

Mr Valdis Dombrovskis
Executive Vice-President for an
Economy that Works for People
European Commission
Rue de la Loi 200
B-1049 Brussels
Belgium

Ref: Review of the Alternative Investment Fund Managers Directive

Dear Mr. Dombrovskis, *Dear Valdis,*

In light of the impending review of Directive 2011/61/EU, the Alternative Investment Fund Managers Directive (AIFMD), ESMA would like to take this opportunity with this letter to highlight some areas of AIFMD where improvements could be made.

As you know, the AIFMD has provided a solid framework for alternative investment funds in Europe. It gave a basis for consistent supervision of alternative managers in the EU, thus reassuring investors in Europe and the world that alternative investment funds are grounded in a credible regulatory framework.

However, as the years have passed since 2011 when the original Directive was published, ESMA has had significant exchanges with National Competent Authorities on their practical experience in supervising firms in accordance with the rules. In doing so, we have noticed many areas of the framework that could be improved during your current review. In addition, the recent COVID-19 related stresses highlighted some areas that could be further improved.

This letter shares ESMA's views in the Annexes below on the key topics of the AIFMD review where we see the need to consider amendments to the framework. In many cases, these suggestions also require consideration of changes to the UCITS framework.

Annex I sets out the key issues in the legislative framework where ESMA recommends revisions and Annex II sets out more specifically the key reporting issues where improvements could be made.



I hope that these considerations are useful to the European Commission in its review. In case you have any questions, please do not hesitate to contact me or Evert van Walsum, Head of Investors and Issuers Department (evert.vanwalsum@esma.europa.eu).

Yours sincerely,

SIGNED

Steven Maijor

ANNEX I – ESMA’s proposed changes to AIFMD

1. Harmonisation of AIFMD and UCITS regimes

ESMA believes that the AIFMD review is an occasion to consider greater harmonisation of the UCITS and AIFMD frameworks.

In some cases, the newer AIFMD (Level 1 and/or Level 2) provisions are more granular or specific compared to UCITS requirements, although there might not be any objective justification for such differences. By way of example, there are different levels of granularity with respect to risk management and liquidity management requirements. AIFMD Level 2 sets out detailed requirements with respect to risk management (Articles 38-45) and liquidity management (Articles 46-49). While this is somewhat understandable as UCITS are subject to more detailed product requirements, it is nevertheless not ideal, taking into account that UCITS may also face liquidity issues despite being invested in transferable securities or money market instruments. The European Commission should consider aligning the frameworks 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.

As an additional example, while the Level 1 provisions on delegation are rather similar (although not identical) in the UCITS Directive and AIFMD, there are no granular Level 2 provisions in the UCITS framework, while this is the case in the AIFMD framework (Section 8 of Chapter III of the Commission Delegated Regulation (EU) 231/2013).

Moreover, the fact that the relevant EU rules are spread across numerous (interlinked) Level 1 and Level 2 Directives and Regulations may add unnecessary complexity for market participants and supervisors.

2. Harmonised reporting for UCITS

The need for harmonisation is particularly relevant in the field of reporting. The ESRB recommendations on liquidity and leverage risks in investment funds¹ covers this topic in its Recommendation D on UCITS reporting. ESRB recommends that the Commission initiate legislation to introduce a harmonised reporting regime for UCITS management companies. ESRB specifies that the Commission’s proposed changes to the relevant EU legislation should include reporting obligations that cover both manager and fund-specific data while also reflecting the specificities of UCITS.

After improvements to AIFMD Annex IV reporting have been made, harmonised UCITS reporting should generally be aligned with those requirements while allowing for tailoring to the characteristics of UCITS funds. To the extent possible, the reporting should try to exploit the synergies with existing surveys both at EU and national level and avoid duplications or unnecessary burdens for the supervised entities. The reported data should allow for sufficient monitoring of potential vulnerabilities that may contribute to systemic risk. Some lessons can

¹ The recommendations, with more details on the envisaged proposals, are available at: https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation180214_ESRB_2017_6.en.pdf

also be learned from the Money Market Fund (MMF) reporting regime that has recently been established, which allows the same information to be used for both supervisory purposes and for systemic risk monitoring.

Given the value of EU-level information on UCITS funds, ESMA agrees with the ESRB Recommendation and would want to underline its importance. For example, the May 2020 ESRB Recommendation on liquidity risk in investment funds² requires ESMA to coordinate a supervisory engagement exercise with investment funds to assess their preparedness in case of a new liquidity stress episode. This assessment should be based on the analysis of how funds have reacted since the onset of the COVID-19 pandemic and their current situation, and on an estimation of their resilience to a future shock.

Both ESMA and NCAs are using AIFMD reporting data to implement this recommendation, by (i) identifying the AIFs with large exposures to corporate debt and real estate markets, and (ii) analysing the outflows, performances and use of liquidity management tools for instance, and (iii) building a comprehensive assessment framework. ESMA does not have access to UCITS data to apply the same approach to UCITS. Moreover, there is an important heterogeneity among NCAs regarding the access to data on UCITS. This situation is sub-optimal, creates the need for extensive ad-hoc data requests and slows down the time available for analysis.

3. Scope of additional MiFID services and application of rules

Previous work at the level of ESMA indicated the need for further legislative clarifications on the scope of permissible business activities listed in Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive³ in conjunction with Annex I of the AIFMD and Annex II of the UCITS Directive. In particular, NCAs expressed divergent views on whether AIFMs (and UCITS management companies) could be permitted to perform business activities other than those explicitly listed in the aforementioned provisions. As a result of these interpretational issues, the list of permissible business activities of AIFMs (and UCITS management companies) in some Member States is broader than in others.

Moreover, ESMA sees merit in providing legislative clarifications on the application of rules when providing services pursuant to Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive. While Article 6(6) of the AIFMD and Article 6(4) of the UCITS Directive include cross-references to certain MiFID rules, legal uncertainties remain as to the precise application of the MiFID and/or AIFMD/UCITS rules in some cases. By way of example, questions arose whether and to which extent MiFID and/or AIFMD/UCITS rules could be applied to discretionary portfolio management or investment advice on assets that do not qualify as 'financial instruments' pursuant to Section C of Annex I of MiFID such as real estate, taking into account that the relevant MiFID provisions do not apply to them.

² The ESRB Recommendation on liquidity risk in investment funds is available at: https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation200514_ESRB_on_liquidity_risks_in_investment_funds-4a3972a25d.en.pdf

³ Which are not identical since Article 6(3) of the UCITS does not include the reception and transmission of orders, whereas this is included in Article 6(4)(b)(iii) of the AIFMD. This may be another example for the need to harmonise the AIFMD and UCITS regimes.

Similarly, different views were expressed on which rules apply in cases where investment management functions for an AIF/UCITS are performed on a delegation basis. While some NCAs considered these cases as discretionary portfolio management and therefore took the view that MiFID rules would need to be applied, other NCAs argued that the management of AIFs/UCITS on a delegation basis would not be discretionary portfolio management and the relevant AIFM or UCITS management company performing functions on a delegation basis would be subject to AIFMD/UCITS rules. This issue is covered further in the delegation section below.

