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ESMA
103 Rue de Grenelle
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**AFG response to ESMA consultation
on possible implementing measures of the Alternative Investment Fund Managers Directive in
relation to supervision and third countries**

The Association Française de la Gestion financière (AFG)¹ is grateful for the opportunity to respond to ESMA’s consultation on possible implementing measures of the Alternative Investment Fund Managers Directive (the AIFMD or the Directive) in relation to supervision and third countries.

General comments

Please find below AFG general comments.

- In our opinion, the concept of “equivalence” is not defined precisely enough and it would be difficult to assess in practice whether some third country rules are “equivalent” to EU rules or not. Instead, we think ESMA should stick to the notion of “same effect as” used in the level 1 directive as it is *more precise, objective* and tangible. Otherwise, at level 2 the wording “equivalent” would in fact blur the meaning of “same effect” of level 1 – while level 2 measures are explicitly aimed at clarifying the level 1 principles. It is particularly

¹ The Association Française de la Gestion financière (AFG) represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include 416 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups. AFG members manage 2,600 billion euros in the field of investment management, making the French industry the leader in Europe in terms of financial management location for collective investments (with over 1,300 billion euros managed from France, i.e. 20% of all EU assets managed in the form of investment funds), wherever the funds are domiciled in the EU, and second at worldwide level after the US. In the field of collective investment, our industry includes – beside UCITS – employee savings schemes and products such as regulated hedge funds/funds of hedge funds, private equity funds, real estate funds and socially responsible investment. AFG is of course an active member of the European Fund and Investment Management Association (EFAMA) and of the European Federation for Retirement Provision (EFRP). AFG is also an active member of the International Investment Funds Association (IIFA).

important to avoid any discrepancy in interpretations from one Member State regulator to another.

- We believe that in some parts of ESMA proposals the respective roles of the AIFMs and of the competent authorities should be clarified in order to avoid any blurred responsibilities.
- We think that it would be useful if ESMA set templates based on the IOSCO multilateral memorandum of understanding (MMoU) of May 2002 for both the arrangements relating to delegations to entities in third countries and to cooperation between EU and third country competent authorities, so that consistency is ensured and the burden of the authorities reduced. We suggest that the arrangements are published on the websites of ESMA and of the relevant national authorities.
- Regarding the determination of the Member State of Reference, we urge ESMA to require ex post checks confirming that it has actually been done properly.

Detailed comments

Please find below AFG detailed comments.

Box 1 - Delegation

ESMA proposes to assess whether a third country undertaking satisfies the requirements of the Directive based on the concept of “equivalence” of the third country rules with EU legislation. However, ESMA does not provide further detail on this concept and as a consequence we do not know how to understand - and implement - it. In any case, and to be consistent with the words used in the level 1 Directive, we wish the notion of ‘equivalence’ to be replaced by the one of ‘*same effects*’, which is both more precise and more objective, and therefore less subject to interpretation by the Member States’ regulators.

In addition, *the notion of ‘asset management’ is too wide: it should be restricted to the notion of ‘collective portfolio management’*, in order to avoid any circumvention of AIFMD through a delegation to an entity which does not provide collective portfolio management.

Furthermore, the explanatory text defining the notion of independence of a third country authority (para.9 p.9) should be included in the box in order to make it binding.

In order to avoid any misinterpretation, we believe that *all the relevant undertakings should be authorised and not merely registered*. A mere registration is not enough: non-authorised entities can be simply registered without being regulated and therefore do not provide enough guarantees.

Furthermore, we believe that any sub-delegation should only be allowed provided the initial AIFM approves it.

