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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

assessing the application and the scope of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers

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ABBREVIATIONS

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Directive on Alternative Investment Fund Managers 2011/61/EU
AuM	Assets under management
CLO	Collateralised loan obligation
CMU	Capital Markets Union
CRD	Capital Requirements Directive
CSD	Central Securities Depositary
DG FISMA	Directorate-General for Financial Stability, Financial Services and Capital Markets Union
ECB	European Central Bank
EGESC	Expert Group of the European Securities Committee
ELTIF	European Long-Term Investment Fund
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
EU	European Union
EuVECA	European Venture Capital Fund
FSB	Financial Stability Board
IMSC	ESMA Investment Management Standing Committee
IOSCO	International Organization of Securities Commissions
NAV	Net asset value
NCA	National Competent Authority
NPPR	National private placement regime
MiFID	Markets in Financial Instruments Directive
UCITS	Undertakings for the Collective Investment in Transferable Securities

1. INTRODUCTION

1.1 Background

The Alternative Investment Fund Managers Directive[1] (AIFMD) was adopted following the global financial crisis, which exposed certain weaknesses in global financial markets and their regulatory regimes.[2] As a result, G20 Leaders agreed on the need for greater regulation of the financial industry to minimise the risk and magnitude of future crises.[3] This also encompassed the alternative investment management sector requiring more coordinated supervisory oversight and increased investor transparency. To support the G20 objectives, the International Organization of Securities Commissions (IOSCO) issued high-level principles for hedge funds regulations to guide the development of international standards in this area.[4]

Following the European Council's[5] endorsement of these international commitments, and in the light of the European Parliament report[6], the European Commission (hereinafter - 'Commission') issued a Proposal for a regulatory framework governing Alternative Investment Fund Managers (AIFM).[7] The AIFMD was adopted on 8 June 2011. Following its transposition into the national legal systems the AIFMD entered into application on 22 July 2013.[8]

The AIFMD seeks to achieve a coherent supervisory approach to the risks of the financial system, to provide high-level investor protection and to facilitate EU AIF market integration.[9] AIFMs are required to take measures to manage risks and ensure the requisite transparency regarding the activities of their managed alternative investment funds (AIF) while being able to manage and market AIFs to professional investors across the Union with a single authorisation.[10]

1.2 Legal basis

This Report is prepared in accordance with Article 69 of the AIFMD. The Commission is required to review the application and the scope of the AIFMD with an emphasis on the experience acquired in applying the Directive. It is necessary to assess the Directive's impact on investors, AIFs, AIFMs in the Union and in third countries in order to establish the degree to which the objectives pursued by the AIFMD have been achieved.

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[1] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Funds Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, pp. 1 - 73. (AIFMD)

[2] Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers, 30.04.2009, COM (2009) 207 final.

[3] Declaration of the Summit on Financial Markets and the World Economy, Washington DC, November 15, 2008.

[4] Recital 89 of the AIFMD; IOSCO Final Report Hedge Funds Oversight, June 2009.

[5] Conclusions of the European Council of 16 September 2010.

[6] Report of the European Parliament with recommendations to the Commission on hedge funds and private equity (A6-0338/2008) ['Rasmussen' Report] and on the transparency of institutional investors (A6-0296-2008) ['Lehne' Report]; Report of the High - Level Group on Financial Supervision in the EU, 25 February 2009, p. 25.

[7] Supra 2.

[8] The last Member State transposing the AIFMD completed this process by the end of 2015.

[9] Recitals 2 - 4 and 94 of the AIFMD.

[10] Article 32(1) of the AIFMD.

This report fulfils the mandate of the Commission to provide the European Parliament and the Council with an assessment of the functioning of the AIFMD. In addition, the report reviews the leverage calculation methods as required under Article 6 of the Commission Delegated Regulation (EU) No 231/2013 (AIFMR), which supplements the AIFMD.[11] The Commission Staff Working Document (SWD(2020)110: Commission Staff Working Document Assessing the application and the scope of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers) provides further information on the conclusions. An independent KPMG report was also published.[12]

1.3 Methodology and consultation process

The Commission tasked an external contractor – KPMG[13] – to conduct a General Survey and evidence-based study to assess the impact of the AIFMD.[14]

The empirical study covered 15 EU Member States.[15] It assessed whether the specific rules of the AIFMD are effective, efficient, coherent and relevant, and if they supported EU measures to achieve the general, specific and operational objectives of the Directive.[16]

In this report, the KPMG findings are complemented by other sources of information, including relevant data updates and information obtained through various work streams in the Commission,[17] ESMA[18] and the European Systemic Risk Board (ESRB).[19] The Commission's interactions with the stakeholders, comprising national competent authorities (NCAs), industry representatives and investor protection associations, through public consultations,

[11] 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, OJ L 83, 22.3.2013, pp. 1 - 95.

