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*By Email*

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29 January 2021

**Re: Public consultation on the review of the Alternative Investment Fund Managers Directive**

Dear Seán

Thank you for this opportunity to provide views on the public consultation on the review of the Alternative Investment Fund Managers Directive (AIFMD). The Central Bank of Ireland (the Bank) welcomes the opportunity to share views on this important piece of legislation. As Ireland is a significant domicile for European investment funds, with appropriately €3.6 trillion in assets under management in 4,802 UCITS and 3,062 Alternative Investment Funds (AIFs)<sup>1</sup>, the Bank welcomes the opportunity to engage on these matters.

As an integrated central bank, prudential, conduct and AML/CFT regulator, macroprudential and resolution authority, the Bank approaches regulation of the funds sector in the light of our statutory mandates of safeguarding monetary and financial stability, securing the proper and effective regulation of financial service providers and markets, and ensuring that the best interests of investors are protected.

Aligned with the format of the AIFMD consultation paper our views are set out under a number of principle headings, namely:

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<sup>1</sup> Figures referenced relate to investment funds, including sub-funds.



- I. Functioning of the AIFMD Regulatory Framework;
- II. Investor Protection;
- III. International Context;
- IV. Financial Stability;
- V. Sustainability/ESG; and
- VI. Other matters.

We also provide more detailed, tailored views on specific aspects of the consultation in the Annex to this letter. The commentary under these headings and in the Annex should be interpreted as relating to the regulation of investment funds (both UCITS and AIFs) and their fund service providers, including fund management companies, depositaries and fund administrators. Unless otherwise stated, the Bank generally supports consistency of approach across the two primary pieces of legislation in area, namely AIFMD and the UCITS Directive.

#### *Introduction*

As noted, the Bank's mandate includes monetary and financial stability and ensuring that the financial system operates in the interests of consumers, investors, and the economy as a whole. The breadth of the Bank's mandate gives both strength and insight, enabling the Bank to harness its collective, wide-ranging and deep policy and technical expertise to tackle complex issues. That breadth has a significant bearing on how we organise our approach to the regulation of the funds sector – examining macro, micro and conduct issues in the round – and our consideration of what changes are required to the existing legislative and regulatory frameworks for investment funds.

Relative to the size of the economy, Ireland has one of the largest non-bank financial sectors in the world. These non-bank financial entities are generally internationally focused, but important domestic linkages exist. Investment funds form the largest part of the non-bank financial intermediation sector in Ireland. The sector plays a vital role in the functioning of the financial system and the financing of the real economy. It will also be critical in determining how successful the global economy is in overcoming some very real challenges, from systemic resilience to the post-COVID recovery and more.



## **I. Functioning of the AIFMD Regulatory Framework**

Since its introduction, the AIFMD has had a significant and positive impact on the regulation of the alternative investment sector. It has facilitated cross-border integration while delivering better outcomes in terms of investor safeguards and improved monitoring of potential risks to the financial system. Proposals for reform of the AIFMD, or other funds legislation, should be considered in the context of delivering a European financial services system that (i) serves the needs of the European economy and supports the economic welfare of EU citizens and (ii) operates fairly, efficiently and safely in the interests of consumers and investors. The development of sound and effective regulatory frameworks for funds and fund managers has been of particular importance in the context of supporting these aims and aiding the stated aims of the Capital Markets Union agenda by better facilitating investment across Member States.

Regulatory and legislative frameworks should be calibrated in a manner that supports adherence to high quality standards and mitigation of potential risks, while facilitating appropriate investor choice and product innovation. The calibration of such frameworks should include appropriately balancing integration in international financial markets taking into account the increasingly complex global context in which the asset management sector now operates. Close, high quality, integration in financial markets subject to appropriate safeguards is essential if the aims for the European economy and European citizens are to be realised. Adherence to such an approach will ensure the European financial services system serves the needs of the European economy and citizens through the development of integrated, strategically-open, sustainable and deep capital markets. This aspect is further discussed under “International Context” below.

