

AIFMD REVIEW

1. The AIFMD review process

The Alternative Investment Fund Managers Directive (AIFMD) requires a review of the Directive (review of the application of the AIFMD; its impact on investors, AIFs and AIFMs within the EU and in third countries; and the degree to which the objectives of the Directive have been met).

The first stage of the review has been completed with the publication on 10 January 2019 by the Commission of a report commissioned from KPMG intended to provide and assess evidence for the Commission's review. This report is based on a survey of stakeholders most affected by the AIFMD¹ and also on an evidence-based study carried out in 15 representative Member States and some non-EU countries that are important fund domiciles such as the US and the Channel Islands.

The Commission has indicated that it will continue its work on the AIFMD review, taking into consideration the information and conclusions contained in this report, alongside other sources of data and further analysis. The intention is for the Commission to issue its own report on the functioning of the AIFMD to the EU Parliament and Council in 2020.

2. Key findings from the AIFMD review report published in January 2019

Generally the report is positive and concludes that the AIFMD has played a major role in helping to create an internal market for AIFs and a harmonized and stringent regulatory environment for AIFMs. Moreover, most areas of the provisions are assessed as having contributed to achievement of the specific and operational objectives of the directive.

The report however identifies several areas of potential weakness related notably to an insufficient harmonisation of rules across EU Member States, the imposition of additional requirements by Member States and uncertainty around certain definitions. Many of these issues have already been raised previously and some of them are already addressed by on-going work at the EU level (e.g. issues related to the cross-border distribution of AIFs) or at the global level (e.g. calculation methodologies for leverage). This report does not propose recommendations on how these potential weaknesses might be addressed and it remains to be seen how the Commission will approach these issues in the future steps of the review.

Reporting: Some requirements may not be essential or overlapping with other EU legislations according to the survey. There are differences across Member States in terms of data delivery methods and additional information may be required on a periodic or ad hoc basis, although

normally there is no room for national discretion. Requests were made by respondents to the study that any future amendments to reporting should take into account the cost impacts and also the possibility of using new technologies, since AIFMD reporting is considered to represent a significant part of overall transaction and operational costs. Some industry respondents also called for a more regular publication of aggregated data by the authorities in order to provide more information on the market.

Leverage: The evidence-based part of the study noted that the use of high leverage is rare in EU AIFs and concluded that AIFMD leverage provisions appear effective in the monitoring and mitigation of systemic risks. Some industry respondents called for the harmonisation of calculation methodologies for leverage across different legislation (notably AIFMD and UCITS) and for considering the interactions with the on-going work at IOSCO on leverage (covering in particular methodology for calculating leverage).

Disclosures to investors: Different issues were raised in responses with some stakeholders believing that requirements on disclosures to investors are excessive and prevent investors from getting a clear understanding of the implications of investing in the AIFs concerned, while others pointed out insufficient disclosures of fees, costs and charges for certain types of AIFs (e.g. private equity). There were also suggestions that inconsistencies of disclosure rules with other EU regimes and duplications could be avoided.

EU passporting regime: Although the EU passport for management companies is working well, the cross-border distribution of AIFs across the EU is still limited and lags behind UCITS products. Definitions of and rules pertaining to 'marketing' also vary across Member States. These issues have been addressed in the recently adopted EU legislative text on the cross-border distribution of funds.

Depository and asset segregation rules: Some respondents noted that some of the AIFMD depository rules are interpreted differently in different Member States² but it is not clear whether and to what extent this has impaired the effectiveness of the internal market in AIFs. There was an overall sense that the depository rules adopted a one-size-fits-all approach, which does not accommodate different asset classes or geographies. In addition, although depository rules are consistent between AIFMD and UCITS, asset segregation rules are slightly less stringent in AIFMD. However respondents believed that applying more stringent rules to AIFs would hinder investments from AIFs in certain third-countries or via certain counterparties.

¹ i.e. AIFMs, depositories, investors and distributors as well as industry bodies

² for example, it was said that there are differing national approaches to the total look-through provision and to the cash monitoring duties.

Investments in non-listed companies: The requirements regarding notifications and disclosures to national competent authorities were considered by many respondents to be overly burdensome for many smaller AIFMs (e.g. private equity / VC AIFMs). A lack of clarity of the meaning of ‘non-listed companies’ and of the application of rules to investments in unlisted special purpose investment vehicles and unlisted UCITS and AIFs was also pointed out, as well as the lack of improvement of the information provided by AIFs / AIFMs to controlled companies.

3. Current status and next steps regarding non-EU AIFMs and AIFs

Some respondents to the KPMG study called for passports to be introduced for non-EU AIFMs (which is a possibility in the AIFMD, to be further determined by the Commission³), some also suggesting that existing national private placement regimes (NPPRs) should be maintained in parallel in any case.

AIFMD and related passporting rights indeed apply to EU AIFMs and non-EU AIFMs managing AIFs registered in the EU, but not to non-EU AIFs. Non-EU AIFs can however be marketed to professional investors in certain individual EU countries via national measures (e.g. NPPRs or specific authorisations granted by Member States⁴) i.e. provided they comply with each EU country’s national regime.

The possibility for non-EU AIFs marketed by non-EU and EU AIFMs to benefit from passporting rights conferred under the AIFM Directive was due to be potentially authorized two years after the entry into force of the Directive (22 July 2013), depending on advice given by ESMA. However, these rights have not yet been extended to non-EU AIFs. Assessments of twelve third countries⁵ have been conducted by ESMA in 2016⁶ to determine whether there are significant obstacles regarding investor protection, competition, market disruption and the monitoring of systemic risks that would impede the application of the AIFMD passport to these countries. Although no significant obstacles were identified for some of the countries (Canada, Guernsey, Japan, Jersey, Switzerland), some issues were raised concerning other countries, for example the US with respect to competition and market disruption criteria regarding certain fund categories or Bermuda and the Cayman Islands with respect to investor protection and effectiveness of enforcement criteria.

³ According to Recital 64 AIFMD: “After the entry into force of a delegated act adopted by the Commission in that regard, which will, in principle, taking into account advice given by ESMA, occur 2 years after the deadline for transposition of this Directive, a basic principle of this Directive should be that a non-EU AIFM is to benefit from the rights conferred under this Directive, such as to market units or shares of AIFs throughout the Union with a passport, subject to its compliance with this Directive. This should ensure a level playing field between EU and non-EU AIFMs.”

⁴ According to the AIFMD, Member States may implement NPPRs for non-EU AIFs, managed by both EU and non-EU AIFs, and authorised EU AIFMs may manage non-EU AIFs that are not marketed in the European Union. A Member State may allow the marketing of a non-EU AIF managed by an authorised EU AIFM in their territory without a passport. The same applies for EU feeder AIFs for which there is no EU master AIF managed by an authorised EU AIFM. AIFMD also provides that the marketing of a non-EU AIF managed by a non-EU AIFM to professional investors in the territory of a Member State may be allowed if certain transparency and cooperation conditions are met.

⁵ Australia, Bermuda, Canada, Cayman Islands, Guernsey, Hong Kong, Japan, Jersey, Isle of Man, Singapore, Switzerland, and the United States.

⁶ cf. ESMA’s advice to the European Parliament, the Council, and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs, 12 September 2016, ESMA/2016/1140.