ESMA also sees merit in providing for a greater regulatory consistency and level playing field between AIFMD/UCITS and MiFID in order to ensure that entities providing similar types of services, such as marketing, are subject to similar regulatory standards. To this end, there would be merit in clarifying the AIFMD, UCITS and MiFID frameworks to ensure that AIFs/UCITS and their managers and MiFID investment firms always remain subject to the same regulatory standards, while providing the same type of services.

Finally, ESMA has noticed that the references in Article 6(6) of AIFMD and 6(4) of the UCITS Directive are references to MiFID I, which – although should be read according to the MiFID II correlation table – have not been updated to reflect the requirements introduced with MiFID II. One example of this is that the transaction reporting obligation from Article 26 of MiFIR is not included in the list of MiFID provisions which also apply to AIFMs/UCITS management companies. This means that AIFMs/UCITS management companies providing MiFID services are not subject to the requirement to report transactions in accordance with Article 26 of MiFIR.

4. Delegation and substance

Beyond the delegation-related aspects mentioned above. ESMA sees merit in providing additional legislative clarifications in the AIFMD and UCITS frameworks with respect to delegation and substance requirements. Such clarifications could be provided in line with the delegation and substance-related guidance provided in the ESMA opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union (ESMA34-45-344)⁴.

Extent of delegation

In many cases, AIFMs and UCITS management companies delegate to a large extent the collective portfolio management functions listed in Annex I of the AIFMD and Annex II of the UCITS Directive to third parties and only perform some control functions internally (notably risk management functions). In particular, portfolio management functions are often largely or even entirely delegated to third parties within or outside of the group of the AIFM or UCITS management company. Moreover, in light of the withdrawal of the UK from the EU, delegation of portfolio management functions to non-EU entities is likely going to further increase.

Such extensive delegation arrangements may result in a situation where the majority of human and technical resources (e.g. IT systems) needed for the day-to-day operations are maintained

⁴ The ESMA opinion is available at: <https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-management-in-context-united>

by several third parties or even a single third party, potentially outside of the EU. In these cases, the majority of operational staff performing portfolio/risk management, administration and other functions work on a delegation basis for the relevant funds and are therefore not directly employed by the authorised AIFM or UCITS management company. As a consequence of this, and as an important indicator for extensive delegation arrangements, a large amount of the management fees generated by the authorised AIFM or UCITS management company are paid to delegates. While such extensive use of delegation arrangements may increase efficiencies and ensure access to external expertise taking into account the global nature of financial markets, they may also increase operational and supervisory risks and raise questions as to whether those AIFs and UCITS can still be effectively managed by the licensed AIFM or UCITS management companies.

Against this background, further legal clarifications on the maximum extent of delegation would be helpful to ensure supervisory convergence and ensure authorised AIFMs and UCITS management companies maintain sufficient substance in the EU. In particular, ESMA sees merit in reviewing Article 82 of the Commission Delegated Regulation (EU) No 231/2013 which may benefit from a clearer legal drafting. In this context, the Commission may in particular wish to reconsider and/or complement the qualitative criteria set in Article 82(1)(d) with clear quantitative criteria or provide a list of core or critical functions that must always be performed internally and may not be delegated to third parties. Such considerations should be matched also in the UCITS Directive.

Applicable regime in case of delegation and regulatory arbitrage

In many cases, the delegates are subject to different regulatory regimes which adds further regulatory complexity and provides for additional supervisory challenges for NCAs, in particular where the delegate is established in another Member State or outside of the EU. Depending on the regulatory license of the delegate, questions may also arise about regulatory level playing field and possible circumvention of AIFMD/UCITS regulatory standards. In the case of delegation to another regulated EU entity, this is often a question of regulatory consistency between the various EU regulatory regimes (for example, but not limited to, the issues on the lack of harmonisation between the AIFMD, UCITS and MiFID rules described above). In the case of delegation to non-EU delegates, the regulatory arbitrage and investor protection concerns may be further increased since the non-EU delegate will not be directly subject to the AIFMD or UCITS frameworks. Consequently, AIFs and UCITS can be largely managed on a day-to-day basis by third parties (within or outside of the EU) that are not directly subject to the AIFMD or UCITS Directive. To avoid regulatory arbitrage and protect EU investors, legislative amendments should ensure that the management of AIFs and UCITS is subject to the regulatory standards set out in the AIFMD and UCITS frameworks, irrespective of the regulatory license or location of the delegate.

Use of seconded staff

Furthermore, ESMA has also observed an increasing use of secondment arrangements where staff from professional services firms/consultancies or group entities are seconded to the AIFM or UCITS management company on a temporary basis. In some of those cases, the seconded staff was not operating in the Member State of establishment of the authorised AIFM or UCITS management company, but in another Member State or even outside of the EU (e.g. staff of

other group entities being seconded to the authorised entity in the EU but continuing to work from their usual offices outside of the EU on a secondment rather than delegation basis). This raises questions whether those secondment arrangements are in line with the substance and delegation rules set out in the AIFMD and UCITS frameworks. Further legislative clarifications could be helpful to address these questions.

List of collective portfolio management functions and distinction from ‘supporting tasks’

Group entities within or outside of the EU often provide ‘supporting tasks’ to the authorised AIFM or UCITS management company. In the absence of clear legal definitions or an exhaustive list of collective portfolio management functions set out in Annex I of the AIFMD and Annex II of the UCITS Directive, it is often difficult for NCAs to assess whether the ‘supporting tasks’ provided by the group entities are subject to the delegation rules set out in the AIFMD and UCITS Directive or not. By way of example, previous discussions at the level of ESMA indicated that NCAs had divergent interpretations on the question of whether in cases where another entity in a third country performed legal or compliance tasks, this should be viewed as a delegation of the legal or compliance functions listed in Annex I of the AIFMD and Annex II of the UCITS Directive. Similar questions arose in cases where other entities (often outside of the EU) performed portfolio or risk management-related tasks such as investment research activities or (quantitative) risk data analyses or calculations. In the absence of legal clarifications on the scope of the Annex I and Annex II functions, NCAs expressed divergent views on whether those activities qualify as mere ‘supporting tasks’ or rather as collective portfolio management functions subject to the delegation regimes set out in the AIFMD and UCITS frameworks.

While certain recitals and general provisions laid down in the Commission Delegated Regulation (EU) No 231/2013 may help to address some of the issues above, more specific and granular requirements would be desirable in order to ensure legal certainty and supervisory convergence.⁵ In this context, ESMA sees merit in implementing legislative clarifications in line with the interpretation supported by ESMA in Section VIII of its Q&As on the application of the AIFMD (ESMA34-32-352)⁶. This would particularly aim to eliminate any residual legal uncertainties as to responsibilities of AIFMs for ensuring that the collective portfolio management functions set out in Annex I of the AIFMD are performed in compliance with the AIFMD rules.