## **II. Investor Protection**

### **Semi-professional investors**

Under AIFMD, ‘professional investor’ means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2014/65/EU (MiFID II). The marketing passport that is made available under AIFMD is only available to professional investors which meet those requirements. The AIFMD, in general, does not include product rules aimed at protecting retail investors.



In our view, initiatives aimed at improving AIFM access to retail investors without a product regime could result in increased investor protection risk. The Bank has concerns with broadening the AIFMD with respect to retail investors such to include a retail AIF passport. The European Securities and Markets Authority (ESMA) previously called for greater convergence in the definition of “professional investor” in its 2015 opinion on the functioning of the AIFMD EU passport and of the National Private Placement Regimes.<sup>2</sup> ESMA identified a wide variety of definitions across the EU on what constitutes a “professional investor”, and a wide variety of treatments of the status of “semi-professional” investors under national private placement regimes. If however it is thought desirable to extend the current passport, consideration could be given to the potential for the introduction of new categories of investors under the AIFMD (such as “semi-professional” investors).

### **Conflicts of interest**

The principle of specialisation for fund management company activities is an important element of the UCITS and AIFMD legislative frameworks. It avoids increased risk and conflict of interest between fund management and other activities and in that way, protects investors. The Bank has concerns with extending the range of permitted activities of Alternative Investment Fund Managers (AIFMs). In particular, allowing for own account trading could increase the risk of conflicts of interest and complexity of the business model and therefore, increase risk to fund investors. There is also the potential of increased regulatory arbitrage between fund and MiFID regimes.

Separately, the risks associated with conflicts of interest and more specifically, connected party transactions have come under scrutiny during recent high profile risk events. These events resulted in significant losses to investors due to the illiquid nature of investments purchased via connected party transactions. Therefore, the Bank sees merit in strengthening the rules on conflicts of interest, in particular connected party transactions as part of the AIFMD Review. For example, the Bank has imposed additional requirements in this regard, including that such transactions must be negotiated at arm’s length, be in the best interests of shareholders and be subject to a certified

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<sup>2</sup> See paragraph 8 of the opinion at [https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-1235\\_opinion\\_to\\_ep-council-com\\_on\\_aifmd\\_passport\\_for\\_publication.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-1235_opinion_to_ep-council-com_on_aifmd_passport_for_publication.pdf)



valuation by an independent and competent person approved by the depositary (or approved by the Board of the AIF in the case of transactions involving the depositary).

### **Passporting frameworks**

The EU passporting system and cross border activity operates on the basis of structurally founded trust between home and host countries based on the application of common, high quality standards. There must be confidence in the supervision undertaken by home countries, so that investors in one jurisdiction feel confident to invest in products from another jurisdiction. As a significant domicile for investment funds, the Bank recognises the high importance of ensuring effective cross border supervision of funds and fund management companies.

Experience with the AIFMD (and UCITS) framework shows that there can still be a lack of clarity in what the precise responsibilities of home and host supervisors are in certain cases. Clarification of the supervisory responsibilities would reduce uncertainty regarding cross-border activities. For example, in the case of AIF suspensions, there are currently only general provisions in the AIFMD in relation to exchange of information. This is in contrast to the more detailed requirements as set out in the UCITS directive.<sup>3</sup> As such, it would be useful to further clarify the supervisory responsibilities and obligations to share information with other National Competent Authorities (NCAs) and ESMA. The supervision of branches is another area where there would be merit in further clarification. Currently, when an AIFM establishes a branch in order to offer products in a host jurisdiction, the AIFMD is not precise on the respective roles of that AIFM's home and host NCAs. It is also not clear what the procedure is for home and host NCAs when an AIFM wants to close a branch, nor is there a register of branches.

