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FRANCE

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

Dear Ms. Ross,

BVI¹ welcomes the opportunity to comment on ESMA's approach to implementation of the AIFMD requirements pertaining to third country issues.

Most of our members do not engage in fund management activities from outside the EU. However, they broadly delegate portfolio management or risk management functions to third country entities especially in the context of asset management strategies involving third country assets. Therefore, our comments focus on section III. of the consultation paper dealing with the requirements for delegation.

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¹ BVI Bundesverband Investment und Asset Management represents the interests of the German investment fund and asset management industry. Its 85 members manage currently assets in excess of EUR 1.8 trillion both in mutual funds and mandates. BVI's ID number in the EU register of interest representatives is 96816064173-47. For more information, please visit www.bvi.de.

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Box 1 (Delegation of portfolio or risk management to an undertaking in a third country)

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

Box 1, para. 5

We strongly disagree with the suggestion requiring equivalence of local criteria for authorisation of the third country undertaking as we deem it inconsistent with the Level 1 provisions.

Art. 20 para. 1 (c) of AIFMD refers only to “undertakings which are authorised or registered for the purpose of asset management and subject to supervision”. This wording is identical with the conditions for delegation of investment management applicable under the UCITS Directive (cf. Art. 13 para. 1 (c)) and should be interpreted in a conformable manner. There is however no requirement for equivalence of authorisation criteria under the UCITS Directive, even though the standards for delegation of portfolio management for UCITS should certainly not be set lower than in the area of AIF, given that the regulatory standards of AIFMD are aimed at the management of investment vehicles for professional clients.

Moreover, the concept of equivalence remains broadly undefined in qualitative terms. According to para. 10 of the explanatory text, assessment of equivalence should be made by comparing the eligibility criteria and the on-going operating conditions locally applicable to the third country undertaking against the corresponding EU requirements. From the legal point of view, however, it is very unclear at which stage the local authorisation criteria would be deemed equivalent to the EU standards. Also, the reference to Box 67 of ESMA’s draft advice in para. 10 of the explanatory text leaves entirely open which of the relevant EU frameworks – AIFMD, UCITS Directive or MiFID – shall be considered the ultimate benchmark for the assessment of equivalence.

What concerns us most, however, is the proposed requirement of comparing the “on-going operating conditions” in the respective third country with the EU standards for “performance of the relevant functions”. This wording in para. 10 of the explanatory text implies equivalence of the entire regulatory framework for asset management services and thus goes definitely too far as it is not even related to the authorisation or registration procedure. By



putting it that way, ESMA would effectively limit the scope of third party delegation to entities conducting their business in line with EU standards which clearly lacks any basis in the Level 1 text.

Hence, it appears that these new standards suggested by ESMA breach the limits of the Level 1 text which provides no discernible basis for the equivalence requirement. In fact, standards for equivalence have been discussed in the course of Level 1 discussions on the basis of the Commission's legislative proposal which was restricting the delegation possibilities in terms of portfolio and risk management to entities holding the AIFM license². This approach has been finally rejected at Level 1 and it seems contrary to the spirit of AIFMD to introduce it at Level 2.

For these reasons, we believe that the equivalence requirement should be abandoned by making the following amendments to the wording of para. 5:

"5. The third country undertaking should be deemed to satisfy requirement under Article 20(1)(c) when it is authorised or registered for the purpose of asset management ~~based on local criteria which are equivalent to those established under EU legislation~~ and is effectively supervised by an independent competent authority."

Otherwise, we agree with Box 1 subject to the following comments:

Box 1, para. 1

The way we understand ESMA's proposal is that the written arrangement which should exist between the competent authority of the AIFM and the third country supervisory authority may either be a general memorandum of understanding covering all cases or a confirmation or exchange of letters establishing the supervisory cooperation regarding the case of a specific delegation. Already today, exchanges of letters between supervisors are recognised as a sufficient basis for delegation of functions outside the EU as long as they deal with all matters relevant for ensuring effective supervision. Therefore, such arrangements should be respected also after the entry into force of the AIFMD in order to avoid disruptions in business relationships.

² Cf. Art. 18 para. 1 (c) of the Commission proposal for a Directive on Alternative Investment Fund Managers dd. 30 April 2009.

Moreover, we would like to draw ESMA's attention to the large number of delegation cases already in place today. In many cases, one single delegation agreement exists to cover delegation of functions for several funds, including UCITS and AIF. In most cases, these agreements have been reviewed and approved by the competent authorities and auditors. In order to avoid disruptions of business operations, ESMA's requirement of written arrangements between authorities being in place prior to the delegation should not apply to delegation agreements already put into practice. EFAMA therefore urges ESMA to modify its advice to accommodate such existing delegation cases. In particular, for existing delegation cases which are concluded in accordance with the currently valid UCITS and MiFID standards, the requirement of a written arrangement prior to entry into force of the AIFMD should not apply.

Box 1, para. 4

In our view, it should be specified that on-site inspections mentioned in para. 4 (c) may only be performed in accordance with the existing international treaties (which as a general rule do not allow for foreign supervisors to perform on-site inspections directly without the presence of the local supervisory authority). Alternatively, para. 11 of the explanatory text could be reflected in Box 1 in order to clarify the circumstances of permissible on-site inspections in third countries.

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?*

We support the proposal in para. 1 and 7 of the explanatory texts to use Memoranda of Understanding based on international standards, such as the IOSCO MoUs, as the basis for cooperation arrangements with third country authorities. We are also in favour of ESMA taking a leading role in negotiating MMoUs at EU level which would obviate the need for bilateral arrangements. In this context, we strongly suggest that the centrally concluded MMoUs should be published at ESMA's website in order to enable AIFM to duly assess the possibility of third country delegation. The same level of transparency should be provided by national authorities when negotiating bilateral MoUs.



In terms of content, we think that ESMA should not go beyond the requirements set out in the IOSCO MoUs and should reflect in its advice the terminology used in the IOSCO MoUs.

We hope that our comments prove helpful for reconsidering and refining ESMA's technical advice on implementation of the AIFMD requirements in relation to third country issues. Please do not hesitate to contact us, should you have any questions or see the need for further discussion.

Yours sincerely

Marcus Mecklenburg

Dr. Magdalena Kuper