

MEMO# 32802

October 2, 2020

Recent Publications in the EU's AIFMD Review

[32802]

October 2, 2020 TO: ICI Members

ICI Global Members

Global Advocacy Coordination Advisory Committee

ICI Global Atlantic Chapter

ICI Global Brexit Task Force

ICI Global EU Capital Markets Union Task Force

ICI Global Regulated Funds Committee

ICI Global Regulated Funds Committee - Asia

International Compliance Advisory Committee SUBJECTS: Alternative Investments

International/Global

MiFID, EMIR, AIFMD, UCITS V RE: Recent Publications in the EU's AIFMD Review

The European Commission ("the Commission") is reviewing the Alternative Investment Fund Managers Directive (AIFMD).[\[1\]](#) To support the review, the Commission has published a report ("the report") and associated staff working document assessing the application and scope of the AIFMD. The European Securities and Markets Authority (ESMA) has also published a letter setting out its recommendations for the changes to the AIFMD, including potential alignment in some areas with the UCITS Directive.[\[2\]](#) The key aspects of the publications from the Commission and ESMA are summarised below.

Report on the application and scope of the AIFMD

The Commission is required to review the application and scope of the AIFMD.[\[3\]](#) On 10 June 2020, the Commission published a report[\[4\]](#) and associated staff working document,[\[5\]](#) with its initial findings. The report follows a general survey and evidence-based survey covering 15 Member States conducted by KPMG on its behalf[\[6\]](#) and draws on other inputs, including responses to the Commission's prior CMU[\[7\]](#) and cross-border distribution consultations.[\[8\]](#) The staff working document published alongside the report builds on a wide number of contributions from stakeholders – ranging from ESMA, the ESRB, the ECB and the Expert Group of the European Securities Committee (EGESC) representing Member States, to industry participants, associations and academia.

In the report, the Commission sets out its high level finding that the AIFMD is a significant pillar of the Capital Markets Union (CMU) facilitating the improved monitoring of risks to the financial system and the cross-border raising of capital for investments in alternative

assets. Furthermore, the Commission finds that the AIFMD has played an important role in creating an internal market for AIFs and reinforcing the regulatory and supervisory framework for AIFMs in the EU. In the report, the Commission sets out its more detailed assessment on the application and scope of the AIFMD. The key issues for regulated funds and their managers in the report are outlined below.

Impact on AIFs and AIFMs

The Commission notes that assets under management (AuM) of alternative investment funds (AIFs) have more than doubled since the adoption of the AIFMD in 2011. Furthermore, the Commission concludes that the AIFM passport has been an important factor in the increase of cross-border activity of AIFMs, for instance the Commission's analysis shows that cross-border distribution of AIF almost doubled between June 2017 and October 2019.

In the report, the Commission highlights the following limitations of current AIFMD regime:

- the “efficacy” of the EU AIFM passport is impaired by national gold plating, divergences in the national marketing rules, varying interpretations of the AIFMD by national supervisors and its limited scope;
- smaller AIFMs whom are unable to comply with all the requirements of the AIFMD must forgo raising capital in other Member States or overcome significant barriers to market access;
- the AIFM passport allows marketing only to professional investors, restricting the cross-border activities of AIFMs as marketing to semi-professional and retail investors is subject to Member State rules; and
- financial intermediaries such as banks and insurance companies actively promote mainly in-house funds instead of offering a broader range of third party AIFs, albeit the Commission notes this situation is improving given an expanding market share of online platforms.

The Commission notes the role played by national private placement regimes (NPPRs) in enabling investors to access global markets to obtain broader diversification in their asset allocation. However, the Commission highlights its view that such a regime creates an un-level playing field between EU and non-EU AIFMs.