White-label service providers

Finally, more specific requirements on white-label service providers⁷ would be advisable. These types of fund managers exist since many years in several Member States, whereas NCAs in other Member States have expressed doubts as to whether those business models would be in line with the AIFMD and UCITS regimes. Should such business models be

⁵ And consistent Level 2 delegation requirements should be introduced in the UCITS framework, where currently no such detailed Level 2 provisions exist.

⁶ The ESMA Q&As are available at: https://www.esma.europa.eu/sites/default/files/library/esma34-32-352_qa_aifmd.pdf

⁷ Meaning fund managers that provide a platform to business partners by setting up funds at the initiative of the latter and typically delegating investment management functions to those initiators/business partners or appointing them as investment advisers or informally following their guidance/instructions. ESMA addressed risks stemming from white-label service providers in the context of Brexit-related relocations in paragraph 36 of the ESMA opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union (ESMA34-45-344).

permissible in the view of the European Commission, more specific regulatory provisions would be advisable, in particular to address the distinct and significant conflicts of interest and investor protection risks faced in these cases. This is mainly because the initiator/business partner of white-label (or third-party) funds is also the client of the authorised AIFM or UCITS management company and may therefore decide to replace the authorised AIFM or UCITS manager with another white-label service provider. In many cases, the relevant funds even carry the name of the initiator/business partner⁸. Therefore, the initiator/business partner may effectively be able to exercise significant influence over the authorised AIFM or UCITS manager. Where the initiator/business partner performs portfolio management on a delegation basis or is appointed as investment adviser, the authorised AIFM or UCITS management company will face significant conflicts of interest since controlling and challenging the delegate/investment adviser in the best interest of investors may come at the risk of losing a client/business partner and therefore losing its own revenue/management fees. Changes should also be reflected in the UCITS Directive.

5. Availability of additional liquidity management tools

ESMA believes that the availability of additional liquidity management tools (LMT) should be consistent throughout all EU jurisdictions. This is reflected in ESRB's Recommendation A on liquidity management tools from the ESRB 2017 Recommendation on liquidity and leverage risks in investment funds.⁹ The experience of market dislocation during the on-going COVID-19 crisis also demonstrates the need for all LMT to be available in all jurisdictions in a consistent manner. A common Union legal framework governing the liquidity management tools would support this. Furthermore, the ESRB's public statement on the use of liquidity management tools by investment funds with exposures to less liquid assets issued on 13 May 2020 noted that recent market developments highlight the need to make progress in implementing the 2017 ESRB Recommendation and to introduce adequate legal backing for the use of such instruments.¹⁰

In ESMA's view, the Commission should take the opportunity of this AIFMD review to include availability of all LMTs outlined in ESRB recommendation A. In addition, the availability of tools should also be included in the UCITS Directive (noting that some of the tools will not be suitable or necessary for all types of funds, e.g. side pockets).

The COVID-19 situation reinforces the relevance of the ESRB Recommendations. For example, ESRB Recommendation A(2) recommends enhanced provisions to AIFMD (and UCITS) clarifying the roles of National Competent Authorities (NCAs) when using their powers to suspend redemptions in situations where there are cross-border financial stability implications. If an investment fund is established in one Member State but the AIFM or the UCITS management company is based in another, it might not be clear which NCA is

⁸ E.g. the Woodford case, see <https://www.fca.org.uk/publication/correspondence/lf-woodford-equity-income-fund-letter-tsc.pdf>, <https://www.fca.org.uk/publication/correspondence/asset-management-portfolio-letter.pdf> (page 3) and <https://www.fnondon.com/articles/fca-will-examine-fund-governance-following-woodford-case-warns-schroders-ceo-20190801>.

⁹ The ESRB Recommendation on liquidity and leverage risks in investment funds is available at:

https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation180214_ESRB_2017_6.en.pdf

¹⁰ The ESRB public statement is available at:

https://www.esrb.europa.eu/home/coronavirus/shared/pdf/esrb.publicstatement200514_on_the_use_of_liquidity_management_tools_by_investment_funds_with_exposures_to_less_liquid_assets.en.pdf.

responsible for supervising the suspension of redemptions and subscriptions or the circumstances justifying an authority intervening with suspension powers.

In addition, ESMA believes there is merit in ESRB Recommendation A(3), which proposes that the legislation set out more specific provisions on ESMA's facilitation, advisory and coordination role in relation to the suspension of redemptions and subscriptions, in particular in situations where there are cross-border financial stability implications.

6. Leverage

AIFMD has two measures of leverage calculation, the gross notional exposure (GNE) method and the commitment method. Both are used for reporting purposes. IOSCO issued in December 2019 its recommendations for a framework assessing leverage in investment funds.¹¹ IOSCO recommends a two-step approach for this framework. Step 1 uses measures of leverage as baseline analytical tools to identify funds that may pose a risk to financial stability. Step 2 entails a risk-based analysis of the subset of funds identified in Step 1.

The goal of Step 1 is to provide regulators with a means of efficiently identifying those funds that are more likely to pose risks to the financial system using at least one notional exposure metric of the metrics outlined by IOSCO in its report:

- (i) GNE without adjustments reported broken down by asset class, long and short exposures; and/or
- (ii) adjusted GNE reported broken down by asset class, long and short exposures.

Moreover, in the process of refining its Step 1 analysis, a regulator may also complement GNE or adjusted GNE metrics with netting and hedging assumptions as relevant (such as the commitment method). Additional data points may also be used as a regulator sees fit.

ESMA believes the IOSCO recommendations give rise to a need to amend the current reporting of the gross method calculation in Article 7 of the Commission Delegated Regulation (EU) No 231/2013, to ensure alignment with the IOSCO framework.

In addition, there is merit in considering amending the commitment amount calculation by adjusting the notional amounts of interest rate derivatives contracts by the duration of the ten-year bond equivalent.¹² This adjustment allows comparability among contracts with different underlying duration, which makes aggregation and comparison possible for systemic risk monitoring purposes. This would be useful also in the context of any harmonised UCITS reporting, as further explored above in Section 2.

7. AIFMD reporting regime and data use

¹¹ The IOSCO Recommendations for a Framework Assessing Leverage in Investment Funds is available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD645.pdf>

¹² As described in the IOSCO recommendations on page 8

ESMA has conducted a separate ad-hoc analysis of the issues it sees merit in addressing regarding the AIFMD reporting regime and data use. This analysis can be read in full in [Annex II](#) below.

8. Harmonisation of supervision of cross-border entities

Experience with the AIFMD (and UCITS) framework shows that there is still a lack of clarity in what the precise responsibilities of home and host supervisors are in some cross-border marketing, management and delegation cases. Clarification of the supervisory responsibilities would reduce uncertainty regarding cross-border activities within the internal market and benefit the Capital Markets Union (CMU).

This is because AIFMs often use branches and/or delegate a variety of functions to multiple third parties across different Member States (and non-EU jurisdictions), which gives added impetus to ensuring clear supervisory responsibilities and effective exchange of information among all relevant NCAs.

Some further legislative clarifications could therefore be provided regarding the supervision of cross-border activities of UCITS and AIFs, (including MMFs, EuVECAs, EuSEFs and ELTIFs), their managers (including cases where they use branches in other Member States or outside of the EU) and delegates.

