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Delegation rules under the AIFMD: Need for clarification, adjustment or complete revamp based on the supervisory experience of national regulators?

The review of the AIFMD, enshrined in the Directive itself aims to complete the work of the CMU, of which the AIFMD is one of the founding pillars. Its primary purpose is hence to introduce legislative proposals designed to tackle hurdles for completing the Single Market for AIFs, with an emphasis on the experience acquired in applying the AIFM, its impact on investors, AIFs and AIFMs.

The AIFMD seeks to achieve a coherent approach of supervisory authorities to the risks of the financial system, to provide a high-level investor protection and also to facilitate AIFM market integration. The current AIFMD provides for rules on delegation, further specified by Article 82 of its Delegated Regulation 2013/231. This article includes a series of parameters for the delegation of AIFM functions to third-parties, including provisions on when the AIFM would be considered to be a “letter-box” entity. This regime was further complemented by a July 2017 non-binding ESMA Brexit Opinion in the area of investment management. This opinion focuses on technical aspects of delegation arrangements such as the due diligence to be applied by an IFM (e.g. operational risk management policies and procedures), a focus on supervisory aspects as well as clarifications on the substance requirements (human and technical resources) as well as expertise on the selection of potential delegates and the effective monitoring of those. Considering the purpose of the AIFMD and the aim of the review of the AIFMD, the experience of NCAs in applying the AIFMD has not evidenced any specific deficiencies relating to the delegation framework that would need to be addressed. To the contrary, experience has not evidenced any issues linked to delegation of investment management functions or to the current delegation regime. Further, an ESMA “Supervisory Coordination Network” has operated between 2017-20 where all EU NCAs had been requested to present Brexit related cases of fund managers and MiFID firms, focusing on delegation and substance aspects. The SCN discussions have shown that delegation rules work effectively, and only a very small number of cases revealed issues which were usually related to an inadequate application of the AIFMD rules rather than problems in relation to the AIFMD delegation regime itself.

If nevertheless the view is taken that substance should be given to the existing AIFMD delegation rules, those could cover specific aspects of the

existing framework such as provisions on the control of the delegates, the requirement for a specific delegation policy addressing specifically initial and on-going controls (e.g. on the basis of the EBA guidelines on outsourcing). Further controlling measures could include an ongoing review of the organizational set-up of the delegate as well as other aspects in accordance with a risk-based approach and potentially more specific provisions on exchanges between NCAs directly involved in the delegation of AIFM core functions.