In our opinion, the IOSCO multilateral memorandum of understanding of May 2002 is a good basis for the cooperation arrangements to be signed at EU level. However, it is not sufficient and would need to be complemented in order to suit better the specificities of these arrangements: in other words, *an ESMA template to be used at pan-European level is necessary.*

Box 2 - Depositary

1.a – We believe that it would be difficult, if not impossible, for an AIFM to assess whether an entity fulfils the criteria described by ESMA. For example, it is definitely not in a position to appreciate whether a foreign competent authority has adequate resources to fulfil its tasks. In this respect, it would be useful if ESMA provided further criteria that the foreign entity should fulfil, and, for each of those criteria, specified what entity - the AIFM or the authorities - is in charge of assessing whether or not they are met. In our view, it is for regulators to carry out this task.

Furthermore, we suggest ESMA to include the paragraph 5 of the explanatory text p.11 in the box, in order to clarify the definition of “equivalent”.

1.b – In our opinion, it is not the AIFM’s responsibility to assess whether the local regulatory framework of a third country sets out criteria that are equivalent to those used in the EU. Rather, it is the role of the European competent authorities. Indeed, the level 1 directive states that the Commission should positively define which third countries meet the set criteria. Furthermore, the articulation of the role of the European competent authorities with that of the national competent authorities should be clarified. In this respect, we urge ESMA to include paragraph 7 of the explanatory text p.12 in the box, as this would enhance investor protection and allow a better harmonisation of the implementation of the rules throughout the EU.

In addition, we suggest that the European Commission shall – and not “*may*” – verify the ‘same effects’ and publish a list of third countries complying with this criterion. It would be in the common interest of investors, as well as a good way to reinforce harmonisation at EU level.

More generally, we urge ESMA to replace the wording “equivalent” in the whole Box by the more precise “to the same effect as” – used in the level 1 directive – in order to be more accurate. Indeed, we think that the concept of “equivalence” is less tangible.

Box 3 - Supervision

We agree that it would be beneficial if ESMA established the detailed content of the cooperation arrangements. We therefore urge ESMA to include paragraph 5 of the explanatory text p.14 in the box in order to make it binding. We also support the development of a template agreement by ESMA in order to set minimum requirements; we therefore urge ESMA to include paragraph 12 of the explanatory text p.15 in the box in order to make it binding. In our opinion, ESMA should set templates based on the IOSCO multilateral memorandum of understanding of May 2002 for both the arrangements relating to delegations to entities in third countries and to cooperation between EU and third country competent authorities, so that consistency is ensured and the burden of the authorities reduced. However, the IOSCO MMoU should be considered as a minimum.

In addition, we believe that it would be useful to publish such arrangements on the website of ESMA and of the relevant national competent authorities.

Explanatory text Para.11 p.15 – We believe that this requirement should be included in the box and re-worded as shown below, in order to make it clearly binding. Indeed, this would avoid any diverging interpretation of the rules by the competent authorities. In addition, we suggest using “Member State” rather than “country” as it is more precise.

*“Where marketing of the units is envisaged in a **Member State** other than that of the EU competent authority which is the reference authority, the agreement **should** be signed as a joint agreement between all the authorities involved”*

Box 4 – Cooperation arrangements between EU and non EU competent authorities

We generally support ESMA proposals. However, we would like to raise ESMA’s attention on the fact that this should be complemented by arrangements on the reciprocity of marketing.

Box 5 – Member State of Reference – authorisation of non EU AIFMs – Opt-in

In our opinion, there should be ex post checks by ESMA that the Member State of Reference actually meets the criteria set by the level 1 Directive and has been properly determined. The Member State of Reference could be for example assessed also with regards to the reciprocal marketing agreements between itself and the relevant third country.

5 – We believe that the proposed one week deadline is too short. One month would be better, in order to let a reasonable time to all relevant competent authorities to assess the relevant case.

If you need any further information, please do not hesitate to contact our Head of International Affairs Division, Stéphane Janin, at +33 1 44 94 94 04 (s.janin@afg.asso.fr), our Deputy Head of International Affairs Division, Carine Delfrayssi, at + 33 1 44 94 96 58 (c.delfrayssi@afg.asso.fr) or myself at +33 1 44 94 94 29 (p.bollon@afg.asso.fr).

Sincerely Yours,

(Signed)

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