For example, in the case of AIF suspensions, there are general provisions in the AIFMD in relation to exchange of information. However, it would be useful to further clarify the supervisory responsibilities and obligations to share information with other NCAs and ESMA.

ESMA also sees the need for the Commission to provide further clarity on the depth of the analysis to be done by the host NCA when AIFs are marketed on a cross-border basis under Article 32 AIFMD. While the home NCA normally makes an assessment of all the relevant fund documents in the authorisation stage, the tasks attributed to the host NCAs – currently specified in Article 32(5) – could be better specified, including the reference to the completeness of the documents attached in the notification and to the supervision on marketing communications.

There is the need to further clarify the roles and responsibilities of home and host NCAs where AIFs are managed on a cross-border basis under Article 33 AIFMD.

The supervision of branches is another area where ESMA sees merit in further harmonisation. When an AIFM establishes a branch in order to offer products in a host jurisdiction, it is not clear what the roles of that AIFM's home and host NCAs are in some cases. It is also not clear what the procedure is for home and host NCAs when an AIFM wants to close a branch, nor is there a register of branches.

9. Semi-professional investors

Currently there is no definition of “semi-professional” investor in AIFMD. There are, however, slightly different approaches used in the EuVECA, EuSEF and ELTIF regulations.

ESMA has already called for greater convergence in the definition of “professional investor” in its 2015 opinion on the functioning of the AIFMD EU passport and of the National Private Placement Regimes (NPPRs).¹³ ESMA identified a wide variety of definitions across the EU on what constitutes a “professional investor”, and a wide variety of treatments of the status of “semi-professional” investors under NPPRs.

ESMA sees merit to clarify the definition of “professional investors” under AIFMD, and is of the view that any possible introduction of any new categories of investors under the AIFMD (such as “semi-professional” investors) should be accompanied by appropriate investor protection rules and that passporting activities should be allowed only in relation to the marketing to professional investors.

10. Loan origination in AIFMD

ESMA believes that there should be a specific framework for loan origination within the AIFMD. It would be particularly helpful for the EU effort to promote a capital markets union (CMU). ESMA already issued an opinion on key principles for a European framework on loan origination by funds¹⁴ in April 2016.

The ESMA opinion contains recommendations on authorisation for loan originating funds, types of funds (closed-ended vehicles), admitted investors (complying with ELTIF rules), and organisational and prudential requirements for loan-originating funds (e.g. leverage, liquidity, stress testing, reporting, diversification, etc.).

Furthermore, should a need for loan funds to play a role in the post-COVID-19 economic recovery be identified, the recommendations in ESMA’s opinion could be taken as a basis to ensure a sustainable role for loan funds, especially that loan funds can only be closed-ended and can only be marketed to professional and semi-professional investors.

ESMA notes that the ELTIF review is also an opportunity to consider the product characteristics of loan origination funds.

11. Application of depositary rules to CSDs

In 2017 ESMA issued an Article 34 Opinion¹⁵ requesting changes to the depositary delegation rules in AIFMD with regard to central securities depositories (CSDs). ESMA recommends that AIFMD be clarified to allow depositaries not to apply the delegation rules to CSDs in their capacity as Issuer CSDs. Depositaries should be required to apply the delegation rules to CSDs in their capacity as Investor CSDs. Furthermore, this change should also be made in the UCITS Directive when it is reviewed.

12. Proportionality principle for remuneration requirements

¹³ See paragraph 8 of the opinion at https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-1235_opinion_to_ep-council-com_on_aifmd_passport_for_publication.pdf

¹⁴ See the opinion issued on 11 April 2016 (ESMA/2016/596), available at: https://www.esma.europa.eu/sites/default/files/library/2016-596_opinion_on_loan_origination.pdf.

¹⁵ See the opinion which is available at: https://www.esma.europa.eu/sites/default/files/library/esma34-45-277_opinion_34_on_asset_segregation_and_custody_services.pdf

ESMA wrote to the Commission in 2016¹⁶ requesting clarification of the application of the proportionality principle in both AIFMD and the UCITS Directive. This clarification would be to make clear that the proportionality principle applies to the full set of remuneration requirements in letters (a) to (r) of paragraph 1 of Annex II of the AIFMD (and Article 14b(1)(a) to (r) of the UCITS Directive). Failure to apply the proportionality principle in all circumstances could lead to a disproportionate application of the quantitative variable remuneration thresholds and payout structures.

13. Sub-thresholds AIFMs

AIFMD exempts small AIFMs (AuM of €100mn including assets acquired through use of leverage or €500mn in case of management of only unleveraged AIFs that have no redemption rights exercisable during a period of 5 years) from most of the Directive but leaves discretion to Member States on what to require from such sub-threshold AIFMs. Some NCAs would prefer to have an explicit EU legal basis for Member States to introduce additional national requirements with a view to supervising sub-threshold AIFMs sufficiently.

In light of this preference by some NCAs, ESMA recommends that the Commission should consider further clarifying the power of Member States to apply additional requirements under their national law to sub-threshold AIFMs.

14. External valuer liability

AIFMD allows use of external valuation services. The AIFMD provisions state that “*the external valuer shall be liable to the AIFM for any losses suffered by the AIFM as a result of the external valuer’s negligence or intentional failure to perform its tasks*”.

In certain jurisdictions the reference to negligence is interpreted as covering not only ‘gross negligence’ but also ‘simple negligence’, acting as a disincentive for external valuers due to liability concerns.

Based on feedback gathered over the recent years, it appears that external valuers may be unwilling to accept valuation mandates from AIFMs on the basis that their liability would be unduly extended by the negligence provisions. Similarly, it appears that the liability cannot be insured (or could only be insured at prohibitive cost) as – at least in certain jurisdictions – the reference to negligence is interpreted as covering not only ‘gross negligence’ (as in Anglo-Saxon legal systems), but also ‘simple negligence’.

ESMA believes that the definition of “negligence” could be limited to “gross negligence” in the legislation. ESMA believes it is preferable to address this point directly in the legislation rather than in ESMA guidance, since guidance provided by ESMA might potentially have unhelpful spill over effects on other provisions of the AIFMD, such as the rules on the cover for professional liability risk or on the depositary liability reference to ‘negligence’.

¹⁶ See the letter which is available at: https://www.esma.europa.eu/sites/default/files/library/2016-412_letter_to_european_commission_european_council_and_european_parliament_on_the_proportionality_principle_and_remuneration_rules_in_the_financial_sector.pdf

15. Amendments to definitions

Notwithstanding ESMA's guidelines on key concepts of the AIFMD (ESMA/2013/611)¹⁷, some residual uncertainties remain in the AIFMD definitions that could be addressed to improve the clarity around the scope of AIFMD.

ESMA believes that it is difficult to explain structural and economic differences and to distinguish on a legally sound basis between vehicles that fall under AIFMD and those that do not. Moreover, making legal changes in the Level 1 framework confers a benefit for the day to day supervisory practice of the NCAs as well as an advantage in possible appeal proceedings.

The current definitions are too vague and not specific enough and thus need to be specified more clearly, otherwise different national implementations will continue to lead to uncertainty and fragmentation across the Single Market.

