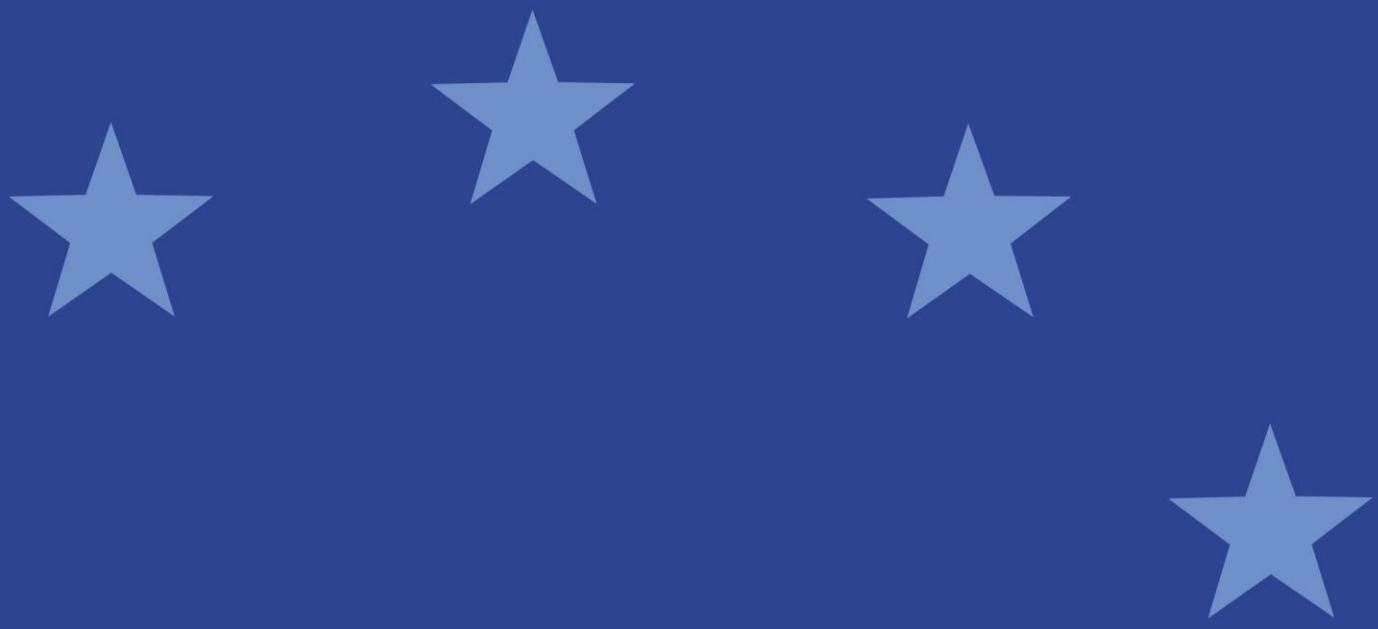
esma European Securities and Markets Authority

Consultation paper

Draft regulatory technical standards on types of AIFMs



19 December 2012 | ESMA/2012/844

European Securities and Markets Authority

Date: 19 December 2012
ESMA/2012/844

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- indicate the specific question to which the comment relates and respond to the question stated;
- contain a clear rationale, clearly stating the costs and benefits; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **1 February 2013**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Legal Notice'.

Who should read this paper?

This document will be of interest to asset management companies and trade associations of asset management companies managing funds falling in the scope of the Alternative Investment Fund Managers Directive and investors investing into such funds.

Table of Contents

Acronyms used

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010[1]
ESMA	European Securities and Markets Authority
UCITS Directive	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transfer able securities (UCITS) (recast)[2]

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF.
[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF

I. Executive Summary

Reasons for publication

Article 4(4) of the AIFMD (see Annex II to this paper for the full text of this Article) provides that ESMA shall develop draft regulatory technical standards (RTS) to determine types of AIFMs, where relevant in the application of the AIFMD, and to ensure uniform conditions of application of the AIFMD. On 23 February 2012, ESMA published a discussion paper on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (ESMA/2012/117) which covered a number of topics relevant for the development of the draft RTS. This consultation paper represents the next stage in the development of the draft RTS and sets out formal proposals for their content on which ESMA is seeking the views of external stakeholders. ESMA may consider developing in the future further draft RTS in order to establish additional typologies of AIFMs where relevant in the application of the AIFMD.

A separate consultation paper on guidelines on key concepts of the AIFMD (ESMA/2012/845) published today follows up on some of the other topics covered by the discussion paper published last February which are not covered by this consultation paper.

Contents

Section II explains the background to our proposals.

Section III describes our proposals on the rules to be introduced to distinguish AIFMs managing AIFs of the open-ended type from those managing AIFs of the closed-ended type.

Section IV seeks stakeholders' views on the necessity to clarify other criteria to determine the application of the AIFMD to certain types of AIFM.