[12] Report on the Operation of the Alternative Investment Fund Managers Directive (AIFMD) - Directive 2011/61/EU, retrieved from: [https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190110-aifmd-operation-report_en.pdf] (KPMG Report).

[13] KPMG Law Rechtsanwaltsgesellschaft mbH as lead firm, with the subcontractors KPMG AG Wirtschaftsprüfungsgesellschaft, Germany and KPMG LLP, United Kingdom supported by the European network of KPMG.

[14] The General Survey took the form of an online questionnaire and ran between 6 February 2018 and 29 March 2018. When carrying out the survey, KPMG was guided by a list of aspects laid down in Article 69(1) of the AIFMD on which stakeholders were invited to share their experiences.

[15] Austria, Belgium, Cyprus, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Italy, Luxembourg, Malta, Netherlands, Spain, United Kingdom. This represents a good sample of Member States in terms of geography and their different market size for AIFs, AIFMs or investors.

[16] Supra 12.

[17] Responses to the Commission's Call for Evidence on the EU Regulatory Framework for Financial Services, responses to the Commission's Consultation on Cross-Border Distribution of Funds (UCITS, AIF, ELTIF, EuVECA and EuSEF) across the EU.

[18] ESMA's opinion to 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 of ESMA on the functioning of the AIFMD passport, 30 July 2015, ESMA/2015/1235; ESMA thematic study among National Competent Authorities on notification frameworks and home-host responsibilities under UCITS and AIFMD, 7 April 2017, ESMA34-43-340; ESMA's opinion on asset segregation and custody services, 20 July 2017 ESMA 34-45-27; ESMA Annual Statistical Report EU Alternative Investment Funds 2019, 21.01.2019, ESMA 50-165-748. (ESMA Statistical Report 2019) and ESMA Annual Statistical Report EU Alternative Investment Funds 2020, 10.01.2020, ESMA50-165-1032 (ESMA Statistical Report 2020).

[19] Recommendation of the European Systemic Risk Board of 7 December 2017 on liquidity and leverage risks in investment funds ESRB/2017/6, 2018/C 151/01. Letter of 3 February 2020 to DG FISMA from the ESRB on its considerations regarding the AIFMD.

bilateral and multilateral meetings were taken into account. Academic and statistical publications further supported the preparation of this report. For example, ESMA's Annual Statistical Reports on EU AIFs was particularly useful in describing the EU AIF market.[20] Individual examples of inefficiencies of particular Union rules were also taken into account.

On 27 September 2019, the Commission consulted the Expert Group of the European Securities Committee (EGESC) representing the Member States to receive technical and policy feedback on material issues pertaining to the application and the scope of the AIFMD. The EGESC members were invited to make written submissions and the report takes into account the positions of the EGESC members.

On 22 October 2019, the Commission presented the key elements of this Report to the ESMA Investment Management Standing Committee (IMSC) and sought its input based on the supervisory experience of NCAs.

2. ASSESSING THE APPLICATION AND THE SCOPE OF THE AIFMD

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. The AIFMD played an important role in creating an internal market for AIFs and reinforcing the regulatory and supervisory framework for AIFMs in the Union. AIFMs are now operating with greater transparency for investors and supervisors.