Specifically, we see merit in further defining 'AIFs' consistent with the ESMA guidelines on key concepts of the AIFMD which could be done by implementing a definition of (1) general commercial or industrial purpose in connection with real estate projects, (2) pooled return in general and (3) investment policy. We also see merit in specifying the distinction between holdings and private equity funds and clarifying the definition of a joint venture.

Furthermore, we would like to point out that the issuance of certificates, and crypto assets might under some interpretations fall within the scope of the AIFMD and therefore welcome clear rules in order to achieve a harmonised Union approach. With regard to certificates, examples were reported to ESMA where such a product makes use of the exemption for securitisation special purpose entities (AIFMD Article 2(3)(g)) while still acting in a similar way to collective investment vehicles that would otherwise fall under AIFMD.

16. Clear definition and rules for reverse solicitation

There is merit in considering achieving greater clarity on the definition of reverse solicitation. ESMA acknowledges that the AIFMD review may not be the most appropriate context for providing clarity on the definition and rules for this concept in light of the evaluation clause under the Regulation on facilitating cross-border distribution of collective investment undertakings¹⁸. However, ESMA would like to seize the opportunity of the present letter to underline the importance of clarifying the notion of reverse solicitation mentioned in Recital 70 of the AIFMD, which is currently subject to divergent practices and interpretation at national level, to protect investors.

17. Convergence in treatment of significant influence

¹⁷ The guidelines are available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-611_guidelines_on_key_concepts_of_the_aifmd_-_en.pdf

¹⁸ Article 18 of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 states the following: "By 2 August 2021 the Commission shall, on the basis of a consultation of competent authorities, ESMA and other relevant stakeholders, submit a report to the European Parliament and to the Council on reverse solicitation and demand on the own initiative of an investor, specifying the extent of that form of subscription to funds, its geographical distribution, including in third countries, and its impact on the passporting regime".

ESMA is of the view that further consideration should be given to the possible significant influence fund managers may exercise over the management of an issuing body.

While the AIFMD does not provide for specific requirements on this issue, Article 56(1) of the UCITS Directive aims at ensuring that UCITS managers may not exercise significant influence over the management of an issuing body. In this context, ESMA has found divergent interpretation of Article 56(1) of the UCITS Directive given the fact that the wording of Article 56(1) of the UCITS Directive is limited to investment companies and management companies acting in connection with all of the *common funds* managed by them. ESMA sees merit in clarifying that the calculation of the limit laid down in Article 56(1) is not limited to common funds or UCITS alone, but also covers, for example, (1) voting rights stemming from AIFs managed by the same fund manager with similar strategies in relation to the exercise of significant influence, i.e. excluding for example private equity funds (in case of dual authorisation under the UCITS Directive and AIFMD), (2) portfolios managed on a discretionary basis by the manager and, (3) where permitted, investments made by the fund manager on its own account.

Moreover, further EU harmonisation on what constitutes “significant influence” (e.g. expressed in terms of harmonised EU thresholds) could equally help to ensure supervisory convergence.

Should the European Commission provide additional legislative clarifications in the AIFMD, ESMA would see merit in including consistent rules in the UCITS Directive.

18. Increasing digitalisation in AIFMD

ESMA believes that the AIFMD review is an opportunity for the Commission to allow more digital communication instead of paper form. For instance, Article 8(5) AIFMD on applications for authorisation states that the home NCA of the AIFM “shall inform the applicant in writing”. This particular provision could be amended in a way to make sure that it would be sufficient if the NCA informs the applicant in an electronic format.

19. Depositary passport

ESMA notes that there has long been a discussion in the EU on the merit of a depositary passport, since the UCITS II debate in 1993 at least. While not recommending the creation of such a passport in AIFMD and the UCITS Directive, ESMA believes the Commission may study the benefits and risks further in the context of the AIFMD Review.

ANNEX II: ESMA's proposed changes to AIFMD regarding the reporting regime and data use

1 Obligation to acquire an LEI for the manager and its funds

Identified article(s)

- Article 3: Exemptions
- Article 24: Reporting obligations to competent authorities

Problem description:

The provisions of the AIFMD, do not, at least directly, impose an obligation upon AIFMs and their AIFs to acquire a Legal Entity Identifier (LEI, ISO 17442). Therefore, reporting is foreseen only where available in the ESMA Guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD¹⁹, which raises enforcement issues. This results in the availability of LEI in the Register for only 16% of the AIF managers, despite most of these entities likely having the LEI under other EU regulations (EMIR, MiFID II/ MiFIR, SFTR).

As stated in the Commission's Staff Working Document Fitness Check of EU Supervisory Reporting Requirements (Fitness check)²⁰ (page 64) – the lack of mandatory reporting of the LEI is clearly a data gap in the reporting regime and prevents the use of international identifiers to foster harmonization of the relevant data (page 108) and to allow the combination and cross-analysis of data under different reporting regimes (page 103). In their reply to the Report on the Operation of the Alternative Investment Fund Managers Directive (AIFMD) FISMA/2016/105(02)/C by KPMG ("KPMG report")²¹, an NCA also recommended that reporting of the LEI should be mandatory also for funds-of-funds and sub-funds (page 84).

ESMA's reply to the consultation paper on the Fitness Check states that "*moreover, LEIs would be essential to monitor AIFs managed by non-European AIFMs operating under the National Private Placement Regime (NPPR). Non-European AIFMs are mandated to report to NCAs of the jurisdictions in which they are marketing their products. The absence of a unique and universal identifier impedes verifying the consistency and/or duplication of reported information in the ESMA central database, impairing supervision of potentially systemically relevant entities. Accurate treatment of the information reported by entities operating under NPPR requires LEIs*".²²

¹⁹ The ESMA Guidelines are available at: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-869.pdf>

²⁰ The Staff Working Document on the Fitness Check of EU Supervisory Reporting Requirements can be found at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191107-fitness-check-supervisory-reporting-staff-working-paper_en.pdf

²¹ The KPMG report can be found at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190110-aifmd-operation-report_en.pdf

²² ESMA's reply to the consultation on the Fitness check regarding AIFMD (https://www.esma.europa.eu/sites/default/files/library/2017-supervisory-reporting-requirements-consultation-document_en.pdf) and the Annex to that reply (https://www.esma.europa.eu/sites/default/files/library/esma70-145-466_2017-supervisory-reporting-requirements-consultation-docu_.pdf).

Proposed solution:

ESMA recommends explicitly requiring all AIFMs to acquire and report an LEI for themselves and their AIFs. This should apply to all types of AIFMs and their AIFs. This change would enhance the effectiveness and efficiency of the reporting regime.

Given the prevalence of LEI in other reporting regimes (EMIR, SFTR, MiFIR), it should allow a clear identification of entities, further reduce the cost of compliance with the reporting requirements as well as to reap the benefits from digitalisation (e.g. automatic processing; interoperability with other regimes). Furthermore, this would also improve the quality of the reported data (e.g. detecting inconsistencies) and improve the information exchange between the supervisory authorities.