Annex I sets out the list of questions contained in this paper.

Annex II contains the legislative mandate to develop draft RTS.

Annex III provides for the cost-benefit analysis related to the draft RTS.

Annex IV includes the opinion of the Securities and Markets Stakeholder Group on the discussion paper.

Annex V gives detailed feedback on the discussion paper.

Annex VI contains the full text of the draft RTS.

Next steps

Responses to this consultation paper will help ESMA in finalising the draft RTS to be submitted to the European Commission in the first half of 2013 for endorsement.

II. Background

1. Article 4 of the AIFMD includes definitions of some of the terms used in the Directive. Article 4(4) of the AIFMD provides that ESMA shall develop draft regulatory technical standards (RTS) to determine types of AIFM, where relevant in the application of the AIFMD, and to ensure uniform conditions of application of the AIFMD.

2. On 23 February 2012, ESMA published a discussion paper on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (ESMA/2012/117)[3] which represented a first step, *inter alia*, in the elaboration of the draft RTS under Article 4(4) of the AIFMD.

3. The discussion paper covered a number of topics on which ESMA saw merit in working to ensure the alignment of supervisory practices among European national competent authorities in the interpretation of certain key concepts of the AIFMD. However, ESMA is of the view that most of the topics covered by the discussion paper do not lend themselves to incorporation in the draft technical standards under Article 4(4) of the AIFMD. However, ESMA recognised in the discussion paper that some of the issues related to the topics covered by the draft RTS to be developed under Article 4(4) of the AIFMD may merit the development of further guidelines and recommendations or other convergence tools (e.g. Q&A) that ESMA may decide to develop in the future.

4. The draft RTS should be aimed at determining the types of AIFM covered by the AIFMD, thereby allowing appropriate differentiation of the requirements according to the nature of the entity.

5. In the discussion paper ESMA identified a number of ways in which AIFMs could be differentiated for the purposes of Article 4(4). These included with reference to whether the fund is externally or internally managed, employs leverage or is substantially leveraged. For the reasons set out in more detail in paragraphs 16-20 below and in the cost-benefit analysis in Annex III, ESMA believes that of the topics covered in the discussion paper only the notion of open-ended/closed-ended funds (which was covered under section IV.5 of the discussion paper) should be selected and covered by the draft RTS under Article 4(4) of the AIFMD at this stage.

6. Therefore, the following section of this consultation paper describes the issues related to the notion of open-ended/closed-ended funds. The related proposals for the content of the draft RTS are set out in Annex VI. A second section seeks stakeholders' views on the necessity to clarify other criteria to determine the application of the AIFMD to certain types of AIFMs.

7. The remaining topics covered by the discussion paper have not been included in the present consultation paper; these are as follows:

   (i) the criteria which may be extracted from the definition of AIFs in Article 4(1)(a) of the AIFMD (section IV.4 of the discussion paper), which are covered by the separate consultation paper on guidelines on key concepts of the AIFMD (ESMA/2012/845);

   (ii) the clarifications on the appointment of a single AIFM and the range of functions that an AIFM must carry out and to what extent it may delegate these functions to third parties (sections III and V of the discussion paper),

[3] http://www.esma.europa.eu/system/files/2012-117.pdf

(iii) the vehicles which are not AIFMs or AIFs or are exempted from the provisions of the AIFMD (section IV.2 of the discussion paper),

(iv) the treatment of UCITS management companies (section VI of the discussion paper), and

(v) the treatment of MiFID firms and Credit Institutions (section VII of the discussion paper).

For the topics under items ii) to v) above, ESMA has reviewed the feedback received from the consultation[4] and, in light of the responses received, will decide whether or not such topics merit the development of separate guidelines or other convergence tools (e.g. Q&A). In making that decision, ESMA will take into account the extent to which regulatory convergence will already be ensured by the content of the AIFMD Level 2 provisions (once published in the *Official Journal of the European Union*).

Q1: Do you agree with the approach suggested above on the topics which should be included in the draft regulatory technical standards? If not, please state the reasons for your answer and also suggest an alternative approach.

III. AIFMs of open-ended/closed-ended AIF(s)

8. ESMA considers that the characteristics of AIFs that make it possible to distinguish whether an AIFM is managing an AIF of the open-ended or closed-ended type should be defined in order to ensure that the rules on liquidity management, the valuation procedures and the transitional provisions of the AIFMD are applied to AIFMs in a uniform manner.

9. Respondents to the discussion paper generally agreed with the approach proposed by ESMA to identify closed-ended and open-ended funds. Most of them agreed with the annual frequency of redemptions identified by ESMA for the purpose of considering a fund open-ended, while some respondents considered one year too long and others too short.

10. Several respondents requested that ESMA take into consideration cases of funds where investors have the right to submit a redemption notice at least annually, but redemptions are subject to a lock-up period and funds which apply under certain circumstances side pockets, gates or suspensions of liquidity. For all these cases, respondents asked ESMA to recognise that the relevant AIFs should be treated as open-ended.