2.1 Impact on AIFs and AIFMs

The EU AIF market has been on a continuous growth path as measured by net assets of AIFs and AuM with a notable cross-border activity of AIFMs. Since the adoption of the AIFMD in 2011, total net assets of AIFs more than doubled in size from € 2.3 trillion to € 5.9 trillion.[21] The cross-border distribution of AIFs almost doubled between June 2017 and October 2019 rising from 3% to 5.8% of AIFs.[22] In this respect, the AIFM passport is confirmed to be an important factor. A majority of the AIFMs, public authorities and institutional investors responding to the General Survey reported that access to national markets had increased due to the AIFMD, although 34% also reported an increased time to market.[23]

This report finds that the efficacy of the EU AIFM passport is impaired by national gold-plating, divergences in the national marketing rules[24], varying interpretations of the AIFMD by national supervisors[25] and its limited scope. Smaller AIFMs 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. Moreover, the AIFM passport allows marketing only to

[20] ESMA Annual Statistical Report EU Alternative Investment Funds 2019, 21.01.2019, ESMA 50-165-748, (ESMA Statistical Report 2019) and ESMA Annual Statistical Report EU Alternative Investment Funds 2020, 10.01.2020, ESMA50-165-1032, (ESMA Statistical Report 2020).
[21] EFAMA Fact Book 2019, p. 27.
[22] Morningstar, June 2017 and Morningstar, October 2019.
[23] Supra 12, p. 101.
[24] Supra 12, pp. 74 and 114.
[25] Commission staff working document Impact Assessment on cross-border distribution of collective investment funds, SWD(2018) 54 final, 12.3.2018, [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3132069_en#pe-2018-1277].

professional investors, again restricting the cross-border activities of AIFMs as semi-professional and retail investors can only be approached under varying (and often restrictive) national rules. AIF distribution is subject to MiFID II[26] rules, which differentiate between retail and professional investors, therefore, any change to the definitions of the types of investors in the AIFMD needs to take into account the interaction of the AIFMD with the relevant provisions of MiFID II.

AIFs are offered to retail investors by banks and insurance companies. These financial intermediaries actively promote mainly in-house funds, instead of also offering a broader range of third party AIFs.[27] However, the situation is changing with an expanding market share of on-line platforms. CMU related work streams in the Commission are focusing on improving the distribution of investment products in the Union and reviewing disclosure requirements. The outcome of those work streams will also impact AIFs and AIFMs based in third countries, which at present may only access investors in individual Member States on the basis of national laws set out in National Private Placement Regimes (NPPRs).

The role of NPPRs is acknowledged by stakeholders as an important factor in market development given the absence of the activation of the AIFM passport for third country entities. As a result, investors in the Member States with such regimes have been able to access global markets for financial services and diversify their investment allocations. However, NPPRs differ among Member States and, more importantly, require AIFMs to implement only a very limited number of the AIFMD requirements. This creates an un-level playing field between EU and non-EU AIFMs. Some Member States have closed market access for third country entities entirely. Some Member States have suggested further harmonising the NPPRs, whereas others consider that activating the AIFMD passport for third country entities, followed by a phasing-out of NPPRs, would be a better solution to this issue.

The Commission did not assess the functioning of the AIFMD third country passport as it has not yet been activated and there is no market information to draw on.

2.2 Impact on investors

Based on the detailed assessment in the Staff Working Document, the depositary regime, rules on conflicts of interest, disclosure and transparency requirements serve to protect investor interests, which builds investor confidence in financial markets. Market figures demonstrate increased sales of AIFs with greater participation of retail investors in several Member States.[28] Cross-border activities have the potential to grow further given the recently adopted rules in the context of the CMU.[29]

[26] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, pp. 349–496.
[27] Study on the distribution systems of retail investment products across the European Union, April 2018, p. 17, retrieved from: [https://ec.europa.eu/info/sites/info/files/180425-retail-investment-products-distribution-systems_en.pdf].
[28] Supra 12, p. 257.
[29] Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings, OJ L 188, 12.7.2019, p. 106–115 and 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, OJ L 188, 12.7.2019, pp. 55 - 66.

A dedicated regime regulating functions and liability of depositaries proved to be an effective measure for enhancing investor protection.[30] It is functioning well, even though targeted clarifications may be necessary to address situations where AIFMs use tri-party collateral management or when central securities depositories (CSDs) act as custodians.

More significantly, the lack of a depositary passport is at odds with the spirit of the single market. Because of the limited choice of service providers in smaller markets, there are also fears of concentration risk where a single depositary could hold the assets of all AIFs established in a Member State.

As regards valuation rules, which are necessary for establishing each investor's share in a given AIF and for monitoring the AIF's performance, the AIFMD brought some discipline and structure to the AIF asset valuation process.[31] There may be, however, issues with the binary nature of the valuation rules, whereby stakeholders understand that a combined use of internal and external valuers is excluded, as well as uncertainty around the liability of external valuers, which determined under the national laws. However, there was insufficient evidence to suggest which disclosure provisions of the AIFMD should be amended.