Impact on investors

The Commission considers that the AIFMD's depositary regime, rules on conflicts of interest, and disclosure and transparency requirements, have built investor confidence in financial markets, as demonstrated by the growth in sales of AIF to retail investors in several Member States. The Commission identifies the following areas of potential focus for reform:

- **depositary liability** – the Commission finds that while the current regime regulating the functions and liability of depositaries is working well, targeted clarifications may be necessary to address situations where AIFMs use tri-party collateral management or when central securities depositories (CSDs) act as custodians;
- **depositary passport** – the Commission highlights that the lack of a depositary passport is at odds with the spirit of the single market and acknowledges concerns that a limited choice of depositaries in smaller markets may raise concentration risks

whereby a single depositary could hold the assets of all AIFs established in a Member State;

- **valuation rules** – the Commission considers that while AIFMD has brought some discipline and structure to the AIF asset valuation process, the Commission highlights potential issues with the binary nature of the valuation rules (i.e., the use of either an internal or external valuer and not both), as well as uncertainty around the liability of external valuers (determined under Member State law.)

Impact on monitoring and assessment of systemic risk

The Commission concludes that aspects of the AIFMD framework of relevance to the monitoring, assessment and management of systemic risk are useful, including supervisory reporting requirements, leverage limits on AIFMs, and the suspension of redemptions. The Commission notes the ESRB's recommendations that systemic risk tools under the AIFMD should be enhanced and harmonized, including clarifying the respective roles of, and cooperation between home and host NCAs, where suspension of redemption has cross-border implications.[\[9\]](#)

The Commission identifies the following areas of potential focus for reform:

- **supervisory reporting requirements** – streamlining requirements including reducing overlaps with other reporting requirements, such as to the ECB for statistical purposes, which the Commission notes could support the case for adjusting the current AIFMD reporting template;
- **loan-originating AIFs** – the Commission suggests that the trend of expanding non-bank lending raises financial stability concerns, and may support the case for setting common standards for loan-originating AIFs and requiring the reporting of more granular information on certain asset classes, such as leveraged loans and collateralised loan obligations (CLOs), as well as information on indirect linkages between banks and non-banks;
- **leverage calculation methods** – the Commission notes that in principle the gross and commitment methods currently provided for in the AIFMD are judged to be appropriate by many stakeholders. However, the Commission highlights that recommendations by the Financial Stability Board,[\[10\]](#) IOSCO[\[11\]](#) and the ESRB may support the case for improved measures to assess macro-prudential risks;
- **supervisory cooperation** – the Commission highlights that the monitoring of systemic risk and supervision of the AIF sector requires effective supervisory cooperation. While the AIFMD lays down rules in this area, and ESMA is playing a central role in forging greater convergence, harmonisation of forms and processes and central management of databases by ESMA could further enhance convergence in implementing and applying the AIFMD.

ESMA Recommendations

On 18 August 2020, ESMA published[\[12\]](#) a letter to the Commission[\[13\]](#) setting out its recommendations for the areas of the AIFMD “where improvements could be made”, including those which it believes may warrant similar changes being made to the UCITS Directive. Key items of relevance to regulated funds and their managers in the 19 areas raised in ESMA's letter are outlined below.

Delegation and substance

ESMA recommends “additional legislative clarifications” in the AIFM and UCITS Directives concerning several aspects of delegation and substance, as outlined in further detail below. ESMA notes that the clarifications it recommends are in line with those set out in its earlier guidance related to supervisory convergence in the context of Brexit.[\[14\]](#)

Extent of delegation

ESMA suggests that in many cases UCITS ManCos and AIFMs delegate to a large extent their collective portfolio management (CPM) functions to third parties. Furthermore, ESMA notes that as a result of Brexit, the delegation of portfolio management functions to non-EU entities will further increase. ESMA concludes that the current arrangements result in the following:

- the majority of human and technical resources residing in a single (or several) third parties, potentially outside the EU;
- the majority of operational staff who perform portfolio management, risk management, administration and other functions working on a delegated basis and not through direct employment by the UCITS ManCo or AIFM; and
- a large amount of the management fees generated by the UCITS ManCo or AIFM being paid to delegates.

ESMA notes that while delegation often increases efficiencies and provides access to external expertise, it can increase operational and supervisory risks and raises questions as to whether the relevant funds can be effectively managed by UCITS ManCos and AIFMs.

ESMA suggests that legal clarifications on the “maximum extent of delegation” would be helpful to ensure supervisory convergence and to ensure that UCITS ManCos and AIFMs maintain sufficient substance in the EU. Specifically, ESMA sees merit in complementing the qualitative delegation criteria specified in the AIFMD[\[15\]](#) with either: (i) clear quantitative criteria; or (ii) a list of core or critical functions that must be performed internally by the UCITS ManCos or AIFMs and not delegated to third parties (ESMA envisages that these criteria would apply to both UCITS and AIF).