In terms of the possible extension of a passporting framework for depositary services, the Bank supports ESMA's proposal for a study on the potential benefits and risks from such a development. While there is merit in such a passporting framework, it may also introduce increased complexity into the supervision of investment funds on a cross border basis. The depositary plays a critical role in terms of the safekeeping of assets and as part of their oversight obligations under AIFMD and UCITS. Therefore, any proposal to amend the current approach to depositary services would need to be carefully considered.

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<sup>3</sup> Paragraph 2, article 98 of Directive 2009/65/EC of the European Parliament and of the Council



### III. International Context

The global nature of the European asset management sector, particularly the UCITS regime, means that investors in European funds are located in all parts the world. These developments have come about over time, based on incremental progress since the introduction of the first UCITS directive in 1985, with a legislative framework designed to remove barriers between jurisdictions and crafted with an internationalist outlook. That approach has brought considerable benefits as an important source of financing for the European economy and improved outcomes for investors in the form of increased product choice and lower costs through economies of scale. The approach has been supported by rigorous and effective processes, firstly at an NCA level and later at ESMA to support such cross border integration. For example, this has included (i) robust gatekeeper / authorisation processes<sup>4</sup>, (ii) separate and distinct approval / clearance process<sup>5</sup> where linkages to third country firms are envisaged and (iii) active engagement at a European level to ensure a consistent approach with European peers (for example this was particularly important recently through the ESMA Supervisory Coordination Network (SCN) in relation to Brexit authorisation applications).

In determining the extent to which third country firms should be able to have access to EU markets, the Central Bank considers that there are three principles that should be applied:

- Services that are offered in the EU must be provided in accordance with EU norms and standards (including by means of equivalence or similar decisions);
- Entities that are authorised in the EU must demonstrably be run and managed from here and be subject to effective supervision by EU competent authorities; and
- EU financial stability must be fully secured.

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<sup>4</sup> NCAs, such as the Bank, should operate robust gatekeeper processes which include detailed examination of a fund management companies resourcing arrangements, senior management personnel, governance and oversight frameworks prior to granting an authorisation.

<sup>5</sup> For example, in relation to delegation of portfolio management to a third country entity, the Bank has a separate approval process in place before the third country entity can act for an Irish fund management company. Information concerning the applicant's experience / expertise, organisational structure and adequacy of financial resources are reviewed to ensure delegation arrangements are fit for purpose.



With respect to delegation provisions under the AIFMD and UCITS for example, when managed appropriately, taking account of these principles, and based on substantive oversight and control by the fund management company, such arrangements can bring substantial benefits to market participants and ultimately the end investor. Such benefits include providing access to particular specialism, increasing efficiencies and reducing costs. Current delegation arrangements allow access to portfolio management expertise which facilitate European domiciled funds operating geographically diverse asset allocation strategies and therefore increased product choice to investors. A move to a quantitative approach as has been suggested by some, is one possibility however it would potentially lead to a tick box approach based on arbitrary limits rather than based on an assessment of the potential risks involved.

As a result, any changes to the AIFMD (or the UCITS Directive) should focus on enhancing the effectiveness of fund management companies to discharge their obligations. There has been good progress made at the ESMA SCN in the context of Brexit related authorisations in terms of ensuring consistent standards are applied with respect to resourcing and delegation arrangements for management companies. Aligned with Principle (2)<sup>6</sup> as outlined previously, consideration should be given to formalising and strengthening the role played by the ESMA SCN in ensuring uniform application of existing requirements during authorisation processes. The Bank has undertaken significant work, both in terms of supervisory activities and policy development, designed to drive improvements in the effectiveness of the governance and management of fund management companies. We would be happy to share additional information in this regard if that would be of assistance.