Whilst entailing certain costs for the industry, the AIFMD rules on disclosures have largely achieved the objective of enabling investors to make informed investment decisions.[32] Requiring disclosure of conflicts of interest is particularly appreciated by investors in alternative assets as this is one of their greatest concerns.[33] The analysis indicates that the AIFMD increased transparency regarding the offered products and services.[34] However, it did not identify which elements of the disclosure requirements could be superfluous given that some professional investors request other information to that prescribed by the AIFMD.

2.3 Impact on monitoring and assessment of systemic risk

To monitor and mitigate macro risks that stem from the activities of AIFMs it is necessary to identify the relevant entities to ensure that they are meeting the basic requirements to manage professionally and responsibly their collective investments for the benefit of investors. There was no evidence found to suggest that the AIFMD thresholds of assets under management (AuM), above which the activities of AIFMs may pose significant systemic risk, should be adjusted.

Stakeholders find the tool-kit for financial stability purposes available to NCAs under the AIFMD, including the possibility to impose leverage limits on an AIFM[35] or suspend redemptions in the interest of the public, useful. The ESRB recommends further enhancement and harmonisation of those measures.[36] This includes a recommendation to clarify the respective roles of NCAs and their cooperation in the cases where suspension of redemptions have cross-border implications.[37] When deciding if an intervention in the financial markets is

[30] Supra 12, p. 94.
[31] Supra 12, pp. 183-184.
[32] Supra 12, p. 77.
[33] Alts Transparency: Finding the Right Balance [https://www.northerntrust.com/documents/campaign-landing/cis/2017/alt-transparency.pdf].
[34] Supra 12, p. 210.
[35] Article 25 of the AIFMD.
[36] Supra 19.
[37] As provided in Article 46 of the AIFMD.

necessary, NCAs should be able to assess trends in the AIF industry and to monitor threats to financial stability considering the markets in which AIFs are trading. This is the reason for the AIFMD supervisory reporting requirements.[38]

These supervisory reporting requirements are confirmed to be necessary for supervisors to monitor risks to the financial system across sectors and borders. However, a closer analysis points to the need to consider their streamlining, while being mindful of the sunk costs already incurred by the compliant AIFMs. There are also overlaps with other Union laws, such as reporting to the ECB for statistical purposes, which could possibly support the case for adjusting the current reporting template under the AIFMR.

An observable trend of expanding non-bank lending raises financial stability concerns.[39] Some granular information on certain asset classes, such as leveraged loans and collateralised loan obligations (CLOs), as well as the information on indirect linkages between banks and non-banks is currently missing but is relevant for macro-prudential oversight. Several stakeholders have asked the Commission to reassess the case for setting common standards for loan-originating AIFs.[40]

Regarding leverage calculation methods, in principle, the gross and commitment methods as currently provided for in the AIFMR are judged to be appropriate by many stakeholders.[41] Nevertheless, some adjustments may be called for by the conclusion of the Financial Stability Board's (FSB) and IOSCO[42] work in this area, which is focused on data reporting, as well as recommendations of the ESRB for improved measures to assess macro-prudential risks.[43]

Monitoring of systemic risk and supervision of the AIF sector requires effective supervisory cooperation. The AIFMD lays down rules on the NCAs' competences and their interaction with ESMA playing an important role. While the AIFMD provides the necessary framework for NCAs to cooperate, the efficacy of the rules has not yet been tested.

ESMA, on the other hand, is playing a central role in forging greater convergence of the AIFMD standards in the internal market by coordinating the NCA's positions. Harmonisation of forms and processes and central management of databases by ESMA could further enhance convergence in implementing and applying the AIFMD. As explained in the detailed assessment in the Staff Working Document, issuing guidelines has proven to be another useful tool in achieving uniform implementation and application of the AIFMD across the Union. For example ESMA guidelines on the AIFMD rules on AIMF remuneration.[44]

[38] Annex IV of the AIFMR.
[39] The role of non-bank financial institutions in the leveraged loan and CLO markets has increased. See FSB, Vulnerabilities associated with leveraged loans and collateralised loan obligations (CLOs), PLEN/2019/91-REV, 22 November 2019.
[40] Expert Group of the European Securities Committee (EGESC) meeting on 27 September 2019.
[41] Supra 12, pp. 171-172. See section 2 of Chapter II of the AIFMR.
[42] FSB Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities, 12 January 2017; IOSCO Final Report on Recommendations for Liquidity Risk Management for Collective Investment Schemes of February 2018; IOSCO Final Report on Recommendations for Liquidity Risk Management for Collective Investment Schemes of February 2018.
[43] Supra 19.
[44] ESMA Guidelines on sound remuneration policies under the AIFMD, 03 July 2013, ESMA/2013/232.