Applicable regime in case of delegation and regulatory arbitrage

ESMA raises the following concerns about the regulatory regimes to which delegates are subject:

- in the case of EU delegates, the lack of consistency and harmonisation across AIFMD, UCITS and MiFID rules;
- in the case of non-EU delegates, regulatory arbitrage and investor protection concerns resulting from the fact that delegates are not directly subject to the AIFMD or UCITS rules.

ESMA recommends legislative changes to ensure that the management of AIF or UCITS is subject to AIFMD or UCITS rules, irrespective of the regulatory license or location of the delegate.

Use of seconded staff

ESMA highlights that it has observed increased use of secondment arrangements whereby staff from professional services firms, consultancies or group entities are seconded to UCITS ManCos and AIFMs on a temporary basis and are often not located in the home Member State of the UCITS or AIF. ESMA raises questions as to whether these secondment arrangements are in line with UCITS/AIFMD substance and delegation rules and suggests legislative clarifications to address these questions.

List of collective portfolio management functions and distinction from supporting tasks

ESMA raises concerns about the absence of: (i) clear legal definitions of “supporting tasks” provided to UCITS ManCos and AIFMs; and (ii) an exhaustive list of CPM functions.[\[16\]](#) Specifically, ESMA highlights divergent NCA views on the treatment of these supporting tasks and difficulties for NCAs to assess whether the supporting tasks provided to a UCITS ManCos and AIFMs (e.g. by a group entity) are subject to AIFMD or UCITS delegation rules.

ESMA recommends legislative clarifications to complement the provisions in the AIFMD Delegated Regulation,[\[17\]](#) and in line with its AIFMD Q&A,[\[18\]](#) to eliminate legal uncertainties as to the responsibilities of AIFMs for ensuring that the CPM functions are performed in compliance with AIFMD rules.

White-label service providers

ESMA recommends more specific requirements for white-label service providers,[\[19\]](#) noting its prior guidance in the context of Brexit.[\[20\]](#) ESMA notes that NCAs in Member States that do not have white-label service providers have expressed doubts as to whether the business models of these providers are in line with AIFMD and UCITS rules. ESMA recommends more specific provisions to address “the distinct and significant conflicts of interest and investor protection risks” of these providers.

Harmonisation of AIFMD and UCITS regimes

ESMA recommends greater harmonisation of the AIFMD and UCITS frameworks, arguing that the newer AIFMD provisions are more granular than the comparable provisions in UCITS. ESMA notes that Level 1 provisions concerning risk management,[\[21\]](#) liquidity management[\[22\]](#) and delegation[\[23\]](#) are supplemented by Level 2 measures under the AIFMD[\[24\]](#) but not under UCITS.[\[25\]](#) ESMA asserts that harmonisation between the AIFMD and UCITS frameworks is also necessary as AIF and UCITS face similar risks and alignment would: (i) reduce burdens for fund managers; (ii) achieve convergence in supervisory and regulatory outcomes; and (iii) reduce unnecessary complexity for market participants and supervisors.

Harmonised reporting for UCITS and AIF

ESMA proposes the following two sets of changes to the supervisory reporting framework for UCITS and AIF:

- Improvements to the AIFMD reporting framework,[\[26\]](#) including the reporting regime and data use,[\[27\]](#) taking into account ESMA’s existing guidance[\[28\]](#) and the Commission’s broader examination of supervisory reporting;[\[29\]](#)
- The introduction of reporting obligations for UCITS at fund and manager level; and

- Harmonisation of reporting between AIFMD and UCITS, tailoring requirements where appropriate but seeking to exploit synergies with existing reporting requirements.

