Views on the review of the Alternative Investment Fund Directive (AIFMD)

A contribution by The Dutch Authority for the Financial Markets (AFM)

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The Dutch Authority for the Financial Markets

The AFM is committed to promoting fair and transparent financial markets.

As an independent market conduct authority, we contribute to a sustainable financial system and prosperity in the Netherlands.

Contents

1. Preface

The Directive on Alternative Investment Fund Managers (Directive 2011/61/EU, hereinafter **AIFMD**) was introduced in response to the financial crisis, which exposed a series of vulnerabilities in the global financial system. Managers of alternative investment funds (AIFMs) are responsible for the management of a significant amount of invested assets in the Union. They can exercise an important – largely beneficial – influence on markets and companies in which they invest. Yet, activities of AIFMs may also serve to spread or amplify risks through the financial system. In order to efficiently manage those risks, a key objective of the AIFMD is to create an internal market for AIFMs and a harmonized and stringent regulatory framework for the activities within the Union of all AIFMs. This includes the establishment of a harmonized regime within the Union for AIFMs from third countries. The Directive also aims to establish equal requirements governing the authorisation and supervision of AIFMs in order to provide a coherent approach to the related risks and their impact on investors and markets in the Union.

Pursuant to article 69 AIFMD, the Commission shall, on the basis of a public consultation and in the light of discussions with competent authorities, start a review on the application and the scope of this Directive. That review shall analyse the experience acquired in applying the AIFMD, its impact on investors, AIFs or AIFMs, in the EU and in third countries, and the degree to which the objectives of the AIFMD have been achieved. The Commission shall, if necessary, propose appropriate amendments.

As a first step in the AIFMD review process, an external contractor -KPMG- was commissioned to conduct a general survey and to provide an assessment of the AIFMD regulatory framework. In anticipation of a public consultation, the Commission is preparing a report for the co-legislators which it aims to publish in the first half of 2020.

The AFM would like to take the opportunity to highlight some areas which it considers to be relevant for the public consultation and for the AIFMD review. The AFM is generally satisfied with the AIFMD and the way it works out in practice. However, in our assessment whether the objectives of the AIFMD are fully achieved, we still see room for improvements in a number of areas. These include the co-existence of the Third Country passport and National Private Placement Regimes (NPPRs); the improvement of data quality; the option to include potential new macro prudential instruments in light of the current discussions on the need for such tools; improvements regarding the EU management and marketing passport; equal interpretations of AIFMD definitions and provisions; and amendments to the rules on private equity transparency notifications and asset stripping. We will elaborate on these points below.

2. Recommendations

The AFM would like to make the following recommendations.

2.1. **Third Country passport and National Private Placement Regimes (NPPRs)**

It is key that the European capital markets remain open and attractive for foreign investment. The interaction between European capital markets and the global capital markets becomes increasingly relevant now that the UK has left the EU. EU capital markets should remain accessible for third country asset managers (without compromising the integrity of the single market). In our view, the most appropriate way to arrange for this is by re-starting the work on the Third Country passport (as foreseen in the AIFMD) which enables Third Country managers to freely circulate their funds throughout the EU on a cross border basis. Currently – in the absence of the Third Country passport – Third Country managers have or may have market access on a country-per-country basis through the National Private Placement Regimes (NPPRs). NPPRs currently prove to be a crucial tool to arrange for effective access to national markets. This is particularly relevant for the Dutch pension sector which is serviced by many Third Country managers. In the AIFMD it is envisaged that the NPPRs are ultimately replaced (and faded out) when the Third Country passport shall have been established and operational for a period of three years (article 68). In contrast to what is currently foreseen in the AIFMD, the AFM would recommend that NPPRs remain longer in place and co-exist alongside the Third Country passport until the passport has proven to work sufficiently adequate in practice.

2.2. **One single data point for AIFMD data and improving data quality**

To enhance effective and efficient supervision by the NCAs, including the AFM, it is essential that the article 24 AIFMD data[1] is readily accessible (no time lags) and of good quality. The AFM believes this can best be accomplished if ESMA or a third party service provider is the single recipient of the AIFMD data and that each NCA (and ESMA) is able to access this database in respect of its 'own national population'. Experiences could be drawn from other pieces of EU legislation. In this way, updates or improvements on the reporting templates (e.g. limiting or removing open text boxes and removing any duplications in the reporting templates) can be carried out centrally and this would increase data quality and would prevent data arbitrage. Additionally, if reports are centrally collected, this would circumvent delays in the exports of data from market participants to NCAs and from NCAs to ESMA (and the review processes of this data).

