

# ESMA invites the European Commission to launch the review of the AIFMD

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**O**n 18 August 2020, the European Securities and Markets Authority (ESMA) addressed a letter<sup>(1)</sup> to the European Commission highlighting some areas of the Alternative Investment Fund Managers Directive<sup>(2)</sup> ("AIFMD") where improvements could be made (the "Letter").

The Letter is a result of ESMA's significant exchanges with National Competent Authorities ("NCAs") on the practical aspects of the AIFMD since its publication in 2011 as well as of the KPMG report<sup>(3)</sup>. Annex I to the Letter lists 19 key topics identified in the AIFMD framework and ESMA's proposed changes. Annex II to the Letter outlines the key reporting issues where improvements could be made.

This article only covers some of the issues that may affect Luxembourg alternative investment fund managers ("AIFMs") and which should thus be carefully followed in the months to come.

## 1. Delegation and substance

Delegation and substance have always been an area of focus since the inception of the AIFMD and have become burning issues with Brexit. ESMA refers to its opinion published on 13 July 2017 to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union ("EU")<sup>(4)</sup>.

### Extent of delegation

ESMA notes that AIFMs rely extensively on delegation arrangements (e.g. delegation of collective portfolio management functions) to third parties within or outside the group of the AIFM. Put simply, ESMA is concerned that AIFMs only perform some control functions related to risk management while the vast majority of functions are entrusted to entities suspected to escape the EU prudential rules.

One of ESMA's concerns is that the majority of human and technical resources needed by an AIFM for day-to-day operations are maintained by several third parties or even a single third party, potentially outside of the EU. This could mean that the majority of operational staff are not employed by the authorised AIFMs and that a large amount of the management fees flows to delegates. This is regarded as triggering operational and



supervisory risks and raises questions as to whether funds can still be effectively managed by the AIFMs.

ESMA thus recommends complementing the qualitative criteria in article 82(1)(d) of the Commission Delegated Regulation (EU) No 231/2013<sup>(5)</sup> with clear quantitative criteria or setting out a list of core functions which may not be delegated to external parties.

This suggestion may not be welcomed by the global asset managers which operate globally while relying on domestic "centres of excellence" to foster economies of scale and get adequate access to the right number of competent staff available on the markets.

### Use of seconded staff

ESMA questions whether the extensive recourse by AIFMs to secondment arrangements really complies with the substance and delegation rules set out in the AIFMD framework. This is surprising as one may think that the resources allocated to these AIFMs should be assessed on the premise that substance shall prevail over form.

### List of collective portfolio management functions and distinction from 'supporting tasks'

Since the requirements when delegating AIFM tasks vary depending on the category of task concerned, ESMA highlights the fine line between delegation and 'supporting tasks' provided by group entities within or outside of the EU, particularly given the absence of clear legal definitions or an exhaustive list of collective portfolio management functions set out in Annex I of the AIFMD. This makes it difficult to assess whether 'supporting tasks' are subject to the delegation rules of the AIFMD or not - and has triggered diverging interpretations of NCAs e.g. on legal or compliance tasks, investment research activities or (quantitative) risk data analyses or calculations.



### White-label service providers

White-label service providers<sup>(6)</sup> have existed for many years but ESMA stresses the fact that some Member States have expressed doubts as to whether their business models are in line with the AIFMD framework. According to ESMA, the customer/supplier relationship between the fund sponsor and the white-label AIFM exacerbates conflicts of interests to the detriment of investor protection.

ESMA observes that initiators/business partners of white-label funds (i) are the clients of the AIFMs and may decide to replace them, (ii) may exercise significant influence over them since quite often the name of the fund carries their name and (iii) may perform portfolio management on a delegation basis or act as investment adviser.

No doubt that this opinion will be challenged since it is not obvious to conclude that the risk of conflicts of interests is higher when alternative investment funds ("AIFs") appoint external independent AIFMs compared to AIFs using their intra-group AIFM staff. Is the source of problem not first and foremost a question of integrity, effective regulatory oversight and accountability and professional liability towards investors?

## 2. Professional investor concept

ESMA sees merit in clarifying the definition of professional investors as some EU Member States allow marketing to semi-professional investors. Let's hope that the definition of professional investors will not be made too restrictive now that the United States has softened the "accredited investor" definition<sup>(8)</sup>.

## 3. Loan origination in AIFMD

ESMA highlights the need for a specific framework for loan origination within the

AIFMD and refers to its opinion dated 11 April 2016<sup>(9)</sup> outlining recommendations on authorisation for loan originating funds; in particular the use of closed-ended vehicles.

