



NEWSFLASH

EU Commission consultation : LuxCMA response

Luxembourg, 4 February 2021

AIFMD review: LuxCMA responses to securitisation-related questions in European Commission Consultation

On 29 January 2021, LuxCMA responded to the consultation on the review of the Alternative Investment Fund Manager Directive (AIFMD), which was published by the European Commission in October last year.

The long version of the Commission's questionnaire included 102 questions focussing on many different aspects:

- I. Functioning of the AIFMD regulatory framework, scope and authorisation requirements
- II. Investor protection
- III. International relations
- IV. Financial stability
- V. Investing in private companies
- VI. Sustainability/ESG
- VII. Miscellaneous

Among the questions raised, question #6 and question #6.1. focused on securitisation vehicles and specifically on whether such vehicles are effectively excluded from the scope of the AIFMD. The LuxCMA Legal & Regulatory Watch working group responded to these important questions.

The Legal & Regulatory Watch working group will continue to follow the legislative developments which follow this consultation. An impact assessment may be published by the European Commission in the second quarter of 2021 and a legislative proposal is currently expected for Q4 2021.

LuxCMA response to securitisation-related questions in European Commission Consultation

Question 6. Are securitisation vehicles effectively excluded from the scope of the AIFMD?

- Yes
- **No**
- Don't know / no opinion / not relevant

Question 6.1. What elements would you suggest introducing into the AIFMD to exclude securitisation vehicles from the scope of the AIFMD more effectively and reducing regulatory arbitrage possibilities? Please explain:

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We suggest to amend the description of securitisation entities which are expressly excluded from the scope of the AIFMD.

Currently the AIFMD excludes “securitisation special purpose entities” which term is defined as *entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions and other activities which are appropriate to accomplish that purpose*;

As the aforementioned ECB Regulation has been repealed and replaced by the European Central Bank Regulation (EC) No 1075/2013 dated 18 October 2013 (the “New ECB Regulation”), we suggest, as a minor “clean-up” change, to update the reference in the AIFMD from “Regulation (EC) No 24/2009” to from “Regulation (EU) No 1075/2013”.

By defining “securitisation special purpose entities” in AIFMD only with reference to the definition of “securitisation” in the aforementioned ECB Regulations, there is a lack of clarity regarding whether some securitisation vehicles are covered or not by the exclusion. For example, it is not clear across all jurisdictions whether securitisation vehicles which are the primary originators of the securitised assets are excluded or whether securitisation vehicles securitising through the issue of profit participating debt are excluded.

While the Luxembourg market benefits from some guidance from the CSSF in this regard (through the CSSF FAQ on securitisation), we think it would be beneficial to include some clarity in the level 1 EU legislation to promote harmonisation across the EU on this point. We think this can be achieved by expressly excluding:

- entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EU) No 1075/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (recast);
- any entity which qualifies as ‘securitisation special purpose entity’ or ‘SSPE’ within the meaning of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and
- any entity which only issues debt instruments.

On the last point, we note that this proposed exclusion is in line with the position of the European Commission in Questions on Single Market Legislation/Internal Market, ID 1169, Scope and exemptions, in which the European Commission considered that any type of instrument not representing an ownership interest in the undertaking should be excluded from the scope of the AIFMD.

All those who would like to become a LuxCMA member should visit www.luxcma.com or contact info@luxcma.lu.

ABOUT LUXCMA

The Luxembourg Capital Markets Association (LuxCMA) represents the common interest of all stakeholders of the primary capital markets industry of Luxembourg. Its mission is to promote Luxembourg's capital markets, provide networking and collaboration opportunities and foster innovation in the industry. LuxCMA's is to become the single point of contact for authorities, associations, market practitioners and other actors.

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