to improve the quality of the reporting submitted by AIFMs.

We support **creating a consolidated database of the different sources of regulatory data** provided by AIFMs to securities market authorities and central banks. This consolidated database would enhance the information

² https://www.esma.europa.eu/sites/default/files/library/esma34-32-551_esma_letter_on_aifmd_review.pdf

³ [https://www.esma.europa.eu/sites/default/files/library/esma34-45-](https://www.esma.europa.eu/sites/default/files/library/esma34-45-344_opinion_to_support_supervisory_convergence_in_the_area_of_investment_management_in_the_context_of_the_united_kingdom_with_drawing_from_the_european_union.pdf)

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⁴ This would also facilitate the extension of the AIFMD reporting to UCITS funds (for instance on the basis of the AIFMD reporting template tailored to retail AIFs), which the AMF supports.

available to authorities while creating economies of scale for authorities and AIFMs by facilitating the removal of redundant fields across the different reportings (for central banks and market authorities).

□ Strengthening the liquidity management framework

The AIFMD sets out a robust framework for the management of liquidity risk by investment funds. The recent publication by ESMA of the guidelines on liquidity stress testing for UCITS and AIFs increased further the standard and consistency for the management of liquidity risks amongst the EU asset management industry. Liquidity issues have also been thoroughly investigated in the ESMA report to the ESRB⁵ and the ESMA Common Supervisory Action on UCITS liquidity risk management⁶, which drew lessons from the COVID crisis and highlighted certain vulnerabilities. As demonstrated during the COVID crisis, Liquidity Management Tools (LMTs) have proved useful to avoid suspensions, yet their use and availability differs across jurisdictions in the absence of EU harmonised rules for LMTs.

The AMF recommends the following actions to enhance the liquidity risk mitigation framework both for AIFs and UCITS funds:

-designing a common EU framework for the availability and use of Liquidity Management Tools: the AMF supports the proposal outlined in the ESMA letter to make all LMTs available in all EU jurisdictions. In addition, we believe that **gates should become a mandatory LMT**, i.e. as a general principle asset managers should be required to include the possibility of activating gates in the funds legal documents whenever relevant⁷, under specific terms they would determine. Taking stock of the IOSCO work on how to address liquidity risk management⁸, a harmonised legal framework should govern the availability and use of the different LMTs, including specifications on the required disclosures for the provision and use of LMTs to ensure greater consistency, as well as specifications detailing NCAs' cooperation arrangements, in particular in situations with cross-border implications.

-information to NCAs on the availability of LMTs to fund managers and their activations: we believe the common EU framework on LMTs should also provide for relevant notifications and reporting to NCAs. In that respect, the activation of extraordinary LMTs (i.e. suspensions of subscriptions and redemptions, gates and side pockets) should be notified to NCAs (but not authorised by them). In addition, the reporting of the availability of LMTs and the use of non-extraordinary LMTs (i.e. LMTs other than suspensions, gates and side pockets, such as anti-dilution levies and swing pricing) could prove useful to NCAs.

-guidance on liquidity profiles: the AMF supports priority area n°3 of ESMA's report to the ESRB on the liquidity risk in investment funds⁵, advocating for further ESMA guidance to specify *"how liquidity profiles should be established and reported as part of the AIFMD reporting [...]. This includes (i) on the asset side how to determine a realistic and conservative estimate of which percentage of the fund portfolio can be liquidated (estimate for each asset class based on reliable methodology and data), and (ii) on the liability side, how to take into account arrangements with respect to gates and notice periods in the determination of investor liquidity profiles."*

□ Consistency and level-playing field

EU regulation should aim to address the unnecessary complexity which can result from overlapping legislations negotiated at different times and in different contexts. Ultimately, a simpler and more consistent set of rules across

⁵ Report published by ESMA on 12 November 2020 - "Recommendation of the European Systemic Risk Board (ESRB) on liquidity risk in investment funds »

⁶ <https://www.esma.europa.eu/press-news/esma-news/esma-launches-common-supervisory-action-ncas-ucits-liquidity-risk-management>

⁷ The expectation is that gates would be introduced for most funds although such a mechanism may be less relevant in specific cases, such as the case of ETFs and MMFs.

⁸ In 2018 IOSCO simultaneously published two final reports on fund liquidity risk management: "Recommendations for Liquidity Risk Management for Collective Investment Schemes" and "Open-ended Fund Liquidity and Risk Management – Good Practices and Issues for Consideration"

level 1, 2 and 3 legislation will reinforce the competitiveness of the EU. The AMF therefore supports harmonising certain requirements in AIFMD, UCITS and MIFID where there are unnecessary differences, in particular where they undermine the fair competition and the level playing field between firms providing similar services.

We see room for improvement in the following areas:

-further harmonisation between AIFM and UCITS regimes: we support ESMA's letter to the European Commission on the review of AIFMD advocating for alignments between AIFM and UCITS directives where appropriate, in particular as applying different requirements to management companies which manage both UCITS and AIFs creates additional burdens for the firms concerned and divergences in supervisory/regulatory outcomes. We would suggest setting forth a common set of rules for asset managers in areas such as conflict of interest management, reporting, liquidity risk management, delegation and definition of leverage.

-level playing field between firms providing the same services under different regulatory regimes: fair competition between firms providing the same services under different licenses justifies the application of the same regulatory standards to the provision of those services. In that context, firms providing MIFID services under an AIFMD/UCITS license should be subject to the relevant MIFID requirements (e.g. governance, conflicts of interest, acting in the best interest of fund investors, capital requirements and trade reporting). Likewise, in case of delegation of collective portfolio management to a MIFID firm, UCITS managers / AIFM should ensure the delegate portfolio manager upholds the UCITS/AIFMD standards under the contractual terms of the delegation arrangement.

-level playing field between depositaries and Central Securities Depositories (CSDs): the AMF supports the 2017 ESMA Opinion on "Asset segregation and application of depositary delegation rules to CSDs"⁹, requiring the application of the depositary delegation rules to central securities depositories when acting as investor CSDs.

⁹ https://www.esma.europa.eu/sites/default/files/library/esma34-45-277_opinion_34_on_asset_segregation_and_custody_services.pdf