#### **IV. Financial Stability**

##### **Liquidity management**

Effective liquidity management is important for the protection of investors, maintaining market integrity and reducing systemic risk, all of which supports financial stability. The importance of liquidity management was epitomised following recent firm specific risk events and the ongoing COVID market turmoil. Recent steps by EU regulators to scrutinise the robustness of liquidity management and the implementation of current requirements are welcome. This includes ESMA

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<sup>6</sup> Principle (2): “Entities that are authorised in the EU must demonstrably be run and managed from here and be subject to effective supervision by European competent authorities”.



conducting a Common Supervisory Action on UCITS liquidity management<sup>7</sup> and the European Systemic Risk Board (ESRB) recommendation on liquidity risks in investment funds (and related ESMA coordinated supervisory action by NCAs).<sup>8</sup> Nevertheless, amendment to the AIFMD and UCITS framework is warranted.

The Bank strongly supports the ESRB's 2017 Recommendation (A) on liquidity management tools<sup>9</sup> which highlights that the availability of additional liquidity management tools (LMTs) should be consistent throughout all EU jurisdictions. The experience of market dislocation during the ongoing COVID crisis demonstrates the need for LMTs to be available in all jurisdictions in a consistent manner. A common Union legal framework governing the LMTs would support this. In addition, however, additional measures are required in order to ensure better alignment of the liquidity profile and redemption policy and the timely use of LMTs, especially during times of market stress. In our view, this should include regulatory measures to assist in addressing "first-mover advantage" dynamics, whereby redeeming investors may not bear the full cost of redeeming their shares, and part of that cost is instead passed on to the investors remaining in the fund. The use of LMTs such as swing pricing and anti-dilution levies appear to have important potential in this regard. The AIFMD review is an important and timely opportunity to enhance the effectiveness of LMTs, their deployment and use, including consideration of ways of significantly enhancing the internalisation by redeeming investors of transaction costs including liquidity premia.

In addition, the Bank recommends that modification to the framework would also cover the development of common understanding and approaches to how LMTs may be provided for including common disclosure requirements and reporting obligations to NCAs.<sup>10</sup> This could be done by way of an empowerment to ESMA to develop Level 3 guidelines, for example.

Another matter that warrants consideration is the fact that the AIFMD provisions in this area are more granular when compared to the longer standing UCITS framework. By way of example, there

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<sup>7</sup> <https://www.esma.europa.eu/press-news/esma-news/esma-launches-common-supervisory-action-ncas-ucits-liquidity-risk-management>

<sup>8</sup> [https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation200514\\_ESRB\\_on\\_liquidity\\_risks\\_in\\_investment\\_funds~4a3972a25d.en.pdf](https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation200514_ESRB_on_liquidity_risks_in_investment_funds~4a3972a25d.en.pdf)

<sup>9</sup> The ESRB Recommendation on liquidity and leverage risks in investment funds is available here [https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation180214\\_ESRB\\_2017\\_6.en.pdf](https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation180214_ESRB_2017_6.en.pdf)

<sup>10</sup> Such information would allow NCAs to better understand possible contagion risk in crisis scenarios.





are different levels of granularity with respect to risk management and liquidity management requirements. AIFMD Level 2 sets out detailed requirements with respect to risk management (Articles 38-45) and liquidity management (Article 46-49). While this is somewhat understandable as UCITS are subject to more detailed product requirements, it is nevertheless not ideal, taking into account that UCITS may also face liquidity issues despite being invested in transferable securities or money market instruments. There would be merit in considering alignment of the frameworks as applying different requirements to management companies which manage both UCITS and AIFs creates additional burdens for the firms concerned and may result in divergences in supervisory/regulatory outcomes.

#### **Further development of a macroprudential framework**

COVID related stresses have also highlighted the need for consideration around the extent to which the collective behaviour of parts of the market-based finance sector, particularly investment funds, may have contributed to the magnitude of these stresses and, by implication, the magnitude of the policy response that was required by authorities to mitigate the effects on the economy. In light of the growth of the non-bank sector in recent years, in large part due to substantial increases in assets under management in investment funds, there is a need to consider the evolution of appropriate macroprudential powers available to national and European authorities. Actions taken by funds and managers in periods of stress, while rational at the individual level, may be materially suboptimal at the system wide level. The lack of a complete and operational macroprudential framework for investment funds in Europe remains a key gap in the regulatory framework in our opinion. While the AIFMD does currently provide for some systemic risk monitoring obligations and related powers, further development is required in this regard.

