

AIFMD Consultation



On 22 October 2020, the European Commission published a public consultation on the Alternative Investment Fund Managers Directive (AIFMD). The consultation is part of the Commission's ongoing review of the directive and seeks the views of stakeholders on how to achieve a more effective and efficient functioning of the EU alternative investment fund (AIF) market as part of the overall financial system. The consultation closes on 29 January 2021 and the Commission is expected to publish a legislative proposal in Q3 2021.

The consultation follows a [report](#) published by the Commission in June 2020 on the application and scope of AIFMD, which looked at the impact of AIFMD on investors, AIFs and AIFMs, and the degree to which the objectives of AIFMD have been met. The report concluded that there were some issues which would require further action at the EU level to "deepen the EU market for AIFs and respond to technological developments". See our note on the report available [here](#).

Policy direction?

The consultation is wide-ranging, covering a number of topics and as a result gives limited insight into the Commission's future policy direction. An introductory sentence does give some suggestion however – the Commission is seeking to improve "the utility of the AIFM passport and the overall competitiveness of the EU AIF industry". Therefore, cross-border and level playing field issues are likely high on their agenda.

The consultation reflects and raises a certain number of questions that were addressed in ESMA's [letter](#) sent to the Commission in August 2020 outlining changes it would like to see made to AIFMD. The letter covered similar themes that we have seen in previously published ESMA opinions and interpretations, including a continued focus on delegation and substance requirements for AIFMs. In particular, ESMA called for the directive to set the maximum extent of delegation, provide a list of critical functions that may not be delegated and to set

out specific rules on white-label service providers. ESMA also suggested greater harmonisation of the AIFMD and UCITS regimes, among other things. These topics are clearly on the Commission's mind, but the consultation document seeks the views of respondents rather than developing the thoughts of the European institutions themselves.

Consultation

There is a short-form and a long-form version of the questionnaire, with the latter containing 102 questions. All areas of the directive are covered, and questions are grouped into seven themes:

Functioning of the AIFMD regulatory framework, scope and authorisation requirements

The Commission is interested in examples of national legislation or market practices which impair the effectiveness of the directive, and seeks views on the AIFM licence (is it appropriate, should AIFM prudential requirements be amended, do ancillary services need further clarification or harmonisation, what changes are needed to ensure a level playing field between investment firms and AIFMs, and should sub-threshold AIFMs be encompassed), and whether the scope of the AIF definition is suitable. The Commission also asks questions about how the AIFM passport can be improved.

Investor protection

The Commission is interested in views on client classification and the way forward, but explicitly avoids asking the same questions that have been raised in its public consultation on MiFID II. A number of questions look at how marketing to retail investors can be improved, including whether there is a need to structure an AIF under EU law that could be marketed to retail investors with a passport. Views on the depositary regime and the need for a depositary passport are sought. Finally, are mandatory disclosures, conflict of interest rules and valuation rules under AIFMD adequate?

International issues

This section of the questionnaire is focussed on the competitiveness of EU AIFs, the functioning of NPPRs (including whether they create an unlevel playing field), and the appropriateness of the AIFMD third country passport. A number of questions look at the delegation rules and whether they are effective and sufficiently clear, particularly to prevent creation of letter-box entities in the EU. The Commission asks – do the delegation rules need to be supplemented with qualification criteria, core/critical functions that can never be delegated, or other requirements? Are measures needed to protect against regulatory arbitrage?

Financial stability

Noting that one of the main objectives of AIFMD is to mitigate systemic risk in financial markets, the Commission wants to know whether AIFMD provides appropriate macroprudential tools to do so and explores whether it is necessary to require greater cooperation of national regulators and harmonisation of liquidity risk management tools. The Commission also contemplates changes to the supervisory reporting requirements, including how to achieve more detailed portfolio reporting on leverage and liquidity, and classification of AIFs/investment strategies among other things. The Commission also asks whether supervisory reporting requirements for UCITS and AIFs should be harmonised and explores potential requirements for loan originating funds. On remuneration, the Commission asks whether the remuneration rules should be adjusted to provide for de minimis thresholds, and if so, asks for suggested thresholds.

Investing in private companies

The rules in this section of AIFMD are intended to increase transparency and accountability of funds holding controlling stakes in non-listed companies, and the Commission is keen to understand whether they have met their objective and are fit for purpose.

Sustainability

The Commission asks about disclosure of sustainability risks under the EU sustainable finance disclosure regulation – should they be quantitative only? Should investment decision processes integrate assessment of non-financial materiality (ie potential principal adverse sustainability impacts)? Should AIFMs be required to take account of sustainability-related impacts beyond what is currently required by EU law, and should the EU sustainable finance taxonomy or other international principles play a role when AIFMs are making investment decisions? See our separate notes on the disclosure regulation ([here](#)) and taxonomy regulation ([here](#)).

Miscellaneous

This section has some final questions on the competences and powers of supervisory authorities, and also asks whether ESMA should be granted additional powers which could include authorisation and supervision of all EU and non-EU AIFMs. The penultimate question asks whether the UCITS and AIFM regulatory frameworks should be merged into a single EU rulebook.



Next steps

The consultation closes on 29 January 2021. The main webpage for the consultation is available [here](#); it includes a link for responses. We are working with various industry bodies and will be contributing to their consultation responses.

The overarching webpage for the AIFMD review is available [here](#) and includes a useful timeline for the review. The Commission is expected to publish a legislative proposal in Q3 2021.

Contacts

If you would like to discuss this consultation or AIFMD more generally, please contact any of the individuals named below or your usual Linklaters LLP contacts.

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