11. ESMA saw merit in taking these requests into account and, therefore, set out a proposal according to which AIFMs managing AIFs of the open-ended type shall mean AIFMs managing AIFs whose unitholders/shareholders have the right to redeem their units or shares out of the assets of these AIFs at least annually, without taking into account any restrictions or powers provided for in the rules or instrument of incorporation of the AIF or its prospectus (if any) to apply special arrangements, such as side pockets, gates, suspensions, lock-up periods or other similar arrangements arising from the illiquid nature of the AIF's assets.

12. Lock-up periods should be understood as any minimum holding period during which unitholders/shareholders may not exercise their redemption rights. Whether the period is set at the AIF level,

[4] See Annex V of this consultation paper for the detailed feedback on the discussion paper.

with reference to its date of creation or starting its activities, or at each individual unitholder/shareholder level, with reference to the date of subscription, shall be of no significance.

13. Furthermore, ESMA believes that in an open-ended fund the transaction should be carried out at a price that does not vary significantly from the net asset value per unit/share of the AIF available at the time of the transaction.

14. ESMA also considers it appropriate to introduce rules relating to the treatment of hybrid structures (i.e. AIF that for a certain period of their life fall under the definition of closed-ended AIF and then due to a change in their liquidity policy fall under the definition of open-ended AIF, or inversely). ESMA proposes that any change in the redemption policy of an AIF implying that that the AIFM managing it may no longer be considered an AIFM of open-ended AIFs or of closed-ended AIFs, should lead the AIFM to cease to apply the rules relating to the old redemption policy of the AIF it manages and to apply instead the rules relating to the new redemption policy of such AIF.

Q2: Do you agree with the proposed definition of AIFMs of open-ended/closed-ended AIFs? If not, do you have any alternative proposal, in particular as regards the relevant frequency of redemptions for the open-ended funds?

Q3: Please provide qualitative and quantitative data on the costs and benefits that the proposed definition of AIFMs of open-ended/closed-ended AIFs would imply.

Q4: Do you consider that any possibility to redeem the AIF's units/shares on the secondary market and not directly from the AIF should be taken into consideration when assessing whether AIFM is an AIFM of open-ended or closed-ended AIF(s)? Or do you consider that, as within the UCITS framework, only any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not significantly vary from their net asset value should be regarded as equivalent to granting to unitholders/shareholders the right to redeem their units or shares out of the assets of this AIF?

Q5: Do you agree with the proposed approach as regards the treatment of hybrid structures? If not, please explain why and, if possible, provide alternative proposals.

IV. Other criteria to determine the application of the AIFMD to certain types of AIFMs

15. Apart from the articles of the AIFMD relating to AIFs of the open-ended or closed-ended type (which are relevant for the liquidity management, the valuation of the assets and transitional provisions), the discussion paper provided for a list of other articles that will be applied differently to certain types of AIFMs, in most cases with respect to the types of AIF under management. These are as follows:

- Article 9 imposes different initial capital requirements to internally-managed versus externally-managed AIFs.
- Article 13 (by reference to Annex II, paragraph 3) requires AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities to establish a remuneration committee.
- Article 14 applies specific requirements in relation to conflicts of interest management where the AIFM on behalf of an AIF uses the services of a prime broker.

- The provisions of Article 16 in relation to liquidity management do not apply to unleveraged, closed-ended AIFs.
- Article 21(3) allows different types of entity to be eligible as depositary for those AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which invest in specific types of asset.
- Article 24(4) imposes additional requirements on reporting to competent authorities on AIFMs managing AIFs that employ leverage on a substantial basis.

16. Therefore, for the abovementioned articles of the AIFMD their application depends on whether the AIF is:

- significant in size – Article 13;
- leveraged / employs substantial leverage– Article 16, 24(4);
- internally or externally-managed – Article 9; or
- contracts with a prime broker – Article 14.

17. The discussion paper asked stakeholders whether they saw merit in clarifying further any of the concepts mentioned in the previous paragraph.

18. Most of the respondents to the discussion paper expressed a strong interest in additional clarifications on the concept "leveraged/employs substantial leverage" since it was not clear how "the type of AIF under management including its nature, scale and complexity" should be interpreted with respect to the level of leverage employed by the AIF. ESMA considers it more appropriate to wait for the publication of the AIFMD Level 2 provisions in the *Official Journal of the European Union* before determining whether it is necessary to provide any additional clarification on these notions.

19. Few respondents asked to clarify the meaning of 'significant size' for the purposes of Article 13 of the AIFMD. ESMA believes it more appropriate to address this issue in the context of the AIFMD remuneration guidelines for which a separate consultation paper on guidelines on sound remuneration policies under the AIFMD (ESMA/2012/406)[5] has been published on 28 June 2012.