In particular, we would highlight the following areas:

- There is a need to examine the effectiveness of the leverage limits as envisaged under Article 25 of AIFMD as a macroprudential tool (for example, providing additional clarity around the modality and flexibility of deployment of the tool by authorities).<sup>11</sup>
- Noting the importance of international coordination for the effectiveness of a macroprudential framework for investment funds, consideration should be given to

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<sup>11</sup> See ESMA Guidelines on Article 25 of Directive 2011/61/EU which were published in December 2020 at: [https://www.esma.europa.eu/sites/default/files/library/esma34-32-552\\_final\\_report\\_guidelines\\_on\\_article\\_25\\_aifmd.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-32-552_final_report_guidelines_on_article_25_aifmd.pdf)



amending the framework to provide for (enhanced) reciprocity between NCAs in order to maximise effectiveness and avoid potential circumvention.

- Under Article 46 of AIFMD, NCAs have the ability to suspend redemptions from an AIF in the public interest. However, there is no definition of ‘public interest’ provided for and additional clarity in this regard would be beneficial.
- Finally, and more broadly, there is a need to enhance the AIFMD and UCITS frameworks to provide for a macroprudential framework for liquidity in the funds sector. This could include consideration of macroprudential measures to better align redemption terms with the liquidity of funds’ assets on financial stability grounds.

In terms of macroprudential supervision more generally, the Bank is supportive of the proposals set out in an ESRB letter dated 3 February 2020, including the sharing of relevant datasets with authorities to carry out their financial stability mandates.<sup>12</sup> The Bank supports strong coordination, information sharing and provision of advice by the ESRB in the funds sector, particularly with respect to the development and deployment of macroprudential tools.

### Loan origination

The Bank strongly supports the introduction of requirements for AIFMs which manage AIFs that originate loans.<sup>13</sup> This follows the Bank’s development of a domestic Irish regulatory framework for loan originating AIFs, taking into account the specific risks which may arise from this activity. Those risks are of increasing importance given the growth in the sector.<sup>14</sup> Amending the AIFMD to provide for such requirements would ensure a level playing field as currently market participants must comply with a range of different domestic regimes when managing such funds in multiple jurisdictions. Such a framework should take account of the key principles articulated in the ESMA Opinion (2016) on the matter.<sup>15</sup> In Ireland, there are 61 Loan Origination AIFs authorised by the Bank with approximately €7.5 billion in assets under management. This is evidence of the fact that

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<sup>12</sup> See ESRB letter outlining [considerations regarding the AIFMD](#), dated 3 February 2020.

<sup>13</sup> By carrying out loan origination, an investment fund provides credit (originates a loan), while acting as a sole or a primary lender.

<sup>14</sup> As noted in the FSB Global Monitoring Report on Non-Bank Financial Intermediation 2019, lending by Other Financial intermediaries (OFIs), which includes investment funds, has continued to grow. OFI lending assets increased by 3.0% in 2018 largely driven by the euro area. Among OFIs, investment funds (predominantly fixed income funds) and finance companies held the biggest share of credit and lending assets respectively.

<sup>15</sup> [ESMA Opinion: Key principles for a European framework on loan origination by funds](#), dated 4 December 2020.



it is possible to have a robust regulatory framework in place, mitigating potential risks, while ensuring that non-bank lending can take place.

