

## European Commission Review of the AIFMD

June 2020

As required under the Alternative Investment Fund Managers Directive (“AIFMD”), the European Commission (“Commission”) has provided a report assessing the application and scope of the AIFMD to the European Parliament and Council (“Report”). This follows on from the publication of the December 2018 independent KPMG report requested by the Commission, which included a general survey and evidence-based study to assess the impact of the AIFMD.

The findings in the Report indicate that the AIFMD has:

- improved the monitoring of risks to the financial system and the cross-border raising of capital for investments in alternative assets;
- played a role in creating an internal market for AIFs and reinforcing the regulatory and supervisory framework for AIFMs in the EU; and
- ensured AIFMs are operating with more transparency for investors and supervisors.

### Functioning of the Marketing Passport

The Commission reports that the EU AIFM passport has been impaired by national gold plating, divergences in national marketing rules, varying interpretations of the AIFMD by national supervisors, and its limited scope. The Report also highlights that the AIFM passport only allows marketing to professional investors, which restricts the cross-border activities of AIFMs wanting to approach semi-professional or retail investors.

The Report notes that non-EU AIFs and non-EU AIFMs at present may only market in EU member states on the basis of national laws set out in national private placement regimes (“NPPRs”). The NPPRs applicable in member states differ and require non-EU AIFMs to implement only a very limited number of AIFMD requirements. This creates an un-level playing field between EU and non-EU AIFMs. Some member states have closed market access for third country entities entirely. Some member states suggest further harmonisation of NPPRs whereas others suggested that activating the AIFMD passport for third country entities, followed by a phasing out of NPPRs (as envisaged by the current provisions of the AIFMD), would be a better solution.

### Depository Rules

The Report concludes that the AIFMD depository regime is functioning well. However, the Commission states that targeted clarifications may be necessary to address situations where AIFMs use tri-party collateral management or when central securities depositories (“CSDs”) act as custodians. The Commission also states that the lack of a depository passport is at odds with the spirit of the single market.

### Systemic Risk

One of the findings in the Report is that there is an observable trend of expanding non-banking lending, which raises financial stability concerns. Several stakeholders have asked the Commission to reassess the case for setting common standards for loan-originating AIFs.

The Commission notes that a reported shift from variable to fixed remuneration appears to have introduced greater risk-aversion in the AIFM sector and increased overall awareness of good remuneration systems.

### Next Steps

Following the submission of the Report, the AIFMD requires the Commission, if appropriate, to put forward proposals, including amendments to the AIFMD. It remains to be seen whether the Commission will put forward any such proposals; it is our understanding that the review of the AIFMD is not an urgent priority of the Commission at present.

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