In an annex to its letter,[\[30\]](#) ESMA sets out the following detailed proposals for changes to the AIFMD's reporting framework:

- requiring the reporting of legal entity identifiers (LEI) for AIF and AIFM;
- enhancing reported information on fund assets and liabilities;
- broadening the definition of a leveraged AIF to require additional reporting by AIF whose exposures are increased by the managing AIFM through any means;[\[31\]](#)
- extending the scope of entities in ESMA's AIF register to include sub-threshold AIFMs,[\[32\]](#) non-EU AIFs managed by a non-EU AIFM with a passport (subject to the "activation" of the third country passport)[\[33\]](#) and AIF being marketed under national private placement regimes;[\[34\]](#)
- changing the update frequency of ESMA's AIF register from quarterly to monthly;
- requiring reporting of data in monetary values rather than percentages;
- removing restrictions on the use and publication of reported data (making it easier for summary or aggregated data to be published such that individual financial market participants can't be identified);
- creating a more flexible reporting regime, including enabling the use of level 3 guidelines to more easily adapt reporting obligations to reflect future changes to market practices or other international reporting standards;
- removing the exemption for private equity funds to report leverage at the level of the SPV;
- introducing requirements to report ESG metrics; and
- providing ESMA and the ESRB with an explicit mandate to analyse data at EU level for systemic risk monitoring and identification purposes.

ESMA also proposes the harmonisation of reporting between the AIFMD and UCITS frameworks, noting the European Systemic Risk Board (ESRB)'s recommendation in this context concerning liquidity and leverage risk in investment funds in 2017[\[35\]](#) and 2020,[\[36\]](#) and the ESRB's letter to the Commission on shortcomings of the AIFMD framework.[\[37\]](#)

ESMA proposes improvements to the existing AIFMD reporting framework[\[38\]](#) and Level 1 changes to the UCITS framework to introduce reporting obligations at manager and fund level. ESMA acknowledges the need to "tailor" reporting to UCITS, but also seek to exploit synergies with existing reports/surveys at EU and Member State level to avoid duplications and placing unnecessary burdens on funds and their managers. ESMA proposes that reported data should allow for sufficient monitoring or potential vulnerabilities that may contribute to systemic risk. It also notes that lessons may be gleaned from existing reporting regimes, including under the Money Market Fund Regulation.[\[39\]](#)

Scope of additional MiFID services and application of rules

ESMA recommends that legislative clarifications are made concerning the other business

activities that can be undertaken by a UCITS ManCo and AIFM, and the application of MiFID rules to certain of these activities and services. ESMA highlights the following aspects of the UCITS and AIFMD frameworks:

- **Permissible services beyond collective (portfolio) management (CPM):**[\[40\]](#) ESMA highlights differences in permissible “Article 6” business activities[\[41\]](#) in the UCITS and AIFMD and divergent NCA views on whether ManCos and AIFMs can perform other business activities other than those listed;
- **Application of MiFID rules to permissible “Article 6” services:** ESMA highlights the cross-references to MiFID rules in the AIFMD and UCITS,[\[42\]](#) but notes that the application of the rules to services such as portfolio management which is performed for non-financial instruments such as real estate is not clear;[\[43\]](#)
- **Application of rules to investment management functions performed by a UCITS ManCo or AIFM on a delegated basis for funds operated by another ManCo or AIFM:** ESMA highlights divergent NCA views as to whether portfolio management undertaken by a UCITS ManCo[\[44\]](#) or AIFM for “other” funds is treated as (individual) portfolio management and whether MiFID rules should apply;
- **Consistency for the regulation of services across AIFMD, UCITS and MiFID:** ESMA suggests there is merit in providing greater regulatory consistency and a level playing field between the AIFM and UCITS Directive and the MiFID framework to ensure that entities providing similar services (e.g., marketing) are subject to similar regulatory standards;
- **Updating cross-references to reflect the recast of MiFID I by MiFID II:** ESMA highlights that cross-references in AIFMD and UCITS Directive to MiFID like services refer to MiFID I and have not been updated through the MiFID II correlation table to reflect the recast of MiFID through MiFID II. In particular, ESMA notes that AIFMs and UCITS ManCos are not subject to MiFIR transaction reporting obligations (a point that ESMA has also made in its recent MiFIR transaction reporting consultation paper).[\[45\]](#)

Availability of additional liquidity management tools

ESMA recommends that additional liquidity management tools (LMTs) should be available in all EU Member States – consistent with the ESRB’s prior recommendations[\[46\]](#) and recent public statement[\[47\]](#) and recommendation.[\[48\]](#) ESMA proposes legislative changes to ensure the availability of LMTs, noting that some LMTs may not be suitable or necessary for all types of fund e.g., side pockets.