2.3. **Macro prudential instruments**

The current legislative framework contains three instruments in the fund sector which can be activated to prevent risks to the financial system. On the basis of the AIFMD, NCAs have the possibility to impose leverage limits or other restrictions to limit the use of leverage (article 25). The AIFMD also offers NCAs the possibility to suspend redemptions in both the interest of unit-

[1] The data includes information on main markets, positions, on which managers are active. Also managers are required to report on illiquid nature of assets, side pockets, leverage and the sources of leverage, etc. Managers must also provide NCAs with the financial statements of the funds they manage.

holders and the public (article 46), although we miss a framework in level 1 for information exchange between NCAs and/or the possibility to inform ESMA of the intended action to suspend. In our view, this is important for the prevention of potential spill-over effects to other Member States. Finally, MiFIR enables ESMA and NCAs to temporarily restrict or prohibit the marketing, distribution or sale of financial products if there is a threat to the stability of the whole or part of the financial system (articles 40, 42). The AFM very much appreciates these intervening powers as a tool to prevent financial stability risks. Yet, in light of current discussions (at the ESRB, FSB and IOSCO) on the need for new macro prudential instruments, we would like to ask the Commission to take into account during the AIFMD-review the option to include potential new instruments that specifically address liquidity risks more directly.

2.4. **Improvements EU management and marketing passport**

One of the objectives of the AIFMD is achieving an internal market within the Union for EU AIFMs. To reach a fully internal market for EU AIFMs, it is necessary to ensure a level playing field and to remove restrictions to the free movement of financial services in the Union. The new rules on the cross border distribution of funds (as set out in the Cross Border Fund Distribution Directive and Regulation) which are part of the Capital Markets Union package are a crucial step forward. We believe it is a very good development that market participants are well-informed on the specific rules for market access in the relevant marketing jurisdictions, on the information to be produced by them and the relevant fees and charges levied by competent authorities for supervision of cross-border activities and that this information is available on the website of ESMA. In this way, the ESMA website is a central point for information for market parties. Furthermore, we believe that the interactive tool enabling indicative calculations of those fees and charges levied by national competent authorities is a good development to increase the transparency of the fees charged. However, we would welcome further harmonization efforts in this area in the future (both in terms of documentation to be produced and fees and charges levied) so as to procure that AIFMD services can be offered more seamlessly on a cross border basis. This would contribute to the level playing field within the Union and the further development of the Capital Markets Union.

2.5. **Equal interpretations of AIFMD definitions and provisions**

We see that NCAs and Member States interpret and apply definitions of the AIFMD differently. This may result in a tendency of market parties towards those Member States that make use of broad interpretations (regulatory arbitrage). For instance, there are differences in the interpretations of the activities of the depository and the delegation rules. We consider it undesirable that there are large variations in supervisory practices due to these different interpretations. This undermines the objective of establishing equal authorisation and supervision of AIFMs in order to provide a coherent approach within the Union. In order to mitigate the differences between NCAs and to ensure a level playing field within the Union, we therefore propose more clarification on level 1, and where this is more suitable, more harmonization through level 2 legislation or level 3 guidance.

2.6. **Private equity transparency notifications and asset stripping**

The AIFMD includes certain transparency requirements for private equity managers vis-à-vis NCAs. The AFM questions the relevance of receiving such transparency notifications.

Articles 26-30 AIFMD contain the obligation of private equity managers that acquire a major holding or control in a non-listed portfolio company to inform the portfolio company and its shareholders of the percentage of the manager's holding. Where private equity managers acquire control over a non-listed company, the private equity manager must in addition fulfil certain disclosure requirements vis-à-vis the portfolio company and its stakeholders, including the relevant trade union or individual employees. The private equity managers must at the same time also inform its relevant NCA of these transparency notifications. The AFM questions the relevance of receiving these notifications. The mandate of the AFM is confined to protecting investors and the integrity of the financial markets. The AFM is therefore a recipient of information which does not seem useful for its supervisory work. Accordingly, the AFM would rather not receive these type of notifications, or would at least prefer that the transparency requirements would be confined to the acquisition of control (and not to the acquisition of a major holding). In addition, the AFM also believes that in case the aim of these notifications is to detect the occurrence of asset stripping, more specific reports tailored for that purpose could be designed.

Asset stripping refers to the practice of selling off the assets of a portfolio company in order to improve returns for equity investors. The rules on asset stripping (article 30) apply once an alternative investment fund, either individually or jointly, has acquired control of a portfolio company. The basic restriction is that in the 24 months after the fund has acquired control, the AIFM must use its best efforts to prevent the 'controlled' company effecting distributions, capital reductions, share redemptions and/or the acquisition of own shares. The AFM notes there are a number of unclarified questions on the concept of asset stripping. For instance, which law applies to determine whether or not the asset stripping rules are breached (the law applicable to the manager or the law applicable to the portfolio company). The AFM believes that the asset stripping rules could best be addressed in corporate law regulations so as to achieve a level playing field amongst private equity investors and other investors. If this is not feasible, further guidance on the application of the asset stripping rules would be most welcome.

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