

## OPINION

### Practical arrangements for the late transposition of the AIFMD

#### 1. Legal basis

1. The European Securities and Markets Authority's (ESMA) competence to deliver an opinion is based on Article 29(1)(a) of Regulation (EC) No 1095/2010 (Regulation). In accordance with Article 44(1) of the Regulation the Board of Supervisors has adopted this opinion.
2. The scope of this opinion is confined to the provision of collective portfolio management services.

#### 2. Background

3. The deadline for the transposition of the AIFMD (Directive 2011/61/EU, hereafter the Directive) into national legislation was 22 July 2013. However, some Member States (MS) may not have fully transposed the Directive by that date. Late transposition can create difficult situations where some competent authorities may not have the legislative framework in place to allow a proper implementation of the rights and obligations provided for in the Directive.
4. Without prejudice to any initiatives taken by the European Commission in case of late transposition by MS, ESMA intends to address the situation at an operational level in order to minimise, as far as possible, the impact on industry and investors deriving from lack of transposition.
5. ESMA proposes practical arrangements for operations under Articles 31, 32 and 33 of the Directive involving one MS that has not transposed the Directive.

#### 3. Identification of the problems caused by late transposition of the Directive

6. Not all situations arising from non-transposition can be accommodated by way of practical arrangements that are legally sound.
7. ESMA has identified the following issues which could be addressed via practical arrangements between competent authorities:
  - An AIFM in a MS where the Directive has been transposed may not be able to manage an EU AIF established in another MS that has not transposed the Directive.
  - AIFMs and competent authorities in MS that have transposed the Directive may have difficulties notifying the marketing of EU AIFs (including AIFs established in a MS other than the home MS of the AIFM) to relevant competent authorities if the host MS has not transposed the Directive.

8. The practical arrangements proposed are based on the jurisprudence of the Court of Justice of the European Union (CJEU) on direct effect of provisions contained in the relevant EU directives.
9. According to the general statement of primary law, “A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods” (Article 288 of the Treaty on the Functioning of the European Union).
10. In the process of transposition MS are obliged to create a legal framework in which the rights and obligations arising from a directive can be recognised with sufficient clarity and certainty to enable citizens to invoke them. In other words, MS have an obligation to reconcile their legal order with the objectives of a directive at the end of the transposition period.
11. It must also be noted that the CJEU has held that MS are liable to pay damages where loss is sustained by reason of failure to transpose a directive in whole or in part.
12. ESMA analysed the relevant provisions of the Directive and adopted this opinion on the practical arrangements to be followed by EU competent authorities.

#### **4. Arrangements before implementation of the Directive in all MS**

##### **4.1. Notification of marketing of EU AIFs when the host MS of the AIFM has not transposed the Directive (Articles 31 and 32 of the Directive)**

13. ESMA believes that, if the Directive has been transposed in the home MS of the AIFM, the competent authority of the host MS of the AIFM (Article 32) or home MS of the AIFM (Article 31) may not refuse a valid notification under the Directive on the ground that the Directive has not yet been transposed in the host MS. This applies irrespective of whether the marketing is done using the freedom to provide services or by means of a branch.

##### **4.2. Management passport (Article 33 of the Directive)**

14. ESMA believes that AIFMs established in a MS that has transposed the Directive should be able to manage an EU AIF via the management passport, both using the freedom to provide services or by means of a branch, in a MS where the Directive has not been transposed, irrespective of the provisions currently in place in such jurisdiction since the relevant provisions of the Directive are of a self-executing nature, and provided the AIFM is authorised to manage that type of AIF in accordance with Article 33(1) of the AIFMD. Any local restrictions on AIFMs that are not in accordance with the AIFMD will need to be disapplied.