ESMA also recommends legislative changes to clarify the role of home and host NCAs when requiring the suspension of redemptions in cases where there are cross-border financial stability implications.

Leverage

ESMA recommends the following changes to align the framework for calculating leverage under the AIFMD with that proposed by IOSCO:[\[49\]](#)

- amending the gross method of leverage calculation[\[50\]](#) to align this with IOSCO’s approach for the calculation of gross notional exposure with or without adjustments, broken down by asset class, and long and short exposure; and

- amending the commitment method[\[51\]](#) of leverage calculation by adjusting the notional amount for interest rate derivatives by the duration of the ten-year equivalent bond.

ESMA considers that its proposed changes could make aggregation and comparison across funds possible for systemic risk purposes. ESMA also suggests exploring how these changes could be made in the context of UCITS, including through its proposed harmonisation of reporting between UCITS and AIFMD.

Harmonisation of supervision of cross-border entities

ESMA recommends clarification of the responsibilities of home and host supervisors in a number of areas to reduce uncertainty regarding cross-border activities within the EU internal market and benefit the Capital Markets Union (CMU). ESMA notes that as AIFMs often use branches and/or delegate a variety of functions to multiple third parties, clarification would benefit supervision and ensure effective exchange of information among relevant NCAs.

ESMA proposes legislative clarification regarding the supervision of cross-border activities of UCITS and AIF, and their managers (including branches), in areas such as fund suspension and the analysis undertaken by host NCAs when AIFs are marketed[\[52\]](#) or managed[\[53\]](#) on a cross-border basis.

Other recommendations

ESMA also presents recommendations in a number of other areas in its letter, including the following:

- **Semi-professional investors**[\[54\]](#) – ESMA proposes a definition of professional investor (in line with its prior opinion[\[55\]](#)) and the possible introduction of a semi-professional investor category (accompanied by appropriate investor protection rules), but that the AIFMD marketing passport should be limited to just professional investors.
- **Loan origination in AIFMD**[\[56\]](#) – ESMA recommends the development of a specific framework for loan origination funds building on the key principles it has outlined.[\[57\]](#)
- **Application of depositary rules to CSDs**[\[58\]](#) – in line with its prior opinion,[\[59\]](#) ESMA recommends clarifications to the AIFM and UCITS Directives to: (i) allow depositaries to disapply the delegation rules to Central Securities Depositories (CSDs) as issuer CSDs; and (ii) require depositaries to apply the delegation rules to CSDs in their capacity as investor CSDs.
- **Proportionality principle for remuneration requirements**[\[60\]](#) – in line with its prior request to the Commission, ESMA recommends clarification of the application of the proportionality principle to the remuneration requirements in the AIFM and UCITS Directives to make clear that this principle applies to a broad set of remuneration requirements to avoid disproportionate application of the quantitative variable remuneration thresholds and pay-out structures.
- **Sub-thresholds AIFMs**[\[61\]](#) – ESMA highlights divergence in the approach adopted by Member States in the respect of small/sub-thresholds AIFMs[\[62\]](#) and recommends clarifying the power of Member States to apply additional requirements under their national law to small/sub-thresholds AIFMs.