To enhance transparency for investors, market participants and financial supervisors, LEIs should be made publicly available for both AIFMs and AIFs in the ESMA register foreseen in Article 7(5) of the AIFMD, whose scope should be enlarged as discussed in the section 0.

In order to fully achieve the scope of the proposed changes, further amendments at Level 2 will be needed in addition to the Level 1 changes.

2 Detailed information on the composition of assets and liabilities of the fund

Identified article(s)

- Articles 3: Exemptions
- Article 24: Reporting obligations to competent authorities

Problem description:

The Directive limits the details to be reported on assets held by the AIFs establishing that it refers to the main instruments (Article 24(1)), or main categories of assets (Article 24(2)(d)) or in the case of liabilities, the five main sources of borrowed cash and securities.

The lack of details regarding asset and liability composition limits the usability of the data to monitor “how the activities of AIFMs may also serve to spread or amplify risks through the financial system” (Recital 2 of the Directive). Furthermore, the lack of details also reduces the capacity of supervisors to execute other activities as monitoring the asset valuation by AIFMs and the combination and cross-analysis of data under different reporting regimes (page 103 of the Fitness Check) useful for market abuse surveillance and data quality analyses.

The current reporting logic also imposes on the AIFMs some reporting costs as:

- It requires additional transformations on their internal data accordingly to AIFMD-specific taxonomies. This is more costly than the direct provision of lightly transformed internal data, which the AIFMs need to maintain for activities as valuation (e.g. ISIN-detail data).

- AIFMs are also subject to ECB statistics²³ on funds requesting ISIN-detail data on the held securities and sectorial breakdowns in the liabilities.
- Some AIFMs will report under MMFR²⁴ ISIN-detail data.
- The aggregations prescribed in AIFMD do not rely on international standards (e.g. CFI code, LEI) and is not consistent with other reporting regimes relevant for AIFMs (e.g. MiFIR, EMIR or SFTR). This unique taxonomy under AIFMD imposes unnecessary burdens on the reporting entity and limits the combination and cross-analysis of data under different reporting regimes. Hence, AIFMD needs to be harmonised with the reporting obligations under EMIR, SII²⁵, CRR and other EU requirements as well as at international level.

Proposed solution:

ESMA recommends changing Article 24(2) of the Directive to support the request of granular information in the subsequent delegated act (see section 8). The objective would be to establish a minimum content that provides relevant information to analyse systemic risks.

ESMA considers the information to be reported shall follow the following principles:

1. **Completeness regarding assets and liabilities:** The information reported on AIFs should be comprehensive regarding assets and liabilities to allow comparison with the aggregated figures on AuM and NAV. This data is already provided for other institutions so it should not be too burdensome to report them to ESMA as well. Hence, coordination is of utmost importance in order to avoid high reporting costs and duplication for all sides.
2. **Detailed information on counterparties and issuers (i.e. LEI of the counterparty / issuer):** To monitor how the activities of AIFMs may also serve to spread or amplify risks through the financial system, the detail of the interaction with other entities should be provided. This detailed information should include at least those entities in the FSB “Global Systemically Important Financial Institutions ([G-SIFIs](#))”, the information should be relatively detailed (e.g. LEI of the counterparty / issuer).
3. **Reduced transformation requirements to AIFMs:** To reduce reporting costs and quality issues, the data should be, when possible, a direct extraction or a straightforward transformation of the internal data that AIFMs should maintain for their regular operations.
4. **International standards:** Furthermore, the reported information should be based on strong international standards or derived computations that can be computed directly from them (e.g. LEI, ISIN, UPI, CFI code, MIC) and/or looking into the standards used in other relevant reporting regimes (see for example treatment of real estate assets under Securitisation reporting²⁶).
5. **Remove reporting of now duplicative items:** Granular provision of data will allow the removal of other reporting items.

²³ Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1073>

²⁴ Regulation (EU) 2017/1131 on money market funds is available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190110-aifmd-operation-report_en.pdf

²⁵ Solvency Directive, revised

²⁶ See templates for Securitisation which available at: <https://www.esma.europa.eu/policy-activities/securitisation>.

6. Other reporting regimes: The reporting template should consider other reporting regimes to which the AIFMs might be subject (e.g. MiFIR, EMIR, SFTR, ECB statistics on funds) or other reporting regimes that describe similar assets (e.g. Securitisation Regulation) and be consistent with them. Thus, the design of the new template and the definition of the data fields must always be defined in the same way. This shall allow AIFMs to reuse the same internal data to report under different regimes.
7. This standardisation is in line with the Fitness Check in particular (page 127) when requiring greater alignment of reporting frameworks and although is in practice a duplication of reporting content, the reuse of same standards will reduce noteworthy the reporting costs. For supervisors, it should allow a more efficient analysis of financial markets as it allows consistent comparisons and will increase the quality of the reported data. For regulatory activities it should allow references to other legislation, reducing risks for inconsistencies. Importantly, in case of relevant modifications in the reporting template of “other reporting regimes”, the provisions of the reviewed AIFMD should allow to automatically harmonise the AIFMD reporting template to ensure its continuous consistency with those other regimes.
8. Information on the liabilities of the AIFs: The information should cover cash/ deposits/ loan held by the funds and the liabilities of the funds, both given short positions but also including, among others, information on shares/ units/ loans, maturity/ liquidity profiles and special arrangements.
9. Other assets and liabilities: Given the variety of assets and liabilities relevant to AIFs (e.g. real estate investments, insurance contracts), for certain type of assets and liabilities some of the attributes used in the reporting templates under Securitisation Regulation could be used as a model of the content to be provided in the reviewed AIFMD. For other assets, where it is not possible to specify the relevant information or taxonomy in Level 2, a general provision of minimum reported content should be considered.
10. Key information provided by the AIFMs in the Annual Report (Article 22) or disclosed to investors (Article 23) shall be included in the report to the NCA.
11. The information on valuation regarding the reporting on assets described above, shall consider, if feasible, the impact of each item on AuM, NaV and leverage metrics.

ESMA is conscious that the development costs associated to the change in IT systems for reporting will be very relevant for AIFMs, NCAs and ESMA. But it is expected that this will be offset by the enhanced content available to the authorities and the reduced operating costs for the entities reporting the data (given the use of common taxonomies and identifiers, alignment with other reporting regimes and using – where possible – internal data).

The text below contains the elements that ESMA recommends for the review of Article 24(2) but is not meant to be seen as the exact formulation of the relevant provisions. In addition, the article should clearly apply to all funds, including in particular those under the NPPR, and should empower ESMA to draft the technical standards on reporting, as described in section 8.