Further to the publication of that opinion, the Luxembourg regulator outlined the key principles to be followed with respect to loan origination in one of its frequently asked questions<sup>(10)</sup>. For the time being Luxembourg closed-ended or open-ended funds can carry out such activity provided that this is permissible under the AIFMD, the Luxembourg law transposing the AIFMD as well as any applicable product law.

## 4. Depositories

Two points to bear in mind: (i) it shall be confirmed now by law (and not just via a recital) that depositaries do not have to apply the custody delegation rules to CSDs when the latter act on the issuers' side and (ii) in line with UCITS 6, ESMA invites the European Commission to study the benefits and risks of establishing a depositary passport.

Here also, it is surprising that in the same paper, ESMA regrets the lack of harmonisation in the supervisory of cross-border activities of AIFMs on the one hand and, on the other hand, opens a new discussion on cross-border depositary activities.

## 5. Sub-thresholds AIFMs

Small AIFMs are exempted from most of the scope of the AIFMD which however leaves discretion to Member States on what they may require from them.

Given the fact that some NCAs would prefer to have an explicit EU legal basis to introduce additional national requirements with a view to supervising sub-threshold AIFMs sufficiently, ESMA advocates for the clarification of the power of Member States to apply additional national requirements.

## 6. Amendments to definitions

Industry players will certainly welcome ESMA's invitation to clarify a certain number of key definitions under the AIFMD. Critically the definition of an AIF - which conditions the application of the whole AIFMD regime. ESMA invites the European Commission to clarify the concepts of "holding company" and "joint venture" as opposed to the AIF definition. The EU asset management industry will welcome the fact that ESMA stresses the importance of a clearer definition of the concept of "reverse solicitation" to achieve greater convergence and harmonization.

## 7. Environmental, Social and Corporate Governance (ESG)

It comes as no surprise that one of the 11 key issues outlined in Annex II of the Letter relates to ESG. ESMA's proposed solution is to include ESG data in the AIFMD reporting under article 24 of the AIFMD to increase transparency and help monitor ESG related risks. ESMA's view is that the requirements of the reporting itself should not be developed in the AIFMD but rather in possible additional technical standards to be developed by ESMA.

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### What will happen next?

The European Commission is expected to issue a consultation of the market industry and a proposal for the review of the AIFMD in the next few months. It will be interesting to see which key topics identified in the Letter will influence the European Commission, what the outcome of the consultation process with fund managers and other players will be, in order to amend the current AIFMD framework. The road ahead to "AIFMD II" may still be long and we hope that once the Brexit debate cools down, the EU lawmaker will strike the balance between the need for investor protection and the need to remain attractive and competitive in a globalized financial market.

1) ESMA34-32-550

2) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

3) Report on the Operation of the Alternative Investment Fund Managers Directive (AIFMD) - Directive 2011/61/EU, FISMA/2016/105(02)/C, submitted 10 December 2018

4) ESMA34-45-344

5) Laurent Fessmann and Catherine Martougin. "Brexit: Times are changing (again)". AGEFI Luxembourg, September 2017, p. 31

6) Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

7) Defined by ESMA as "fund managers that provide a platform to business partners by setting up funds at the initiative of the latter and typically delegating investment management functions to those initiators/business partners or appointing them as investment advisers or informally following their guidance and instructions"

8) Rule 501(a) of the Securities Act of 1933

9) "Key principles for a European framework on loan origination by funds" - ESMA/2016/596

10) Frequently Asked Questions concerning the Luxembourg Law of 12 July 2013 on alternative investment fund managers as well as the 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 regards to exemptions, general operating conditions, depositaries, leverage transparency and supervision (version 15, 27 September 2019), section 22 "Loan Origination"

# Libérer le potentiel de l'hydrogène vert

**S'il n'a pas tenu toutes ses promesses dans le passé, l'hydrogène est devenu un thème d'investissement à intégrer dans un portefeuille diversifié.**

Par Sara CATTANO, analyste financier chez Edmond de Rothschild

L'utilisation de l'hydrogène est un moyen efficace de stocker de l'énergie. Cependant, l'hydrogène ne se trouve pas à l'état naturel et doit être fabriqué. Jusqu'à présent, son précieux potentiel en tant que vecteur d'énergie n'a été que peu exploité, notamment en raison de son processus de fabrication industriel ayant à l'origine une mauvaise empreinte carbone (on parle alors d'hydrogène gris).