20. A very limited number of respondents mentioned the interest of clarifying the notion of contracts with prime brokers (for the purposes of Article 14 of the AIFMD) and the notion of internally or externally managed (for the purposes of Article 9 of the AIFMD). Given the limited number of requests received and the absence of any input on the clarifications needed, ESMA did not insert any proposal on these notions in this paper.

21. Finally, ESMA may consider in the future developing further draft RTS in order to establish additional typologies of AIFMs where relevant in the application of the AIFMD, bearing in mind the boundaries of the empowerment to develop draft RTS in Article 4(4) of the AIFMD. For instance, ESMA may analyse the possibility of developing a typology of AIFMs based on the investment strategies of the AIFs that they manage.

Q6: Do you see merit in clarifying further the notion of contracts with prime brokers and/or the notion of internally or externally managed? If so, please provide suggestions. In particular, if your answer is yes for the notion of internally or exter-

[5] http://www.esma.europa.eu/system/files/2012-406.pdf

nally managed, please indicate which of the criteria already in recital (20) of the AIFMD need additional clarifications.

Q7: Do you consider that there is a need to develop further typologies of AIFMs where relevant in the application of the AIFMD? If yes, please provide details on the additional typologies sought.

Annex I - Summary of questions

Q1: Do you agree with the approach suggested above on the topics which should be included in the draft regulatory technical standards? If not, please state the reasons for your answer and also suggest an alternative approach.

Q2: Do you agree with the proposed definition of AIFMs managing AIFs of the open-ended/closed-ended type? If not, do you have any alternative proposal, in particular as regards the relevant frequency of redemptions for the open-ended funds?

Q3: Please provide qualitative and quantitative data on the costs and benefits that the proposed definition of AIFMs managing AIFs of the open-ended/closed-ended type would imply.

Q4: Do you consider that any possibility to redeem the AIF's units/shares on the secondary market and not directly from the AIF should be taken into consideration when assessing whether an AIF is open-ended or closed-ended? Or do you consider that, as within the UCITS framework, only any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not significantly vary from their net asset value should be regarded as equivalent to granting to unitholders/shareholders the right to redeem their units or shares out of the assets of this AIF?

Q5: Do you agree with the proposed approach as regards the treatment of hybrid structures? If not, please explain why and, if possible, provide alternative proposals.

Q6: Do you see merit in clarifying further the notion of contracts with prime brokers and/or the notion of internally or externally managed? If so, please provide suggestions. In particular, if your answer is yes for the notion of internally or externally managed, please indicate which of the criteria already in recital (20) of the AIFMD need additional clarifications.

Q7: Do you consider that there is a need to develop further typologies of AIFMs where relevant in the application of the AIFMD? If yes, please provide details on the additional typologies sought.

Annex II – Legislative mandate to develop technical standards

The Regulation (EU) No 1095/2010 establishing ESMA empowered the latter to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU.

Article 4(4) of the AIFMD provides that: '*The European Supervisory Authority (European Securities and Markets Authority) (ESMA) shall develop draft regulatory technical standards to determine types of AIFMs, where relevant in the application of this Directive, and to ensure uniform conditions of application of this Directive.*

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010'.

Annex III – Cost-benefit analysis

1. Introduction

1. Pursuant to Article 10(1) of the Regulation establishing ESMA[6], ESMA is empowered to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts within the scope of action of ESMA. The same article obliges ESMA to conduct open public consultations on draft regulatory technical standards and to analyse the related potential costs and benefits, where appropriate. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the draft regulatory technical standards.

2. Pursuant to Article 4(4) of the AIFMD, ESMA is required to develop draft regulatory technical standards (RTS) to determine types of AIFMs, where relevant in the application of the AIFMD, and to ensure uniform conditions of application of the AIFMD.

2. Procedural issues and consultation process

3. ESMA is seeking feedback from stakeholders on its proposals on draft RTS via this consultation paper. On 23 February 2012, ESMA published a discussion paper on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (ESMA/2012/117) (DP) which covered certain topics relevant for the development of the draft RTS under Article 4(4) of the AIFMD. This consultation paper represents the next stage in the development of the draft RTS and sets out formal proposals for their content on which ESMA is seeking the views of external stakeholders.

4. The content of the discussion paper has been narrowed down in the present consultation paper since most of the topics covered by the discussion paper did not lend themselves to inclusion in the draft technical standards under Article 4(4) of the AIFMD. Some of these topics are covered by the separate consultation paper ESMA/2012/845, while the other residual topics may merit the development of further guidelines and recommendations or other convergence tools (e.g. Q&A) that ESMA may decide to develop in the future.

5. The draft RTS should be aimed at determining the types of AIFMs covered by the AIFMD, thereby allowing appropriate differentiation of the requirements according to the nature of the entity. For these reasons, ESMA considered it appropriate to develop the draft RTS by providing details on one of the differentiations made in the AIFMD among different types of AIFMs, i.e. the notion of open-ended/closed-ended funds. This aims at ensuring that the rules on liquidity management, the valuation procedures and the transitional provisions of the AIFMD are applied to AIFMs in a uniform manner.