- **External valuer liability**[\[63\]](#) – ESMA highlights divergence in the interpretation of “negligence” in the context of the liability of external valuers under the AIFMD, noting that in some cases this is interpreted as gross negligence and in other cases also as including simple negligence. ESMA recommends legislative clarification to confirm that negligence is limited to “gross negligence”.
- **Amendments to definitions**[\[64\]](#) – ESMA recommends changes to various definitions in the AIFMD in line with its prior guidelines,[\[65\]](#) including further defining what constitutes an AIF.
- **Clear definition and rules for reverse solicitation**[\[66\]](#) – ESMA highlights considerable divergence in the practices and interpretation of reverse solicitation at Member State level and recommends greater legislative clarity in light of the recent EU cross-border distribution reforms.[\[67\]](#)
- **Convergence in treatment of significant influence**[\[68\]](#) – ESMA highlights divergence in the requirements concerning the significant influence that UCITS ManCos and AIFMs may exercise over the management of an issuing body and recommends clarification as to the calculation of limits currently set out in UCITS, legislative clarifications in AIFMD and EU harmonisation as to what constitutes “significant influence”.
- **Increasing digitalisation in AIFMD** – ESMA considers the AIFMD review to be an opportunity for the Commission to allow more digital communication rather than in paper form, highlighting the example of the AIFMD rules on authorisation applications which still require the home NCA of the AIFM to inform the applicant in writing of the outcome of the authorisation application.[\[69\]](#)
- **Depository passport** – ESMA does not recommend the introduction of a depository passport but believes that the Commission may study the benefits and risks further in the context of the AIFMD review.

Next Steps

The European Commission has indicated that it will publish a public consultation on changes to the AIFMD review over the coming weeks and may subsequently propose legislative changes which could also reform the UCITS Directive.

Giles Swan
Director of Global Funds Policy
ICI Global

endnotes

[\[1\]](#) Directive 2011/61/EU on Alternative Investment Fund Managers, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0061>

[\[2\]](#) Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, *available from* <https://eur-lex.europa.eu/eli/dir/2009/65/2014-09-17>

[3] Article 69, AIFMD envisages that by 22 July 2017 the Commission will start a review of the application and scope of the Directive.

[4] European Commission Report Assessing the Application and the scope of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers, 10 June 2020, *available from* <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-232-F1-EN-MAIN-PART-1.PDF>

[5] Staff Working Document: Assessing the application and the scope of Directive 2011/61/EU on the European Parliament and of the Council on Alternative Investment Fund Managers, 23 June 2020, *available from* <https://data.consilium.europa.eu/doc/document/ST-9053-2020-INIT/en/pdf>

[6] Report on the Operation of the Alternative Investment Fund Managers Directive (AIFMD), 10 December 2018, *available from* https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190110-aifmd-operation-report_en.pdf

[7] European Commission Call for Evidence: EU regulatory framework for financial services, September 2015, *available from* https://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm

[8] European Commission Public Consultation on cross-border distribution of investment funds, June 2016, *available from* https://ec.europa.eu/finance/consultations/2016/cross-borders-investment-funds/index_en.htm

[9] Article 46, AIFMD

[10] FSB Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities, 12 January 2017, *available from* <https://www.fsb.org/2017/01/policy-recommendations-to-address-structural-vulnerabilities-from-asset-management-activities/>

[11] IOSCO Final Report on Recommendations for Liquidity Risk Management for Collective Investment Schemes, February 2018, *available from* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD590.pdf> and IOSCO Final Report on Recommendations for Liquidity Risk Management for Collective Investment Schemes, February 2018, *available from* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD590.pdf>

[12] ESMA Press Release: ESMA recommends priority topics in AIFMD review, 19 August 2020, *available from* <https://www.esma.europa.eu/press-news/esma-news/esma-recommends-priority-topics-in-aifmd-review>

[13] Letter from Steven Major to Valdis Dombrovskis, RE: Review of the Alternative Investment Fund Managers Directive, 18 August 2020, *available from* https://www.esma.europa.eu/sites/default/files/library/esma34-32-551_esma_letter_on_aifmd_review.pdf

[14] See Memorandum No. 30777, RE: ESMA Publishes Brexit Related Opinions on

Supervisory Convergence and Relocations from the UK to the EU27 - Member Call on 21 July 2017, dated 14 July 2017, *available from* https://www.ici.org/my_ici/memorandum/memo30777

[15] Article 82(1)(d), AIFMD

[16] Annex I, AIFMD and Annex II, UCITS Directive

[17] Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0231>

[18] ESMA Questions and Answers on the Application of the AIFMD, 4 December 2019, *available from* <https://www.esma.europa.eu/file/23444/download?token=P6ElbtC>

[19] For instance, third party management companies or host management companies as they are sometimes known.