En produisant de l'hydrogène à partir d'énergies renouvelables (hydrogène vert), nous pouvons lui envisager un meilleur destin en l'utilisant non seulement comme matière première verte pour aider les usines chimiques et raffineries à réduire leur empreinte carbone, mais aussi dans une variété de nouvelles applications, qui permettront de parti-

ciper à une véritable décarbonisation de l'économie.

Par exemple, les technologies de l'hydrogène et des piles à combustible peuvent augmenter la flexibilité opérationnelle de la production d'énergie renouvelable, ce qui demeure nécessaire pour accroître leur contribution au réseau électrique. A cette fin, ces technologies peuvent être intégrées dans les parcs solaires et éoliens en utilisant l'électricité excédentaire pour créer de l'hydrogène qui alimentera les piles à combustible permettant alors la génération d'électricité en temps voulu. En outre, l'hydrogène peut être stocké et transporté, ce qui permettra de disposer d'énergie loin de sa source et de relier différents secteurs énergétiques.

Les applications de l'hydrogène s'étendront à divers et importants secteurs qui restent difficiles à électrifier et dépendent des combustibles fossiles, tels que le transport maritime, la production de fer et d'acier et le chauffage des bâtiments. Les piles à combustible représentent des solutions déjà viables dans la fourniture de chauffage et d'électricité pour les bâtiments ou les centrales électriques. En

outre, elles se sont avérées être de meilleures solutions que les batteries lithium-ion dans diverses applications de transport, notamment dans les transports longue distance et les transports lourds.

Pour que cette transition puisse avoir lieu, le prix de l'hydrogène vert doit être compétitif par rapport aux alternatives à faible teneur en carbone ou par rapport aux combustibles fossiles. Aujourd'hui, nous avons une vision plus claire de ce qu'il faut en termes d'augmentation de production et d'intégration technologique pour parvenir à des prix plus bas. Le potentiel de croissance du marché de l'hydrogène est très important et de nombreux acteurs industriels ont commencé à y faire des investissements.

Les projets d'hydrogène vert prévus jusqu'en 2025 représentent une croissance 12 fois supérieure à la capacité embryonnaire installée aujourd'hui. Cette trajectoire continuera dans les deux prochaines décennies si les plans de développement à long terme actuellement en discussion dans de nombreux pays sont mis en œuvre comme prévu. Cela est d'autant plus probable que plusieurs gouvernements ont mis en place

des politiques claires avec un soutien financier à cette phase de transition. A cela s'ajoute une nécessité d'intégration des autres gaz à faible teneur en carbone telles que l'hydrogène bleu et le biométhane comme solutions complémentaires dans la voie de la décarbonisation du système énergétique.

L'hydrogène ne date pas d'hier et a déçu par le passé, pourquoi devrait-il en être autrement cette fois-ci? Premièrement, les enjeux environnementaux n'ont jamais été aussi prioritaires et sont désormais universellement reconnus. Nous savons qu'il sera impossible d'atteindre les objectifs climatiques à horizon 2050 sans sources d'énergie alternatives complémentaires à l'électrification. C'est pourquoi, malgré la baisse du coût des combustibles fossiles, l'hydrogène et les autres gaz renouvelable sont à nouveau sérieusement envisagés.

Deuxièmement, aider à la création d'un écosystème de l'hydrogène est un moyen durable de relancer la croissance pour les gouvernements en promouvant l'expertise industrielle existante en matière d'électrolyseurs et de technologies liées à l'hydrogène. Enfin, la der-

nière décennie n'est pas passée en vain. L'énergie renouvelable s'est imposée et son coût a diminué. Nous savons désormais que la feuille de route et les investissements nécessaires pour développer l'hydrogène et le rendre économiquement compétitif sont certes ambitieux mais réalisables.

En tant qu'investisseurs financiers, nous voyons les entreprises opérant en amont de la chaîne de valeur comme étant les plus grands bénéficiaires des investissements prévus pour augmenter la production d'hydrogène, soit les fournisseurs d'électrolyseurs, de cylindres et les développeurs de piles à combustible. Même si de nombreuses sociétés spécialisées dans l'hydrogène sont des entreprises de petite capitalisation, les grandes entreprises qui participent à la mise en place de l'infrastructure nécessaire ne doivent pas être ignorées.

Ces leaders du marché sont des fournisseurs de technologies essentielles et représentent des moyens intéressants d'être exposés à ce thème. Au final, l'hydrogène est un thème d'investissement prometteur à moyen et long terme qui s'intègre bien dans un portefeuille diversifié.