6. This cost-benefit analysis assesses the qualitative costs and benefits that will potentially arise from the different policy options identified by ESMA. Stakeholders' views are sought on these costs and benefits; quantitative data would be particularly useful in helping ESMA reach a final decision on the best approach.

3. Problem definition

[6] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010.

7. As noted above, ESMA is obliged to develop RTS to determine types of AIFMs. Given the uncertainties surrounding the entities to which some specific requirements apply if only the Level 1 text was to be applied, ESMA considered that the RTS under Article 4(4) of the AIFMD would add most value if these were aimed at determining which particular requirements apply to entities of different nature.

8. The baseline scenario for this cost-benefit analysis would be the application of the requirements in the Level 1 Directive (i.e. the provisions in Articles 16(1), 19(3) and 61(3) and (4) of the AIFMD) without any further specification. This would leave discretion to AIFMs and national competent authorities to determine whether the specific liquidity management requirements, valuation procedures and transitional provisions apply to an AIFM managing a specific type of AIF. This could lead to a lack of harmonisation in the application of the provisions of the Level 1 Directive across the alternative investment industry.

9. Indeed, uncertainty on the notions of AIFMs of open-ended and closed-ended AIFs may lead to regulatory arbitrage and to inconsistent supervisory practices. For instance, an entity could be considered falling within the scope of the liquidity management provisions by one competent authority whereas a competent authority in a different Member State could consider that the same entity falls outside the scope of such provisions.

4. Objectives of the technical standards

10. The draft RTS aim to promote the objectives of the Level 1 Directive as identified in the European Commission's Impact Assessment accompanying the AIFMD proposal[7] and they do so by clarifying the scope of application of certain of the AIFMD provisions. They should contribute to the creation of a level playing field across Member States, which will help ensure that the risks tackled by the AIFMD are done so in a harmonised way and there is reduced scope for regulatory arbitrage (e.g. an undertaking choosing to move its activities to a jurisdiction with a more flexible approach according to which it would not have to apply the stricter liquidity management requirements provided for AIFMs of open-ended AIFs) which could hamper the key objectives of the Level 1 Directive such as the monitoring of systemic risks and strengthened investor protection.

5. Policy options

11. In order to address the problem and comply with the objectives identified above, ESMA has not only considered the idea of providing details on the notion of open-ended/closed-ended funds, but has also carried out a screening of all the specific provisions of the AIFMD which make a differentiation between different types of AIFs (and, as consequence, between different types of AIFMs).

12. As recalled in the main body of this consultation paper, in the DP published in February ESMA set out a list of provisions of the AIFMD that differentiate between certain types of AIFMs, in most cases with respect to the types of AIF under management. These were as follows:

- Article 9 imposes different initial capital requirements to internally-managed versus externally-managed AIFs.

[7] Available at: http://ec.europa.eu/internal_market/investment/docs/alternative_investments/fund_managers_impact_assessment.pdf.

- Article 13 (by reference to Annex II, paragraph 3) requires AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities to establish a remuneration committee.
- Article 14 applies specific requirements in relation to conflicts of interest management where the AIFM on behalf of an AIF uses the services of a prime broker.
- The provisions of Article 16 in relation to liquidity management do not apply to unleveraged, closed-ended AIFs.
- Article 21(3) allows different types of entity to be eligible as depositary for those AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which invest in specific types of asset.
- Article 24(4) imposes additional requirements on reporting to competent authorities on AIFMs managing AIFs that employ leverage on a substantial basis.

13. ESMA sought stakeholders' views on whether some guidance on each of the following concepts extracted from the above provisions would be beneficial for the purposes of the uniform application of the Directive:

- significant in size – Article 13;
- leveraged / employs substantial leverage– Article 16, 24(4);
- internally or externally-managed AIF – Article 9; or
- contracts with a prime broker – Article 14.

14. Notwithstanding the fact that most of the respondents to the discussion paper expressed a strong interest in additional clarifications on the concept "leveraged/employs substantial leverage", ESMA considers it more appropriate to wait for the publication of the AIFMD Level 2 provisions in the *Official Journal of the European Union* before determining whether it is necessary to provide any additional clarification on these notions.

15. As for the other concepts mentioned above, ESMA decided not to elaborate any further on them in the context of this consultation paper for the following reasons:

– the notion of 'significant' in size is already dealt with in the context of the AIFMD remuneration guidelines for which a separate consultation paper was published on 28 June 2012[8];

– for the notion of contracts with prime brokers (for the purposes of Article 14 of the AIFMD) and the one of internally or externally managed (for the purposes of Article 9 of the AIFMD), a very limited number of requests for clarification were received in the feedback to the DP; furthermore, as for the notion of internally or externally-managed AIF, ESMA considered that the details provided in recital (20) of the AIFMD should be sufficient in reducing the scope for regulatory arbitrage.