An AIFM shall, for each of the AIFs it manages, provide the following to the competent authorities of its home Member State:

- (a) the type, characteristics, strategy, dominant influence and the LEI and other identifiers of the AIF and its share classes;*
- (b) information at AIF level at least including total value of assets under management, NAV, level of leverage with supportive details like base currency;*
- (c) information on the assets held by each AIF and its exposures, including:*

- (i) *financial instruments and contracts as securities, derivatives and transactions regulated under SFTR, providing at least on the ISIN, LEI of the issuer or counterparty and the type of asset and contracts.*
- (ii) *deposits and loans granted by the AIF or equivalent assets, providing at least the LEI of the counterparty and maturity.*
- (iii) *other assets not included above, at least the LEI of the counterparty or issuer and other key characteristics.*
- (d) *information on liabilities of the fund, including the country of the counterparty, the sector of the counterparty liabilities. This information shall include individual details for counterparties being EU financial institutions and other counterparties considered a global systematically important financial institution, including at least the LEI of the counterparty.*
- (e) *information on special arrangements regarding liquidity risk of the AIF.*
- (f) *information on the guarantees granted by the AIF.*
- (g) *information on the fund trading activity, asset purchased and sold, redemptions and subscriptions during the period following the structure foreseen in paragraphs d and e.*
- (h) *the current risk profile of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk.*
- (i) *the results of the stress tests performed in accordance with point (b) of Article 15(3) and the second subparagraph of Article 16(1).*
- (j) *information in machine-readable-format provided to investors as established in Article 22 and Article 23.*

In order to fully achieve the scope of the proposed changes, further amendments at Level 2 are needed. In assessing the specific drafting, issues such as proportionality, benefits and administrative burdens, avoidance of double reporting, timeliness of reporting and effectiveness of the regulatory oversight, among others, would need to be taken into account.

3 Definition of leveraged fund

Identified article(s)

- Article 4: Definitions

Problem description:

The text of the Directive contains several references to “leveraged” and “unleveraged” AIFs. The concept of leverage itself is central to the Directive and several provisions in L1, L2 and L3 refer explicitly as applying to leverage and leveraged AIFs. The definition of leverage adopted by the AIFMD is broad.

Two well-known examples of the centrality of concept of leverage and leveraged AIFs are Article 25 of the AIFMD and Article 112 of the Commission Delegated Regulation (EU) 231/2013, which refer respectively to ‘leveraged AIFs’ and to ‘AIFMs managing leveraged AIFs’.

Article 4 lays down the definitions that apply for the purpose of the Directive, including the definition of AIF and leverage. In particular, Article 4 adopts a broad definition of leverage that does not exclude *a priori* any means an AIFM may use to acquire and/or hedge assets:

“Leverage means any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means”.

It must be noted that according to Article 7 an AIFM applying for authorisation should specify its policy as regards the use of leverage. Moreover, the Commission Delegated Regulation (EU) 231/2013 mandates the depositary to monitor the AIF's compliance with investment restrictions and leverage limits.

The reporting content of an AIF is indeed determined by the characteristics of AIFMs and AIFs and the use of leverage. Moreover, Article 24(4) lists the type of information to be reported by substantially leveraged AIFs.

Despite the direct link between the reporting requirements and the definition of leveraged funds, there is a lack of clarity on the latter which creates impediments for competent authorities and reporting entities who have to demonstrate to NCAs that they comply with their leverage policy. Furthermore, the distinction between "leveraged" and "unleveraged" has significant implications for monitoring the build-up of systemic risks.

Proposed solution:

In order to clarify to reporting entities and supervisors the appropriate reporting content, Article 4 AIFMD could clarify the notion of 'leveraged AIF' by simply linking the definition of 'AIF' and 'leverage'. Hence, it is proposed to include in Article 4 that 'leveraged AIF' means an AIF whose exposures are increased by the managing AIFM, whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means.

4 Scope of entities in ESMA register

Identified article(s)

- Article 3: Exemptions
- Article 7: Application for authorisation
- Article 24: Reporting obligations to competent authorities
- Article 37: Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the Union in accordance with Article 39 or 40
- Article 40: Conditions for the marketing in the Union with a passport of non-EU AIFs managed by a non-EU AIFM
- Article 42: Conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM

Problem description:

The scope of AIFMs and their funds that are submitted to ESMA under Article 7(5) does not include sub-threshold AIFMs (Article 3) and those under NPPRs (Article 42) and non-EU AIFs managed by a non-EU AIFM with a passport (Article 40), although all these types of entities should comply with the reporting obligations foreseen in Article 24.

The unavailability of a public Register containing a complete overview results in the following shortcomings:

- Reduced transparency on the status of these entities and their limited geographical scope for their marketing activities;
- Unavailability for market participants to execute their due diligence through machine readable systems by consuming the register, and
- Limited information for financial supervisors to identify relevant counterparties for analysis of AIFMD data and other reporting regimes.

Proposed solution:

Include in the ESMA public register information submitted by NCAs on sub-threshold AIFMs, under NPPR and passported non-EU AIFs managed by non-EU AIFMs.

The enhanced scope and the provision of identifiers such as LEI should allow easy access by investors and market participants to execute due-diligence activities and by financial supervisors to complement other information received through other reporting regimes.

The following costs or risks of increasing the scope of the registers should be considered:

- Changes to the scope of the ESMA register would imply additional information to be submitted regularly by NCAs with associated costs, including modifications of IT systems by both ESMA and NCAs. Regarding the content to be reported, the costs should be relatively minor as this information shall be already available to NCAs.
- Lack of clear identification of the different regimes under which these entities operate (i.e. their geographically limited authorisation to market their products) might confuse the public. To reduce this risk, clear information should be provided and it should be consistent with the foreseen future register of cross-border activities by funds as established in the Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings.

In order to fully achieve the scope of the proposed changes, further amendments at Level 2 are needed.

5 Timeline for the NCAs to update ESMA register

Identified article(s)

- Article 3: Exemptions
- Article 7: Application for authorisation
- Article 24: Reporting obligations to competent authorities
- Article 37: Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the Union in accordance with Article 39 or 40
- Article 40: Conditions for the marketing in the Union with a passport of non-EU AIFs managed by a non-EU AIFM
- Article 42: Conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM

Problem description:

The Directive foresees quarterly updates of the ESMA Register, something that limits the value of the information provided to investors, market participants and financial supervisors, as information on recent authorisations / withdrawals are not available in a timely manner.

Proposed solution:

Amend the Directive, by changing Article 24(3)(b) on the information to be submitted by AIFMs to NCAs and replace the reference of quarterly frequency by monthly frequency in Article 7(5) and 24(3)(b).

The main cost is related to the need to change reporting systems between AIFMs and NCAs to provide this information punctually. From an ESMA perspective, the current system would allow this type of transmission and there would not be additional associated costs.

In order to fully achieve the scope of the proposed changes, further amendments at Level 2 are needed.

6 Reporting in percentages

Identified article(s)

- Article 24(2): Reporting obligations to competent authorities

Problem description:

The use of percentages for reporting to authorities as in Article 24(2) leads to persistent quality issues.

Proposed solution:

Request the provision of monetary values instead of percentages. In case that proposal on the provision of detailed information on assets and liabilities is implemented, as detailed in Section 1.2, the issue should be solved. This reporting of percentages might need to be kept for some fields like the monthly fund performance.

In order to fully achieve the scope of the proposed changes, further amendments at Level 2 are needed.

