



## EUROPEAN COMMISSION LAUNCHES ITS PUBLIC CONSULTATION ON THE AIFMD

In the next step towards a possible AIFMD2, on 22 October 2020 the European Commission published its public [consultation](#) on the AIFMD (the “Consultation”). The Consultation, which contains more than 100 questions spanning investor protection, international relations, private equity provisions, sustainability and interaction with the UCITS framework, will close on 29 January 2021. Responses will be used by the European Commission to inform its decision on what, if any, amendments to propose to the current AIFMD framework.

### BACKGROUND

Article 69 of the AIFMD requires the European Commission to undertake a review on the application and scope of the AIFMD and to make proposals for amendments to the AIFMD, if appropriate.

As a result, the European Commission commissioned an independent review of the AIFMD, published on 10 January 2019 (see our [earlier briefing](#)), and completed its own review of the AIFMD, published on 10 June 2020 (see our [earlier briefing](#)). Publication of the Consultation marks the next step towards the European Commission’s satisfaction of this Article.

Following receipt of responses to the Consultation, the European Commission will consider whether to make proposals for amendments to the AIFMD. The European Commission has indicated that such proposals will be published in the third quarter of 2021.

### THE CONSULTATION

The Consultation is split into seven sections, set out in the table below, each containing questions grouped around a particular theme. The questions reflect the European Commission’s findings from its review of the AIFMD published in June 2020, such as its comments regarding impediments imposed through inconsistent national implementation of the AIFMD and the potentially unlevel playing field that currently exists between EU and non-EU AIFMs.

The Consultation also reflects the contents of a letter published by ESMA in August 2020 (the “ESMA Letter”) outlining areas in which, in ESMA’s view, amendments to the AIFMD should be considered (see our [earlier briefing](#)). In particular, the Consultation contains a number of questions regarding the potential introduction of further restrictions on delegation by AIFMs, as recommended by ESMA, (which will be of particular relevance and concern to those firms whose Brexit models rely on a delegation models) and the possibility of greater harmonisation between the AIFMD

### Key issues

- On 22 October 2020 the European Commission published its public consultation on the AIFMD.
- The deadline for responses to the Consultation is 29 January 2021. Responses can be submitted via the [online questionnaire](#) on the [EU Commission’s website](#).
- The questions contained in the Consultation indicate the areas in which the European Commission may consider introducing amendments to the AIFMD framework.
- Such areas include questions regarding imposing greater restrictions on delegation, introducing marketing passporting of AIFs to retail investors, introducing a harmonised framework for loan-originating AIFs and questions regarding whether there is potentially an unlevel playing field between EU and non-EU AIFMs.
- The European Commission has stated that it plans to publish feedback on the Consultation in the third quarter of 2021.

and UCITS Directive. Certain of ESMA's recommendations do not, however, appear to be reflected. Notably, while ESMA recommended greater clarity on the rules for reverse solicitation, the Consultation contains no specific questions in this regard.

The following table summarises each of the sections contained in the Consultation and sets out examples of questions from those sections.

Section in the Consultation	Summary and example questions
<p><b>1. Functioning of the AIFMD regulatory framework, scope and authorisation requirements</b></p>	<p>This section seeks views on the scope of the AIFM licence, its potential extension to smaller AIFMs and level playing field concerns in relation to the regulation of other financial intermediaries that provide similar services, such as MiFID firms and UCITS managers. A number of questions also relate to AIFMs' capital requirements.</p> <p>Examples of questions include:</p> <ul style="list-style-type: none"> <li>• <i>Do you believe that the effectiveness of the AIFMD is impaired by national legislation or existing market practices? (Q.2)</i></li> <li>• <i>Should AIFMs be permitted to invest on own account? (Q.5)</i></li> <li>• <i>Should the AIFM capital requirements be made more risk-sensitive and proportionate to the risk-profile of the managed AIFs? (Q.8)</i></li> <li>• <i>Is it necessary to provide an EU-level passport for sub-threshold AIFMs? (Q.18)</i></li> <li>• <i>What are the changes to the AIFMD legal framework needed to ensure a level playing field between investment firms and AIFMs providing competing services? (Q.13)</i></li> </ul>
<p><b>2. Investor protection</b></p>	<p>This section seeks views regarding investor access, disclosure requirements and the lack of a depositary passport. Interestingly, notwithstanding the recommendation in the ESMA Letter that the marketing passporting should be allowed in relation to professional investors only, the Consultation does raise the question of the potential introduction of a retail marketing passport.</p> <p>Examples of questions include:</p> <ul style="list-style-type: none"> <li>• <i>Is there a need to structure an AIF under EU law that could be marketed to retail investors with a passport? (Q.23)</i></li> <li>• <i>What difficulties, if any, do the depositaries face in exercising their functions in accordance with the AIFMD? (Q.24)</i></li> <li>• <i>What would be the potential benefits and risks associated with the introduction of the depositary passport? (Q.32)</i></li> <li>• <i>Should the investor CSDs be treated as delegates of the depositary? (Q.35)</i></li> <li>• <i>Are the mandatory disclosures under the AIFMD sufficient for investors to make informed investment decisions? (Q.36)</i></li> <li>• <i>Are the AIFMD rules on valuation appropriate? (Q.40)</i></li> </ul>

### 3. International relations

This section seeks views on how to achieve the equitable treatment of non-EU AIFs while ensuring that EU AIFMs are not exposed to unfair competition or are otherwise disadvantaged. It contains questions regarding whether there is an unlevel playing field between EU and non-EU AIFMs and, in line with the ESMA Letter, contains a number of questions regarding the adequacy of current delegation rules and whether delegation should be subject to quantitative limitations or prohibitions on the delegation of certain core or critical functions.