### **Reporting frameworks**

With respect to regulatory reporting requirements, the Bank strongly supports the ESRB 2017 Recommendation (D) on UCITS reporting, which recommends the introduction of a harmonised reporting regime for UCITS management companies (similar to that currently provided for under AIFMD). In order to mitigate the potential burden of such reporting requirements for market participants, to the extent possible, reporting frameworks under both UCITS and AIFMD should exploit synergies with the existing reporting regimes both at EU and national level and to avoid duplications or unnecessary burdens for the supervised entities. As a central bank, the Bank benefits from receipt of both regulatory reporting (such as under Annex IV of AIFMD) and statistical reporting which is collected on behalf of the European Central Bank. For example, statistical reporting data provides for more granular portfolio level information for investment funds (on a quarterly basis) and money market funds (on a monthly basis) than would otherwise be available from the regulatory reporting provided for under AIFMD. As such information is already reported to central banks, consideration should be given to how such data could be better utilised, particularly for non-unitary authorities, for monitoring purposes.

### **V. Sustainability/ESG**

Climate change and sustainable finance related matters are an important priority for the Bank which impacts nearly all aspects of our mandates. As an organisation, we have recently established a centralised Climate Change unit. This unit operates as the motor of our strategy in this area and as a strong central component in a hub and spoke model involving, for example, different sectoral policy and supervisory areas. The establishment of this new dedicated unit, further reflects the importance the Bank is placing on its role in relation to climate risk and the financing of a sustainable economy more generally. In examining climate risk issues the Bank is dealing with a number of interacting and complementary priorities, including addressing:

- the prudential and financial stability risks associated with climate change to regulated firms' sound functioning arising from increasingly commonly occurring climate events or from the transition to a sustainable economy;



- conduct related aspects including ensuring that investors are fully and effectively informed. In particular, where investments or financial products are described as green or sustainable, ensuring that this is meaningful and accurate and based on reliable parameters that are consistently applied both within jurisdictions and across Europe; and
- ensuring that the financial system operates in the best interests of consumers and the wider economy. This reflects legislative authorities' determination that our economy should become ever more sustainable and that the financial sector should play its role in achieving this.

Specifically in regard to the questions outlined in the AIFMD consultation, as noted in the Bank's response to the Commission's Consultation on the Renewed Sustainable Finance Strategy, as a general point, and without diminishing the importance of continued progress on legislative and regulatory frameworks, it is important to emphasise the need for the effective implementation of the sustainability related legislative changes that have been already been introduced or are in the process of being introduced. This includes in particular, for fund management companies, the Sustainable Finance Disclosures Regulation (SFDR), sustainability related AIFMD / UCITS amendments and the Taxonomy Regulation. Therefore, any further changes introduced should be consistent both with these new requirements, as well as, where possible, aligned with requirements for other sectors.

In terms of quantitative versus qualitative sustainability risk disclosures, the Bank sees merit in both types of disclosures. There is limited value in requiring AIFMs to 'only' quantify such risks; furthermore there are risks to this approach particularly in the context of the maturity of methodologies and data availability, and whilst these continue to develop and evolve, in many aspects they still remain at early stages. The desired outcome is for useful disclosures which inform effective decision making, whether qualitative or quantitative in nature.

## **VI. Other Matters**

### **Organisation of micro prudential supervision in Europe**

The consultation poses specific questions related to the centralisation of certain activities, including entrusting ESMA with the authorisation and supervision of certain AIFMs and AIFs. When considering these matters, it is necessary to consider the criteria that must be met in order



to achieve effective and high quality supervisory activities. These include (i) sufficient flexibility in order to respond in a timely manner to changing market conditions or events, (ii) the ability to deploy skilled resources and high-calibre expertise in a responsive and prioritised manner and (iii) coherence and integration of authorisation, supervisory, insolvency / resolution and legal frameworks. Any proposal for the centralisation of certain supervisory processes for funds and fund service providers should be assessed against these criteria.