7 Restrictions in the use and publication of the reported data

Identified article(s)

- Article 47: Powers and competences of ESMA

Problem description:

AIFMD provisions on professional secrecy is far stricter than the relevant provisions in ESMA Regulation or in other sectoral legislation (UCITS). In particular, Article 47 of AIFMD provides that all information exchanged between NCAs and ESMA cannot be disclosed unless i) disclosure is required for legal proceedings or ii) the NCA gives consent for disclosure.

In practice, this introduces legal uncertainties regarding the possibility for ESMA to share any AIFMD data even when the data are anonymised, and individual AIFs cannot be identified. This is an issue in the context of ESMA work with NCAs, as well as with the FSB and IOSCO.

Proposed solution:

Align Article 47 with ESMA Regulation Article 70(2), accepting use, distribution and publication of the data in summary or aggregated form, such that individual financial market participants cannot be identified.

8 Delegated act defining reporting

Identified article(s)

- Article 3: Exemptions
- Article 24: Reporting obligations to competent authorities
- Article 25: Use of information by competent authorities, supervisory cooperation and limits to leverage

Problem description:

The changes in the directive and the foreseen changes in the delegated act will require major adjustments in the Guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD.

The current Directive does not foresee any delegated act regarding the transmission of data from NCAs to ESMA and this is only solved in the delegated act by establishing under article 110.6 that the AIFMs shall report using a pro-forma reporting template.

As described in Fitness Check, “7.2. Lessons learned”, it should be important to consider in the processes of Level 2 and Level 3 regulation the following considerations: i) the input from ESAs in early stages and throughout the process of designing the requirements; ii) the adequate level of technical details in Level 1; iii) the insufficient use of standards, common formats and international identifiers and its consistency with other reporting regimes and iv) that the inconsistent definitions and insufficient standardisation of formats and processes hinder the development and application of new technologies.

In ESMA’s Annex to the reply to the consultation on the Fitness Check, related issues are described such as: i) insufficient timelines for the development/implementation of the new reporting requirements; ii) imprecise/inconsistent empowerments for the development of the implementing measures, in particular regarding the definition of standards and formats to be used for the technical messages across various reporting frameworks; iii) the need for dedicated and appropriate legal instrument for reporting rules and instructions, and in particular the definition of particular values to be reported and that sometimes are provided in Level 2 legislation. Given the changing nature of market practices and the complexity of updating Level 2 legislation, it shall be adequate to complement this information in Level 3 legislation; as well as iv) the unexploited synergies amongst reporting requirement, in particular by using international reporting standards.

Proposed solution:

ESMA recommends including under Article 25 a provision for ESMA to draft the technical standards supporting the reporting by AIFMs that shall consider the principles described above. Article 25 only refers to the information to be submitted by NCAs to ESMA, the technical standards shall apply also to AIFMs when reporting to NCAs.

The proposed solution could, in ESMA's view, be achieved by the drafting along the following lines:

- (a) ESMA shall develop draft regulatory technical standards to specify frequency, timing and data standards and formats for the information to be reported, including the methods and arrangements for reporting the information and the form and content of such reports.*
- (b) ESMA shall consider when drafting those technical standards, the consistency of the reported information with other reporting regimes to which AIFMs might be subject to or could be relevant in terms of standards such as MiFID / MiFIR, EMIR, SFTR and Securitisation Regulation, and the provision of detailed information to monitor how the activities of AIFMs may also serve to spread or amplify risks through the financial system.*
- (c) ESMA shall submit those draft regulatory technical standards to the Commission by XX XX 20XX.*
- (d) Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010. The Commission is also delegated the power to adjust those regulatory technical standards to maintain the consistency with the reporting regimes described above in case of modification in the relevant regulations.*

Naturally, in order to fully achieve the scope of the proposed changes, further amendments at Level 2 will be needed.

9 Reporting exemptions for Private Equity funds

Identified article(s)

- Recital 78

Problem description:

According to Recital 78 of the AIFMD²⁷, PE funds do not have to report leverage at the level of the structure they invest in (e.g. Special Purpose Vehicle). In practice, it implies that gross exposures and NAV are only based on the equity approach and not on the consolidated approach used for accounting purposes. As a result, actual leverage of PE is under-reported, which could also provide a way to bypass potential limits on leverage under Article 25.

Proposed solution:

ESMA recommends removing the reference in the recital mentioning that PE funds do not have to report leverage at the level of SPV to ensure harmonised reporting requirements for all AIFs independently of their type:

²⁷ "The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU where expressly provided for in this Directive. In particular, the Commission should be empowered to adopt delegated acts to specify the methods of leverage as defined in this Directive, including any financial and/or legal structures involving third parties controlled by the relevant AIF where those structures are specifically set up to directly or indirectly create leverage at the level of the AIF. In particular for private equity and venture capital funds this means that leverage that exists at the level of a portfolio company is not intended to be included when referring to such financial or legal structures."

“The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU where expressly provided for in this Directive. In particular, the Commission should be empowered to adopt delegated acts to specify the methods of leverage as defined in this Directive, including any financial and/or legal structures involving third parties controlled by the relevant AIF where those structures are specifically set up to directly or indirectly create leverage at the level of the AIF. ~~In particular for private equity and venture capital funds this means that leverage that exists at the level of a portfolio company is not intended to be included when referring to such financial or legal structures.~~”

In order to fully achieve the scope of the proposed changes, further amendments at Level 2 are needed.

10 Requirement to report ESG metrics

Identified article(s)

- Article 24: Reporting obligations to competent authorities

Problem description:

Currently, the AIFMD reporting template does not contain any fields on ESG data and the AIFMD review is a very good opportunity to add ESG factors in the reporting to increase transparency regarding environmental impacts and consider social and governance aspects. This would be in line with [“EU Commission action plan on sustainable finance”](#) and ESMA developed [“Strategy on sustainable finance”](#). Furthermore, this would reply to the strong interest raised by NCAs for having a common framework to monitor ESG metrics.

Proposed solution:

ESMA recommends adding a reference in the Directive that ESG factors should be considered in the AIFMD reporting in order to monitor ESG related risks. This should also reflect the need for flexibility given the ongoing work of the ESAs to develop technical standards further specifying the necessary disclosures for investments, from a sustainability perspective. Since the metrics used to assess ESG risks are evolving quickly and are difficult to define, it may be appropriate (to ensure consistency) to avoid specifying overly detailed requirement in Level 1, and instead adopt a more general requirement that includes a mandate for ESMA to develop additional technical standards from an AIFM perspective.

The proposed solution should be calibrated for proportionality, consistency, timeliness and its impact should be duly assessed.

11 European mandate for ESMA and ESRB to analyse systemic risks

Identified article(s)

- Article 25: Use of information by competent authorities, supervisory cooperation and limits to leverage

Problem description:

Pursuant to Article 25 of AIFMD, NCAs are required to analyse systemic risks. At the same time, there is no explicit mandate to analyse the data at European level by ESMA or ESRB,



even though, NCAs without EU data cannot conduct a complete EU systemic risk analysis but only an analysis at national level.

Proposed solution:

ESMA recommends amending Article 25 to include an explicit mandate for ESMA and ESRB to analyse systemic risks.