Examples of questions include:

- *Do you believe that national private placement regimes create an uneven playing field between EU and non-EU AIFMs? (Q.49)*
- *Should the delegation rules be complemented with: (i) quantitative criteria; (ii) a list of core or critical functions that would always be performed internally and may not be delegated to third parties; (iii) other requirements? (Q.52.1)*
- *Should the AIFMD standards apply regardless of the location of a third party to which the AIFM has delegated the collective portfolio management functions, in order to ensure investor protection and to prevent regulatory arbitrage? (Q.53)*

### 4. Financial stability

Questions in this section seek views on how to ensure that national competent authorities and AIFMs have the tools necessary to effectively mitigate and deal with systemic risks, with a particular focus on reporting by AIFMs to national competent authorities. The section also contains questions regarding the collection of data on the exposure of funds to the leveraged loan and collateralised loan obligation (CLO) markets and leverage calculation methods. As suggested in the ESMA Letter, it also seeks views on the introduction of harmonised requirements for loan-originating AIFs.

Examples of questions include:

- *Are the supervisory reporting requirements as provided in the AIFMD and AIFMR's Annex IV appropriate? (Q.61)*
- *Should supervisory reporting for UCITS funds be introduced? (Q.76)*
- *Should the requirements for loan originating AIFs be harmonised at an EU level? (Q.85)*

### 5. Investing in private companies

This section seeks views on the current rules relating to investing in private companies, found in Chapter 5 of the AIFMD. These rules will be familiar to fund managers in the private equity space and require, amongst other things, regulatory filings when AIFs acquire major holdings in non-listed companies, as well as requiring AIFMs to comply with restrictions regarding asset stripping.

Examples of questions include:

- *Are the rules provided in Section 2 of Chapter 5 of the AIFMD laying down the obligations for AIFMs managing AIFs, which acquire control of non-listed companies and issuers, adequate, proportionate and effective in enhancing transparency regarding the employees of the portfolio company and the AIF investors? (Q.86)*
- *Are the AIFMD provisions against asset stripping in the case of an acquired control over a non-listed company or an issuer necessary, effective and proportionate? (Q.88)*

<p><b>6. Sustainability/ESG</b></p>	<p>This section seeks views on how the alternative investment sector can participate in responsible investing and the appropriateness of the AIFMD rules in assessing sustainability risks.</p> <p>Examples of questions include:</p> <ul style="list-style-type: none"> <li>• <i>The Disclosure Regulation (Regulation 2019/2088 on sustainability-related disclosures in the financial services sector) defines sustainability risks, and allows their disclosures either in quantitative or qualitative terms. Should AIFMs only quantify such risks? (Q.90)</i></li> <li>• <i>Should investment decision processes of any AIFM integrate the assessment of non-financial materiality, i.e. potential principal adverse sustainability impacts? (Q.91)</i></li> <li>• <i>The EU Taxonomy Regulation (Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment) provides a framework for identifying economic activities that are in fact sustainable in order to establish a common understanding for market participants and prevent green-washing. To qualify as sustainable, an activity needs to make a substantial contribution to one of six environmental objectives, do no significant harm to any of the other five, and meet certain social minimum standards. In your view, should the EU Taxonomy play a role when AIFMs are making investment decisions, in particular regarding sustainability factors? (Q.94)</i></li> </ul>
<p><b>7. Miscellaneous</b></p>	<p>This section poses various miscellaneous questions, including whether ESMA and national competent authorities have sufficient powers and competencies under the AIFMD, whether sanctioning under the AIFMD should be changed and whether a more coherent approach between the AIFMD and UCITS Directive is warranted.</p> <p>Examples of questions include:</p> <ul style="list-style-type: none"> <li>• <i>What improvements to intra-EU cross-border supervisory cooperation would you suggest? (Q.99)</i></li> <li>• <i>Should the UCITS and AIFM regulatory frameworks be merged into a single EU rulebook? (Q.101)</i></li> </ul>

## **NEXT STEPS**

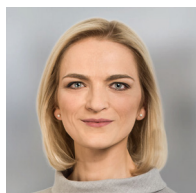
The deadline for responses to the consultation is 29 January 2021. Responses can be submitted via the [online questionnaire](#) on the [EU Commission's website](#).

The European Commission's website states that it plans to publish feedback on the consultation in the third quarter of 2021, at which point firms should gain a clearer indication of the potential scope and shape of the proposed AIFMD2 package.

## **IMPACT OF BREXIT**

As the UK has left the EU, it will not be obliged to follow any European Commission proposals for amendments to the EU AIFMD regime (subject to any agreement to the contrary with the EU). However, UK firms may be affected by amendments to the EU AIFMD regime. In particular, responses to the questions surrounding whether an unfair level playing exists between EU and non-EU AIFMs, potential restrictions on delegation by EU AIFMs and potential imposition of AIFMD requirements on non-EU entities to whom EU AIFMs delegate functions could impact UK (and other non-EU) managers. In addition, the UK is likely to watch the European Commission's proposals closely and to consider whether similar proposals should be made to the UK's AIFMD framework.

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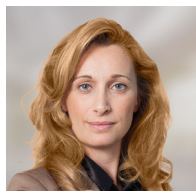
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