6. The likely economic impacts

Costs

Direct costs for regulators

[8] Consultation paper on guidelines on sound remuneration policies under the AIFMD (ESMA/2012/406)

16. The RTS are unlikely to lead to additional costs for regulators to the extent that they provide clarifications on the Level 1 provisions and do not impose additional obligations beyond those already set by the AIFMD on firms whose compliance has to be supervised.

Benefits

17. The expected benefits of the draft RTS are as follows:

- The proposed definition of open-ended fund gives clear and simple criteria to investment managers and competent authorities for assessing the nature of a fund.

- An annual period seems to be a reasonably long period of time for considering whether or not an AIF is of the open-ended type.

Annex IV – Opinion of the Securities and Markets Stakeholder Group

The SMSG has been asked by ESMA to comment on the discussion paper on key concepts in the AIFMD. The ESMA consultation ended on 23 March, 2012 and while the SMSG was given the possibility of an extended period for responding given that the SMSG was only able to meet on April 26, 2012 as a body, comments are limited to a few key points as outlined below.

1. ESMA again has a balancing act of on the one hand providing additional clarity as to what entities are to be considered AIFs and AIFMs while on the other hand avoiding to becoming too descriptive (and narrow, as the reality is already out there; in existence) and looking at defining more commercial terms like e.g. family offices and joint ventures. There is no need to do the latter.

   Key elements of the AIF definition in the view of the working group are:

   - the raising of capital from external, unaffiliated/third parties (i.e. you are managing other people's money)

   - it needs to be an enterprise with a commercial reason of generating profits for investors

   - there needs to be a business communication by or behalf of the entity seeking capital which results in the transfer of cash or assets to the AIF

   -there should be an express linking of the capital raising with the defined investment policy

   -the capital raising should be done by or on behalf of a "sponsor" which plans (itself or through a group member) to make a profit out of the management of the capital raised from third party/external sources

2. Proportionality needs to be applied to all articles and not only some, as proportionality is a general principle of law and regulation. It must also be borne in mind that size is not the only relevant factor - others mentioned already in the Level1 text are, nature, scope and the complexity of activities as well as internal organisation. This will be especially important for the Remuneration discussion paper as well.

3. Dual registration. Due to the high number of managers which are currently MIFID firms (in particular for carrying out reception and transmission of orders and investment advice) the possibility of dual registration needs to be considered. Otherwise firms in some member states (where MIFID authorisation is demanded today) may need to restructure their activities while firms in other MS (where MIFID authorisation currently is not demanded) need not.

4. Delegation. Two aspects on delegation should be clarified by ESMA: Firstly, just because an AIFM itself does not perform certain of the functions in paragraph 2 of Annex 1 of the AIFMD, it does not au-

tomatically imply that they should be considered as delegated as these are not mandatory functions to be performed by an AIFM nor are they functions for which an AIFM needs to have responsibility. Secondly, an AIFM must be able to delegate both portfolio management and risk management as long as the delegation is not to such an extent that the AIFM becomes a letter-box-entity.

5. This opinion will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 26 April 2012

Guillaume Prache

Chair

Annex V – Feedback on the discussion paper

1. ESMA received 48 responses to the consultation on the discussion paper (DP) on key concepts of the AIFMD and types of AIFM. Responses were received from alternative investment fund managers (and their associations), associations of publicly listed real estate companies and associations of investment companies, depositaries, banking associations), an advisory and audit firm, an association of pension funds, law firms, lawyers' associations and public authorities.

General comments

2. A couple of respondents pointed out that the discussion on some of the issues in the DP is premature and that a more useful debate on these issues could be had only once the Level 2 measures have been finalised.

3. An asset managers association was of the opinion that the sections III (Definition of AIFM) and IV (Definition of AIF) of the DP went beyond the mandate received under Article 4(4) of the AIFMD since technical standards should not identify any policy orientations or suggest interpretations which go beyond the terms of the AIFMD.

4. A respondent was generally supportive of the approach taken in the CP and supported ESMA's focus on the development of further criteria to determine whether a particular business has a "defined investment policy", but discouraged ESMA from placing too much emphasis on a Q&A approach to develop guidance as suggested in paragraph 3 of the DP.

5. A depositary generally agreed with ESMA' proposals and suggested ESMA to develop guidelines for the approval of delegates who do not hold an authorisation or registration for the purposes of asset management.

6. Some respondents asked to address certain questions, which are not covered by the CP:

- A private equity and venture capital association asked whether and in what circumstances a set of arrangements between several legal or natural persons should be considered to be a single AIF or multiple AIF.