The European funds sector has developed a number of centres of excellence which has resulted in significant expertise being formed at a national level over the last four decades. This has meant that responsible NCAs have developed highly effective approaches to the supervision of a large and diverse funds sector. Any move to a centralised model of supervision would, at least in the short to medium term, be challenging due to the complexity and range of activities involved. For example, the requirements for authorised AIFs and the underlying legal form which they take are set at a national level and vary from jurisdiction to jurisdiction. As a result, the effectiveness of supervisory processes to manage the risks involved and the ability of the European Union to be agile in responding to market developments would be impacted. European authorities and NCAs have made good progress however at fostering increased levels of supervisory cooperation and convergence. These efforts should be further supported. In this regard, ESMA's Common Supervisory Action on UCITS liquidity management is a good example of the valuable role that European Authorities can play in building a common supervisory culture among NCAs and promoting sound, efficient, and consistent supervision throughout the Union. The ESMA SCN, as referenced earlier, is another important example of where ESMA could play an enhanced role in the future in order to ensure application of common, high standards, in authorisation processes.

The Annex to this letter sets out views on other aspects of the consultation.



My colleagues and I would welcome further opportunities to engage on these important matters. If we can be of any assistance during this review, or offer additional clarity on any of the matters mentioned in this letter, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Gerry Cross', written in a cursive style.

**Gerry Cross**  
**Director Financial Regulation – Policy and Risk**  
**Central Bank of Ireland**



## Annex 1: Other proposals as part of the AIFMD Review

### Other proposals as part of the AIFMD Review

#### Scope of additional MiFID services and application of rules

Previous work at the level of ESMA indicated the need for further legislative clarifications on the scope of permissible business activities listed in Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive<sup>16</sup> in conjunction Annex I of the AIFMD and Annex II of the UCITS Directive.

Moreover, there is merit in providing legislative clarifications on the application of rules when providing services pursuant to Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive. While Article 6(6) of the AIFMD and Article 6(4) of the UCITS Directive include cross-references to certain MiFID rules, legal uncertainties remain as to the precise application of the MiFID and/or AIFMD/UCITS rules in some cases. By way of example, questions arose whether and to which extent MiFID and/or AIFMD/UCITS rules could be applied to discretionary portfolio management or investment advice on assets that do not qualify as ‘financial instruments’ pursuant to Section C of Annex I of MiFID such as real estate, taking into account that the relevant MiFID provisions do not apply to them.

Similarly, there are currently different views between NCAs on which rules apply in cases where investment management functions for an AIF/UCITS are performed on a delegation basis. While some NCAs considered these cases as discretionary portfolio management and therefore took the view that MiFID rules would need to be applied, other NCAs have taken the view that the management of AIFs/UCITS on a delegation basis would not be discretionary portfolio management and the relevant AIFM or UCITS management company performing functions on a delegation basis would be subject to AIFMD/UCITS rules.

Generally, there is merit in providing for a greater regulatory consistency and level playing field between AIFMD/UCITS and MiFID in order to ensure that entities providing similar types of services, such as marketing, are subject to similar regulatory standards. To this end, there would be merit in clarifying the AIFMD, UCITS and MiFID frameworks to ensure that AIFs/UCITS and their managers and MiFID investment firms always remain subject to the same regulatory standards, while providing the same type of services.

In addition, references in Article 6(6) of AIFMD and 6(4) of the UCITS Directive are references to MiFID I, which – although should be read according to the MiFID II correlation table – have not been updated to reflect the requirements introduced with MiFID II. One example of this is that the transaction reporting obligation from Article 26 of MiFIR is not included in the list of MiFID provisions which also apply to AIFMs/UCITS management companies. This means that AIFMs/UCITS management companies providing MiFID services are not subject to the requirement to report transactions in accordance with Article 26 of MiFIR.