[20] See paragraph 36 of ESMA's Brexit Relocation Opinion, outlined in Memorandum No. 30777, RE: ESMA Publishes Brexit Related Opinions on Supervisory Convergence and Relocations from the UK to the EU27 - Member Call on 21 July 2017, dated 14 July 2017, *available from* https://www.ici.org/my_ici/memorandum/memo30777

[21] Article 51, UCITS Directive and Article 15, AIFM Directive

[22] Article 16 of the AIFM Directive contains liquidity management provisions. Article 84 of the UCITS Directive imposes a general obligation on UCITS to meet redemption requests unless the UCITS is suspended and the UCITS Directive contains overarching rules concerning portfolio investments (Article 49-57), including eligible asset requirements (Article 50) and diversification rules (Article 52), supplemented by the Eligible Assets Directive (Directive 2007/16/EC).

[23] Article 13, UCITS Directive and Article 20, AIFM Directive

[24] The AIFMD Delegated Regulation (231/2013) includes risk management provisions (Article 38-45), liquidity management provisions (Article 46-49) and delegation provisions (Article 75-82).

[25] The UCITS Directive is supplemented by Level 2 and Level 3 in areas noted by ESMA including but not limited to: CESR's Risk Management Principles, *available from* https://www.esma.europa.eu/sites/default/files/library/2015/11/09_178.pdf; UCITS Commission Directive 2007/16/EC, *available from* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32007L0016>; UCITS Implementing Directive 2010/43/EU, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0043&from=EN>; ESMA Guidelines on ETFs and other UCITS issues, *available from* https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00_en_0.pdf; CESR Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS, *available from* https://www.esma.europa.eu/sites/default/files/library/2015/11/10_788.pdf; CESR Guidelines concerning eligible assets for investment by UCITS, *available from*

https://www.esma.europa.eu/sites/default/files/library/2015/11/07_434.pdf; ESMA UCITS Q&A, *available from* https://www.esma.europa.eu/sites/default/files/library/esma34-43-392_qa_ucits_directive.pdf

[26] Annex IV, AIFMD

[27] Annex II of ESMA's letter sets out its proposed changes in some detail

[28] ESMA Guidelines on reporting obligations under Article 3(3)(d) and 24(1), (2) and (4) of the AIFMD, 8 August 2014, *available from* <https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-869.pdf>

[29] The European Commission undertook a fitness check on EU supervisory reporting to which both ICI Global and ESMA responded: see Memorandum, No., 31128, RE: ICI Global Response to the EU Commission Consultation on Supervisory Reporting for ICI Global's response and details of the consultation, *available from* https://www.ici.org/my_ici/memorandum/memo31128; and ESMA's response to the consultation, *available from* <https://www.esma.europa.eu/press-news/esma-news/esma-responds-ec-consultation-fitness-check>

[30] Annex II, ESMA's AIFMD Letter

[31] ESMA notes that the link between leveraged and unleveraged AIF and the associated reporting requirements is unclear.

[32] Defined in Article 3 of AIFMD

[33] Marketing under Article 40, AIFMD

[34] Article 42, AIFMD

[35] Recommendation of the European Systemic Risk Board of 7 December 2017 on liquidity and leverage risks in investment funds ("ESRB 2017 Liquidity Risk and Leverage Recommendation"), *available from* https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation180214_ESRB_2017_6.en.pdf?c8d7003d2f6d7609c348f4a93ced0add

[36] Recommendation of the European Systemic Risk Board of 6 May 2020 on liquidity risks in investment funds ("ESRB 2020 Liquidity Risk Recommendation"), *available from* https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation200514_ESRB_on_liquidity_risks_in_investment_funds~4a3972a25d.en.pdf?9903de66f9dbd6783563ae3a4f76febb

[37] Letter from Francesco Mazzaferro, Head of ESRB Secretariat to John Berrigan, ESRB Considerations regarding the AIFMD, dated 3 February 2020, *available from* https://www.esrb.europa.eu/pub/pdf/other/esrb.letter_200205_AIFMD_framework~4ac870326f.en.pdf?7768fc9e5556936f6eec29f970e06f75

[38] Annex IV, AIFMD

[39] ESMA references the MMFR reporting regime (Article 37, Regulation 2017/1131). It is

also important to note that MMFs are required to submit statistical data to the European Central Bank under Regulation ECB/2013/38 and guidelines ECB/2014/15.

