EFAMA

European Fund and Asset Management Association

EFAMA's Response to the European Commission Roadmap on the review of EU rules on alternative investment fund managers

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EFAMA's RESPONSE TO EC ROADMAP ON THE AIFMD REVIEW

HIGH LEVEL COMMENTS

The AIFMD is one of the pillars of EU regulation for asset managers and investment funds, which have a crucial role to play in the development of the Capital Markets Union (CMU) and the post Covid-19 economic recovery in the EU.

The Commission's Report to Council and Parliament assessing the application and the scope of Directive 2011/61/EU on alternative investment fund managers **provides a balanced analysis leading to the conclusion that, overall, the AIFMD regime is working well.** We welcome the recognition that the framework has improved the monitoring of risks for the financial system and the cross-border raising of capital for investments in alternative assets. We also agree on the assessment of the important role played by the AIFMD 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, helping building confidence in financial markets.

When identifying **possible areas of action**, the Report is weighted and prudent, acknowledging the need for a holistic approach and the importance of assessing the impact of potential amendments to the directive and its implementing acts.

Against this solid analysis, also underpinned by the conclusions of the report mandated to KPMG, and in the absence of evidence of market failures, it is our strong belief that **the upcoming AIFMD review should only introduce targeted changes either at Level 2 or Level 3 when necessary and duly justified by factual evidence of shortcomings. It is important to bear in mind that any change to the current framework might create more uncertainties, generating more operational costs to apply those changes.**

EFAMA looks forward to further contributing to the AIFMD review notably by providing a detailed and evidence-based response to the European Commission's consultation running until the end of this month. We have set out below our high-level views on the key sections of the European Commission's consultation document on AIFMD.

Functioning of the AIFMD Framework

In general, the **AIFMD sets a high standard of harmonisation in the alternative investment fund management sector** and ensures a consistent regulatory approach to potential risks to the financial system, better coordinated supervision, a high level of investor protection and facilitates the market integration of EU AIFs. We see the need for a few well-targeted amendments through Level 2 and Level 3 to improve the effectiveness of AIFMD by avoiding different approaches at national level. Such targeted amendments will be further outlined in our consultation response. It is important in any case to ensure a consistent application of rules across Member States. In order to ensure a level playing field among AIFMs, NCAs should be bound to apply similar interpretations at national level.

In terms of additional improvements to the functioning of the **AIFM passport**, at present, **we do not believe that the cross-border marketing and investor access rules for AIFs (as well as for UCITS) need to be reviewed**, pending the application of the most recent amendments to both UCITS and AIFM directives, published in June 2020. We note in particular that the amending directive (2019/1160) is presently awaiting Member States' transposition and will only apply as from 2 August 2021.

Investor Protection

Generally speaking, **the AIFMD provides a high level of protection to investors**. The **existing issues** with **access to AIFs for certain type of investors** are linked to the very restricted manner in which MiFID has defined 'professional investors' very often excluding more sophisticated retail investors such as HWNIs, family offices and others from that definition. Consequently, it is difficult for these types of investors to access AIFs which may be more suitable to their particular investment needs. Necessary changes to the investor classification will be most effectively achieved through the upcoming MiFID

II/MiFIR review, rather than through the AIFMD review, as consistency with the former is of utmost importance.

Given that AIFs are generally aimed at professional investors, **flexibility must be given to AIFMs to only provide relevant and meaningful information to their investors**. Retail investor-type disclosures should not be mandated for all types of clients, as is currently the case under MiFID. This leads to a situation where non-relevant information is disclosed to professional investors and eligible counterparties without taking into account that bilaterally-agreed and more targeted information is already being provided.

As to whether a passporting regime for retail AIFs is worth introducing, we believe such an option is not justified. Despite the existence of a retail AIF domestic distribution regime in a few EU jurisdictions, cross-border retail demand for AIF products remains low compared to other fund products (i.e. UCITS). By comparison, AIF products are usually less suitable to the needs of retail investors and UCITS already offers those retail investors a very wide range of different investment opportunities. These come with a recognised brand that third-party intermediaries and fund distributors are more familiar with when explaining their product features to investors. For retail investors looking to invest in less liquid asset classes – especially in view of longer-term investment returns – we believe that a preferred solution could become an ELTIF structure, once appropriately amended through the Commission's ongoing review of the ELTIF Regulation.