A similar inconsistency arises in relation to collective portfolio management. In the case of UCITS management companies and AIFMs, certain conduct requirements, for example, the best execution rules applying to their collective portfolio management (“CPM”) activities are specified in the UCITS Directive and AIFMD respectively. The best execution requirements specified in those Directives replicate the counterpart requirements in the original MiFID and have not been updated to replicate the standards specified in MiFID II. As it currently stands, AIFMs and UCITS management companies undertaking CPM need only comply with legislative requirements which correlate to the original MiFID and not MiFID II. In order to reduce scope for legislative inconsistency and regulatory arbitrage,

<sup>16</sup> Which are not identical since Article 6(3) of the UCITS does not include the reception and transmission of orders, whereas this is included in Article 6(4)(b)(iii) of the AIFMD. This may be another example for the need to harmonise the AIFMD and UCITS regimes.



the Bank suggests that these inconsistencies are considered at an EU level as part of the AIFMD Review.

### **Leverage**

IOSCO issued in December 2019 its recommendations for a framework assessing leverage in investment funds.<sup>17</sup> IOSCO recommends a two-step approach for this framework. Step 1 uses measures of leverage as baseline analytical tools to identify funds that may pose a risk to financial stability. Step 2 entails a risk-based analysis of the subset of funds identified in Step 1.

The goal of Step 1 is to provide regulators with a means of efficiently identifying those funds that are more likely to pose risks to the financial system using at least one notional exposure metric of the metrics outlined by IOSCO in its report:

- (i) Gross Notional Exposure (GNE) without adjustments reported broken down by asset class, long and short exposures; and/or
- (ii) adjusted GNE reported broken down by asset class, long and short exposures.

Moreover, in the process of refining its Step 1 analysis, a regulatory authority may also complement GNE or adjusted GNE metrics with netting and hedging assumptions as relevant (such as the commitment method).

The IOSCO recommendations give rise to a need to amend the current reporting of the gross method calculation in Article 7 of the Commission Delegated Regulation (EU) No 231/2013, to ensure alignment with the IOSCO framework. In addition, there may be merit in considering amending the commitment amount calculation by adjusting the notional amounts of interest rate derivatives contracts by the duration of the ten-year bond equivalent.<sup>18</sup> This adjustment allows comparability among contracts with different underlying duration, which makes aggregation and comparison possible for systemic risk monitoring purposes. This would be useful also in the context of any harmonised UCITS reporting.

### **Application of depositary rules to CSDs**

The Bank is supportive of the ESMA Article 34 Opinion requesting changes to the depositary delegation rules in AIFMD with regard to central securities depositories (CSDs). ESMA recommended that AIFMD be clarified to allow depositaries not to apply the delegation rules to CSDs in their capacity as Issuer CSDs<sup>19</sup>. Depositaries should be required to apply the delegation rules to CSDs in their capacity as Investor CSDs. Furthermore, this change should also be made in the UCITS Directive when it is reviewed.

### **Proportionality principle for remuneration requirements**

<sup>17</sup> The IOSCO Recommendations for a Framework Assessing Leverage in Investment Funds is available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD645.pdf>

<sup>18</sup> As described in the IOSCO recommendations on page 8

<sup>19</sup> 'issuer CSD' means a CSD which provides the core service referred in point 1 or 2 of Section A of the Annex to the CSDR Regulation (CSDR - Regulation (EU) No 909/2014) in relation to a securities issue. 'investor CSD' means that either a participant in the securities settlement system operated by another CSD or that uses a third party or an intermediary that is a participant in the securities settlement system operated by another CSD in relation to a securities issue





Previously, ESMA wrote to the Commission in 2016 requesting clarification of the application of the proportionality principle in both AIFMD and the UCITS Directive. The Bank is supportive of clarification in this regard.

This clarification should be to make clear that the proportionality principle applies to the full set of remuneration requirements in letters (a) to (r) of paragraph 1 of Annex II of the AIFMD (and Article 14b(1)(a) to (r) of the UCITS Directive). Failure to apply the proportionality principle in all circumstances could lead to a disproportionate application of the quantitative variable remuneration thresholds and pay-out structures.