  This respondent stressed that the essential future of an AIF is that it must be an "undertaking": even if this term is not defined in Community law, it is likely to encompass certain pooled investment vehicles, but mere parallel investment arrangements and ordinary corporate and joint venture arrangements should not be caught by the definition, even if one of the participants is a fund. For instance, in a private equity fund where there are several "parallel" limited partnerships having a common general partner and a common AIFM, each undertaking (limited partnership) should be properly regarded as a separate and distinct AIF. Also a private equity AIF structured as a limited partnership may have amongst its limited partners another limited partnership and these limited partnerships may have a common AIFM: if the second limited partnership has the features of an AIF, then there will be two separate AIFs, one a feeder fund into the other, whereas if it is not the case, there will be one AIF, which is the main fund limited partnership.

- An asset managers association asked to clarify the transitory provisions under Article 61 of the AIFMD:

i. this respondent asked to confirm that Article 61(1) of the AIFMD means that AIFMs will have twelve months (i.e. until 22 July 2014) to both (a) take the necessary measures to comply with the national law implementing the AIFMD, and (b) submit an application for authorisation; and

ii. this respondent also asked to clarify the scope of the application of the transitory provisions to closed-ended funds in existence as of 22 July 2013, in particular the reference to "making additional investments" within the meaning of Article 61(3) of the AIFMD and also the scope of Article 61(4): it raised the question whether the investment is deemed made once a legally binding arrangement is entered into or whether the test is based on the point in time at which the actual investment is made.

- A respondent mentioned that the AIFMD did not provide clarity as to whether the function of "portfolio management" includes the determination of the investment policy of an AIF and argued that none of the provisions of the AIFMD seems to suggest that to be the case, in particular since a prohibition of delegation of the function of determining the investment policy of the AIF has not been inserted within the provisions of the AIFMD. Therefore, this respondent asked to clarify that if an AIFM has been involved in the determination of the investment policy of the AIF, such AIFM may not delegate the (further) determination of the investment policy of such AIF to a third party and such delegation should clearly result in the AIFM becoming a letter-box entity.

- Some respondents asked to clarify that SPVs should not be considered as AIFs. One of them claimed that SPVs of real estate funds fall outside the definition of an AIF and mentioned that Article 26(2)(b) and recital (78) of the AIFMD confirm that not only SPVs do not constitute AIFs when treated on a stand-alone basis, but also they do not form part of the wider AIF for the purposes of whose investments they are established. Similarly, a depositary suggested that where the parent entity of an SPV is an AIF, the SPV as such should not automatically qualify as an AIF. Another respondent argued that an SPV or an acquisition vehicle set up by a manger in order to facilitate multiple participation in a particular investment by a number of AIF and/or other accounts managed by the manager or one of its affiliates should not be treated as an AIF since it would merely be a means of investing capital already raised and would not have an investment policy since it would be established for the purpose of making a specific investment or investments identified by the manager or one of its affiliates.

Definition of AIFM

General comments

7. A public authority found the analysis under this section not sufficiently clear and mentioned that as a result it remains uncertain exactly which functions an entity must either perform, or be capable of performing, in order to require an authorisation as an AIFM and the amount of delegation which is possible.

Paragraph 6

8. An asset managers association questioned that in paragraph 6 of the DP ESMA was trying to use Article 6 of the AIFMD to define an AIFM (i.e. by saying that "*Article 6(5)(d) of the AIFMD should be interpreted as requiring an AIFM to be capable of providing* [...] *both portfolio management and risk management functions in order to obtain an AIFM authorisation in accordance with the AIFMD*"),

whereas Article 6 of the AIFMD regulates the technicalities of authorisation of AIFMs, while many AIFMs may be third country AIFMs not subject to the authorisation requirements. Furthermore, this respondent argued that the requirement that an AIFM should be "capable of providing" both portfolio management and risk management in paragraph 6 of the DP went far beyond what ESMA stated on letter-box entities in its technical advice to the European Commission (AIFMD Advice) and with the provisions of Level 1.

9. A respondent considered that, in order to be an AIFM, an entity should be providing both the portfolio management function and the risk management function and if an entity performing either portfolio management or risk management for an AIF was to be considered an AIFM, this would mean that there would be two AIFMs, which is contrary to the requirement according to which there can only be a single AIFM for each AIF. Furthermore, this would be contrary to recital (21) of the AIFMD.

10. Some investment managers associations mentioned that in their understanding paragraph 6 of the DP does not mean that any entity which performs either risk management or portfolio management for an AIF must seek authorisation as an AIFM, since that could jeopardise the requirement that each AIF should only have one AIFM. These respondents suggested to clarify that the entity performing portfolio management is supposed to be the AIFM, who has then delegated the risk management to a third party (according to Article 20 of the AIFMD).

11. An asset managers association requested to make clear that the fact that an AIFM delegates one of the two functions (risk management or portfolio management) does not mean that it is not performing both functions according to Article 4(1)(w) of the AIFMD: performing a function means primarily to have the liability of that function, even if it delegated to a third party.