International Relations

EFAMA believes **the AIFMD establishes a very clear delegation framework, as further specified by its delegated Regulation 2013/231 (AIFMR).** Article 82 thereof establishes a series of clear parameters against which a third-party could be considered to be a "letter-box" entity. Such parameters are in our view exhaustive enough, striking an optimal balance between the twin objectives of investor protection and the preservation of a management company's need to structure its business as most appropriate when serving its investors.

Financial Stability

The Covid-19 pandemic has demonstrated the resilience of the investment management sector as the industry was able to manage significant outflows experienced during the market volatility in March.

EFAMA has a longstanding view on the **need to make the full set of liquidity management tools available in all Member States**, which can be achieved through Level 2 or Level 3. In any case, the fund manager must retain discretion as to which tools they want to use because the investment management sector is characterised by very different fund types and structures.

In terms of reporting, our view is that **the AIFMD regulatory reporting requirements have been working well so far**, and any change to the Annex IV must be limited to improving minor aspects, avoiding significant changes the implementation costs of which would not be balanced with the benefits.

There are a number of opportunities for European (micro and macro) supervisory authorities to address their own data-sharing practices to allow more efficient sharing and cross-referencing of data already provided by AIFMs. We believe this approach would allow authorities to address many of the supervisory comments raised in recent years without imposing additional burdens on the industry.

Sustainability / ESG

EFAMA sees no identifiable cause for tightening up standards for the quantification of principal adverse impacts only for AIFM, or for initiating such a discussion before SFDR and its regulatory technical standards are finalised and implemented, making it possible to assess their effects.

Moreover, integration of principal adverse impacts (PAIs) and other non-financial considerations in the investment process should always depend on the investment objectives and preferences of fund investors. This has been acknowledged under Art. 7 (1)(a) SFDR by requiring specific disclosures on "whether and if so, how" PAIs are being considered at the product level. Extending this obligation to any AIFM and potentially any product independently of its investment features may cause the manager to act against its fiduciary duties towards the investors.

In any case, we would recommend that the implementing measures on the integration of sustainability risks in UCITS and AIFMD are first implemented, before including those considerations in the context of the AIFMD review.

Miscellaneous

ESMA supervisory powers - Although EFAMA supports greater supervisory convergence under the AIFMD framework, **we are firmly opposed to attributing additional competences and powers to ESMA via the present AIFMD review.** Through amendments to its founding regulation as part of the 2019 ESAs Review, ESMA has already received additional powers to foster convergence in the EU. As this reform only came into force in January 2020, we believe ESMA should rely firstly on these new tools to bring about greater convergence by using them to their full potential.

Merger of UCITS and AIFM directives - **EFAMA is sceptical about the proposal to merge both directives into a single EU regime.** The existing body of norms for asset management companies is built on the recognition that fund product types differ substantially between each other, as do their investor bases. The current difference between a product (UCITS) vs. a manager (AIFMD) directive is thus justified in that it best reflects these differences. Worth noting is that a merger must be considered against the complexity of the current EU body of norms for asset management companies, including interdependent and very specific Level 2 and Level 3 measures. Any change at this stage will also inevitably distract considerable resources from the achievement of more important and pressing EU objectives.

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About EFAMA

EFAMA, the voice of the European investment management industry, represents 28 Member Associations, 57 Corporate Members and 23 Associate Members. At end Q3 2020, total net assets of European investment funds reached EUR 17.6 trillion. These assets were managed by more than 34,200 UCITS (Undertakings for Collective Investments in Transferable Securities) and almost 29,400 AIFs (Alternative Investment Funds). At the end of Q2 2020, assets managed by European asset managers as investment funds and discretionary mandates amounted to an estimated EUR 24.9 trillion.

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