[40] Annex I of the AIFMD refers to investment management functions performed when managing an AIF and other functions that may be additionally performed in the course of the collective management of an AIF, whereas Annex II of the UCITS Directive refers to functions included in the activity of collective portfolio management.

[41] Article 6(4)(b)(iii) of the AIFMD includes reception and transmission of orders whereas this is not included in Article 6(3) of the UCITS Directive.

[42] Article 6(4), UCITS Directive and Article 6(6), AIFMD, cross-reference Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC (i.e. MiFID I which has now been recast by MiFID II – Directive 2014/65/EC, albeit ESMA notes that the MiFID II correlation table has not been correctly updated) with respect to the permissible services that may be provided by a UCITS ManCo or AIFM respectively.

[43] Certain assets such as real estate are not included within the definition of financial instruments in MiFID (Section c, Annex I, MiFID II Directive 2014/65/EC). Article 6(4)(a), AIFMD permits AIFMs to undertake the management of portfolios of investments on a discretionary client-by-client basis and does not impose any limitation on asset types. Article 4(1)(8), MiFID II defines portfolio management as “managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments”.

[44] Under Article

[45] ESMA Consultation Paper: MiFIR review report on the obligations to report transactions and reference data, 24 September 2020, *available from* https://www.esma.europa.eu/sites/default/files/library/esma74-362-773_mifid_ii_mifir_review_report.pdf

[46] See ESRB Liquidity Risk Recommendation and ESRB Liquidity Risk and Leverage Recommendation

[47] ESRB Statement: Use of liquidity management tools by investment funds with exposures to less liquid assets, 13 May 2020, *available from* https://www.esrb.europa.eu/home/search/coronavirus/shared/pdf/esrb.publicstatement200514_on_the_use_of_liquidity_management_tools_by_investment_funds_with_exposures_to_less_liquid_assets.en.pdf

[48] ESRB Recommendation on Liquidity Risks in Investment Funds, 6 May 2020, *available from* https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation200514_ESRB_on_liquidity_risks_in_investment_funds~4a3972a25d.en.pdf

[49] IOSCO Recommendations for a Framework Assessing Leverage in Investment Funds, December 2019, *available from* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD645.pdf>

[50] Article 7, AIFMD Commission Delegated Regulation

[51] Article 8, AIFMD Delegated Regulation

[52] Article 32, AIFMD

[53] Article 33, AIFMD

[54] Section 9, page 10-11, ESMA Letter

[55] ESMA Opinion on the European Parliament, Council and Commission and responses to the call for evidence on the functioning of the AIFMD EU passport and of the National Private Placement Regimes, 30 July 2015, *available from* https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-1235_opinion_to_ep-council-com_on_aifmd_passport_for_publication.pdf

[56] Section 10, page 11, ESMA Letter

[57] ESMA Opinion on Key Principles for a European Framework for Loan Origination by Funds, 11 April 2016, *available from* https://www.esma.europa.eu/sites/default/files/library/2016-596_opinion_on_loan_origination.pdf

[58] Section 11, page 11, ESMA Letter

[59] ESMA Opinion on asset segregation and application of depositary delegation rules to CSDs, 20 July 2017, *available from* https://www.esma.europa.eu/sites/default/files/library/esma34-45-277_opinion_34_on_asset_segregation_and_custody_services.pdf

[60] Section 12, page 11-12, ESMA Letter

[61] Section 13, page 12, ESMA Letter

[62] Article 3, AIFMD

[63] Section 14, page 12, ESMA Letter

[64] Section 15, page 13, ESMA Letter

[65] ESMA Final Report: Guidelines on key concepts of the AIFMD, 24 May 2013, *available from* https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-600_final_report_on_guidelines_on_key_concepts_of_the_aifmd_0.pdf

[66] Section 16, page 13, ESMA Letter

[67] The Commission is required to submit a report to the European Parliament and to the Council on reverse solicitation by 2 August 2021 under Article 18 of Regulation 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1156>

[68] Section 17, page 13-14, ESMA Letter

[69] Article 8(5), AIFMD

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.