Remuneration rules were introduced in the AIFMD to promote effective and sound risk management by aligning pay incentives with sustainable performance.[45] A reported shift from variable towards fixed remuneration[46] seems to have introduced greater risk-aversion in the collective alternative investment management sector and increased overall awareness of good remuneration systems.[47] Despite this trend, some stakeholders have called for aligning the AIFMD rules on remuneration with the similar regimes provided in other sectorial legislation such as the recently changed Capital Requirements Directive (CRD).[48] The latter establishes *de minimis* institutions and amounts of remuneration that may be exempt from deferring variable payment.

2.4 Impact of rules on investment in private companies and in/or for the benefit of developing countries

The AIFMD rules on supervisory reporting, depositary, risk management and remuneration do not explicitly take into account all of the specificities of managing private equity investments. Transparency requirements when a private equity fund acquires controlling stakes in private companies and the provisions against asset-stripping are not overtly burdensome but it was not possible to establish their added value due to the lack of available data.

Private equity fund managers, which for their managed portfolio size do not adhere to the regulatory parameters of the AIFMD or of the EuVECA Regulation[49], encounter significant barriers to marketing their funds in other Member States.[50] Consequently, some argue that the AIFMD could be amended to better accommodate the private equity sector by removing unnecessary charges and looking for more effective ways to protect non-listed companies or issuers.

There is insufficient evidence to determine the impact of the AIFMD on investing in or for the benefit of developing countries. However, the AIFMD does not appear to impose regulatory restrictions that would hinder such investments.

Following the submission of this report to the EU co-legislators, the AIFMD requires the Commission, if deemed appropriate, to put forward proposals, including amendments to the AIFMD. The Commission is still assessing the need for further proposals in this domain.

It is also important to note other legislative steps the EU has recently taken in the asset management sector. The package on Cross-Border Fund Distribution of Investment Funds was adopted *inter alia* to increase transparency in relation to regulatory fees charged by NCAs for processing AIF notifications and in relation to national marketing rules.[51] The asset

[45] There is some evidence supporting their effectiveness in nudging targeted agents towards a risk conscious behaviour.
[46] Supra 12, pp. 188 - 189.
[47] Supra 12, p. 192.
[48] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, OJ L 150, 7.6.2019, pp. 253 - 295.
[49] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.
[50] Bilateral meetings with stakeholders.
[51] Supra 29.

segregation requirements where custody of assets is delegated to a third party were rationalised by the recent amendments to the Commission Delegated Regulation 231/2013.[52] Amendments to the CRD provide that AIFMs belonging to the same corporate group or conglomerate will have to apply the AIFMD rules on remuneration thus avoiding becoming subject to multiple sets of rules regulating different financial intermediaries.[53] The EU regulation on sustainability-related disclosures in the financial services sector will ensure coherence across different EU regulatory frameworks.[54] The recently changed European Venture Capital Fund Regulation (EuVECA) opened up the use of the designations 'EuVECA' to managers of collective investment undertakings authorised under the AIFMD and expanded investment parameters.[55]

However, other issues raised in this report could possibly require further action at Union level to deepen the EU market for AIFs and respond to technological developments ensuring that the AIFMD legal framework is fit for purpose.

[52] Commission Delegated Regulation 2018/1618 of 12 July 2018 amending Delegated Regulation (EU) No 231/2013 as regards safe-keeping duties of depositaries, OJ L 271, 30.10.2018, pp. 1 – 5.
[53] Supra 48.
[54] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability- related disclosures in the financial services sector, OJ L 317, 9.12.2019, pp. 1–16.
[55] Regulation (EU) 2017/1991 of the European Parliament and of the Council of 25 October 2017 amending Regulation (EU) No 345/2013 on European venture capital funds and Regulation (EU) No 346/2013 on European social entrepreneurship funds, OJ L 293, 10.11.2017, pp. 1–18.