



Consultation response: ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive in relation to supervision and third countries¹

1. Introduction

The HFSB welcomes the opportunity to respond to the Consultation paper on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive in relation to supervision and third countries.

The Hedge Fund Standards Board (HFSB) is the guardian of the Standards drawn up by international investors and hedge fund managers to create a framework of discipline for the hedge fund industry. The HFSB's mission is to promote the Standards through collaboration with managers, investors and the regulatory community

The Standards were drawn-up and published in 2008 in response to G8 policy leaders' concerns over financial stability. They serve the interests of all market participants and of the economy at large.

Many aspects of the standards are reflected in the AIFM-Directive, in particular in areas such as portfolio and liquidity risk management, disclosure, and valuation. However, it is important to highlight that the Hedge Fund Standards are based on a comply or explain mechanism, whereby managers provide an explanation to their investors in relation to those areas, where they chose a different approach. Overall, this framework acknowledges the responsibility of each investor to assess properly the relevant disclosures made by the managers before making an investment decision.

The HFSB is pleased to continue to inform the regulatory process about industry practices and how outcomes in the capital markets can be improved.

2. Overview

The HFSB has highlighted the important difference between banking and asset management and the regulatory implications in its response to the consultation on ESMA's draft technical advice to the

¹ ESMA Consultation Paper: http://www.esma.europa.eu/index.php?page=consultation_details&id=188

European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive.² The HFSB also highlighted in the past that the implementing measures in relation to third countries should not restrict investor choice and international capital flows. Therefore, the HFSB welcomes ESMA's attempt to draw upon international standards (e.g. by IOSCO) to facilitate collaboration between international regulators.

3. Consultation responses

The following sections provide responses to select questions raised in the ESMA Consultation Paper. Section numbers and page references refer to the ESMA Consultation document³.

III. Delegation (Articles 20 (1) (c), 20 (1) (d), and 20 (4))

Asset management is increasingly becoming a global business where investors pursue diversification by allocating capital across various regions. As a result of this, asset managers operate globally delivering various components of the investment process in a number of locations. This is very similar to other industries in a globalised economy: cars are no longer manufactured from scratch in one single country; today car manufacturing engages several regions.

In the investment management context, this "division of labour" is in the interest of investors, as it ensures that portfolio managers and analysts are in proximity to the markets they operate in and allows firms to organise themselves in a competitive manner. Therefore, it is important that the AIFM-Directive caters accordingly for the increasingly global nature of the asset management business and allows firms to build international "supply chains", drawing upon talent and skill around the globe.

Q1: Do you agree with the above proposal? If not, please give reasons.

(4d) A practicality concern arises in relation to (4d): The text refers to relevant supervisory authorities to "receive information from the supervisory authority in the third country in case of breach of regulations." It is not clear how the supervisory authority in a third country will know which other supervisors to inform about breaches in their jurisdiction by a particular entity. Ultimately, if that type of notification became a global standard, all supervisors around the world would have to "cross inform" each other on all breaches occurring in their respective jurisdictions, which might become unmanageable. The HFSB would recommend to thoroughly review the implications of this requirement from an efficiency perspective, and to introduce a materiality threshold including a specification of the types of breaches of regulation that require immediate notification (4.d), to avoid that all minor breaches (e.g. breaches which can be easily rectified) will have to be reported.

² http://www.hfsb.org/files/esma_aifmd_response_13-09-2011.pdf

³ http://www.esma.europa.eu/index.php?page=consultation_details&id=188

In relation to (4e) it is important to highlight that enforcement action by third country supervisors is taken when the relevant regulations of that third country are breached, but not when provisions in relation to the AIFM-Directive are breached. A third country supervisor can impossibly be required to enforce the laws and regulation of other countries alongside its own regulations.

It is unclear whether under (5), the AIFM is required to assess if a third country satisfies the requirements under Article 20(1)(c). An AIFM is unlikely to be in a position to assess this.

Q2: In particular, do you support the suggestion to use as a basis for the co-operation arrangements to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation?

In general, the HFSB would welcome an international standard for cooperation between international supervisors on the basis of the IOSCO MMoU⁴ and the IOSCO Technical Committee Principles for Supervisory Co-operation, drafted in collaboration with other interested countries and subsequent public consultation.

Co-operation between EU and third country competent authorities for the purposes of Article 34 (1), 36 (1) and 42 (1) of AIFMD

Q5: Do you agree with the above proposal? If not, please give reasons.

(1c) refers to the right to obtain all information necessary for the performance of the duties provided for in the Directive. If the approach taken by ESMA was mirrored by other supervisors, this would result in the cross-imposition of the various regulators' individual data collection requirements on each other, which could become fairly complex and expensive. Therefore, the HFSB believes that there is significant room for global cooperation and harmonisation, and IOSCO appears to be an appropriate platform for this.

Member State of reference: authorisation of non-EU AIFMs – Opt-in (Article 37(4))

Q9: Do you have any suggestions on possible further criteria to identify the Member State of reference? / Q10: Do you think that any implementing measures are necessary in the context of Member State of reference given the relatively comprehensive framework in the AIFMD itself?

In reality, the investor base of a non-EU AIFM might fluctuate over time and it might not be possible to predict such outcomes at the time of registration by the non-EU AIFM. The HFSB recommends that the process of registration of non-EU AIFM should not be overcomplicated and non-EU AIFM should be allowed to choose the most suitable jurisdiction. At the end of the day, investors are in a position to use their judgement and assess the choices made by non-EU AIFM and decide if they are satisfied with the regulatory oversight and protections in the relevant member state.

⁴ www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf