

European Securities and
Markets Authority (ESMA)
103 rue de Grenelle
F-75007 Paris

Basel, 23. September 2011
A.170.2/MT

Swiss Bankers Association response to the Consultation paper “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” (submission per electronic mail)

Dear Sir or Madam,

We thank you for the opportunity to contribute to the Consultation paper on possible implementing measures of the AIFMD in relation to the supervision of third countries.

The Swiss Bankers Association (SBA) was founded in 1912 in Basel as a trade association and today has nearly 355 institutional members and approximately 16,800 individual members. It is the leading professional organisation of the Swiss financial centre. Its main purpose is to maintain and promote the best possible framework conditions for the Swiss financial centre both at home and abroad.

Our mission is to represent the interests of the banks in dealings with the authorities in Switzerland and abroad, to promote Switzerland’s image as a financial centre throughout the world, to foster an open dialogue with a critical public in Switzerland and worldwide, to develop the system of self-regulation in consultation with regulatory bodies, to support the training of junior staff and established executives in the banking industry, to facilitate the exchange of information and knowledge between banks and bank employees, to advise its members, to coordinate joint projects undertaken by the Swiss banks.

Please note that our contribution to the above mentioned consultation only concerns the **questions 1 to 9** (i.e. the most relevant questions for our member banks). **This submission should not be publically disclosed.**

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

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

In principle, we support the view that ESMA should set the standards and also prefer if ESMA could negotiate with the third country authority the contents of a cooperation agreement, as this would ensure a certain level of standard and uniform application. We understand, though, that based on the relevant provisions of the AIFMD, the agreement would be effectively entered into and signed not with ESMA but with the relevant national authority of the Member State and the third country supervisory authority. Finally, we suggest that ESMA issues a model agreement to be used by the Member State authorities. This would guarantee consistency of agreements with third country authorities with different Member State authorities.

Moreover, we are concerned about the equivalence requirements introduced by ESMA in Box 1 Para. 5. By introducing equivalence requirements and equivalence tests ESMA goes beyond the requirements in the Level 1 text of the AIFMD. In particular, Box 1, paragraph 5 requires that the third country entity should be "*authorised or registered for the purpose of asset management based on local criteria which are equivalent to those established under EU legislation.*" Paragraph 10 of the Explanatory Text states that the equivalence assessment of the legislation should be made "*by comparing the eligibility criteria and the on-going operating conditions locally applicable*" to the corresponding requirements in the EU. By contrast, there is no such requirement for equivalence in the Level 1 text which states that the entity is authorised or registered for the purpose of asset management, but does not specify the criteria for authorisation or registration. We, therefore, suggest to amend the requirements to align them with the requirements of the Level 1 text.

2. In particular, do you support the suggestion to use as a basis for 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 also believe that taking the stands of the IOSCO MMoU is in principle the favoured approach. However, we note that the relevant principles in those MMoUs are quite broad and not specifically addressed to the area of investment fund and asset management.

They have, therefore, to be further specified in particular also in view of the needs for supervision, information sharing and enforcement in relation to alternative investment funds and managers. The relevant provisions of the MMoU need to be limited to the actual supervisory needs such as organizational issues with regard to the delegated tasks.

Furthermore, the scope of the agreement in particular regarding potential on-site inspections should comply with the relevant national regulatory requirements for such measures, including the relevant procedural rules. These inspections should only be performed upon request and prior authorisation by the third-country supervisory authority. Moreover, if the supervisory authority in the third country and its competencies are deemed to be equivalent with the competent authority in the EU Member State, the competent EU Member State should rely on inspections by the third-country supervisory authority.

Depositary (Article 21(6))

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

The requirements as set out in Box 2 go partially beyond the requirements of the Directive. Article 21(6)(b) requires “*effective* prudential regulation, including minimum capital requirements, and supervision” which will have “the *same effect* as Union law”. In our view, “*effective*” is result driven and requires as the Directive specifies the same effects. This does not mean that the operating conditions (d), the requirements on the performance (e) etc. are equivalent, as different legal set ups may result in the same effects. We suggest, therefore, to delete the requirement for equivalence.

In addition, we believe that letter (f) “*The local regulatory framework provides for the application of sufficiently dissuasive sanctions in cases of violations by the depositary*” should be deleted as it is not stated in the level 1 text and it is not clear enough to provide legal certainty. Alternatively, if it is not deleted it must be clarified.

Furthermore, the Directive does not extend to “operating conditions” of credit institutions. In particular, no reference is made that the requirements on the *performance of the specific duties* as AIF *depositary* established in the third country are equivalent to those provided in

Article 21 (8)-(15). Rather and specifically, apart from the *prudential* regulation regime for the relevant banking or credit institution, article 21(6)(e) refers to *contractual* arrangements in relation to the liability and the rules on the delegation of section 11. There is no requirement that the relevant regulations in the third country be equivalent, these requirements are all subject to contractual arrangements between AIF and the depositary in accordance with article 21(6)(e), as well as paras 12 and 13.

4. Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above ?

According to our answer to question 3, we believe that there should be an effects test and not a test of equivalence, and that this test should be limited to the prudential side of the regulation, including capital requirements and supervision.

Where CEBS and EBA, respectively, have recognized the regulation for credit institutions as equivalent (e.g. as required under article 131a Capital Requirements Directive), the relevant requirement under article 21(6)(b) should be considered as being satisfied. It should be avoided to require another standard under the AIFMD for this purpose.

V. Supervision

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

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

We basically agree with the proposal regarding Co-operation between the EU and third country competent authorities, with the restrictions described in the answers to questions 1 & 2. The scope of the co-operation shall be limited to systemic and organizational issues and the co-operation agreement should respect national legislation on the co-operation between supervisory authorities.

With regard to on-site inspections, we would like to refer to our answer to questions 1 & 2. Therefore, we do not entirely support the proposal 1(d) in box 3, where on-site inspection would have to be allowed.

Moreover, the requirement for an « *exchange of information for the purpose of systemic risk oversight* » (see Box 3, Para. 3 in relation with Explanatory Text 8) should not be applicable in the field of the private placement regimes. This should be clarified.

However, we support the proposal that ESMA would draft the template for the co-operation agreements setting the standard in substance for these agreements.

6. In particular, do you support the suggestion to use as a basis for the co-operation arrangement 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?

See answer to question 2.

V.II.Co-operation arrangements between EU and non-EU competent authorities as required by Articles 35(2), 37(7)(d) and 39(2)(a) of AIFMD

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

We would like to refer to our answers to the questions 1, 2 and 5.

V.III.Co-operation and exchange of information between EU competent authorities

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

We agree with the proposal. However, it is important to emphasize that co-operation is in reality limited to identifying potential systemic risks and risks to the orderly functioning of markets. The scope should not be broadened including for instance the exchange of specific and individual investor information.

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

9. Do you have any suggestions on possible further criteria to identify the Member State of reference?

The authority in the member state in which the AIFM intends to develop most effective marketing may still not be the most suitable authority to perform the supervision. It would be more favorable to opt for the authority which may perform the supervision most effectively.

Yours sincerely,

Swiss Bankers Association


H. Siegmann


M. Tissot