12. A respondent asked to clarify the second sentence of paragraph 6 which provides that no AIFM licence should be required for the performance of either portfolio management or risk management functions under a delegation agreement since it might be read as exempting from the authorisation requirement in case the delegate itself holds an AIFM licence.

13. A banking association asked to clarify whether the intention of paragraph 6 is to allow the delegation to an entity which is located in a third country that is neither authorised nor registered, as this could lead to regulatory arbitrage.

14. An alternative investment managers association suggested to clarify that the approach on delegates of AIFMs includes situations where the AIFM is a non-EU AIFM: in the case of a non-EU AIFM which is not itself authorised under the AIFMD, the delegation arrangements would not specifically be in accordance with Article 20 of the AIFMD.

Paragraph 7

15. A private equity and venture capital association asked clarifications in relation to the statements on delegation in paragraph 7 of the DP that delegates are not responsible for monitoring the compliance of the AIFM itself with Article 20 of the AIFMD and that a delegate that has taken reasonable measures to confirm that the AIFM delegating to it is not a letter-box entity shall not be considered to be acting as an AIFM if it is later determined that the AIFM that delegated to it was a letter-box entity or was otherwise not acting in compliance with Article 20 of the AIFMD.

16. An association of publicly listed real estate companies mentioned that non-tradeable closed-ended funds do not have portfolio management activities since their activities usually only focus on a single asset and not on a portfolio of assets and the management of this kind of funds is specifically not authorised to buy or sell, but only to manage the fund's assets. Therefore, since the only remaining task under Annex I of the AIFMD for these funds is risk management, this respondent feared that non-tradeable closed-ended funds would already be seen as a letter-box entity by delegating the (only existing) task of risk management.

Paragraph 8

17. A banking association mentioned that the delegation of major activities has to be limited and it must not be possible to delegate both portfolio management and risk management functions in order to avoid absolutely the registration of letter-box AIFMs.

18. An alternative asset managers association was of the opinion that paragraphs 8 and 47 of the DP were contradictory since the first one says that an AIFM may not delegate both portfolio management and risk management functions at the same time, whereas the second one states that an AIFM can "perform one or both of these functions under a delegation arrangement".

19. A large number of respondents believed that an AIFM may delegate both portfolio and risk management functions at the same time and that a prohibition of such delegation seems contradictory with ESMA's position expressed in the AIFMD Advice and with the provisions of Level 1 which does not provide for any prohibition for the delegation of both functions at the same time. Most of these respondents added that the delegation of both functions should be possible as long as the delegation arrangements do not result in the AIFM becoming a letter-box entity in accordance with the AIFMD Advice. Furthermore, one of these respondents was of the opinion that Article 20 of the AIFMD clearly contemplates the ability of AIFMs to delegate both portfolio management and risk management functions.

20. Some members of an asset managers association wondered whether ESMA with the words "in whole" referred to such a situation where there would not be a sufficient structure left at the level of the AIFM (i.e. where the AIFM was a letter-box entity). A vast majority of the members of the same association however understood from this wording that ESMA wanted to express that the AIFM could only delegate one or the other function but not both. To avoid such confusion, an asset managers association strongly suggested avoiding the words "in whole".

21. Another respondent pointed out that an AIFM is entitled to delegate the whole of both functions at the same time provided that it: (1) retains responsibility to the AIF or to investors for the whole of both functions; (2) retains the expertise and resources to supervise the delegated functions effectively and to manage the risks associated with the delegation; and (3) retains the power (under or consistent with the constitutional documents of the AIF) to terminate the delegation and reserve the performance of either or both functions to itself, or to appoint a different delegate.

22. Furthermore, an alternative asset managers association pointed out that the aforementioned prohibition would mean that there could rarely, if ever, be self-managed AIFs since it is unlikely that a governing body will have the capacity itself to perform risk management or portfolio management.

23. A couple of respondents asked to clarify that:

- the calculation of individual risk figures by external providers should not be considered partial delegation of functions, but rather an ancillary service for the internal performance of risk management; and

- the function of liquidity management in Article 16 of the AIFMD is distinct from risk management and hence would not be affected by the approach illustrated in the DP.

24. Two banking association asked to clarify further the reference to "in part" in paragraph 8 of the DP.

Paragraph 10

25. A banking association was of the opinion that an AIFM should in any case be responsible for all the functions performed by the AIF, including the additional functions listed in Annex I of the AIFMD.

26. The vast majority of respondents mentioned that the statement in paragraph 10 of the DP went beyond the provisions of Level 1 since paragraph 2 of Annex I of the AIFMD states that the listed functions "may" be performed by an AIFM.

27. A couple of these respondents recalled the general rule of law according to which nobody may delegate more functions than he has previously received and mentioned that, accordingly, an AIFM which has not been appointed for all functions may also not delegate such functions for which it has not been appointed. From a similar perspective, another respondent pointed out that unlike the UCITS Directive which specifies that investment management and administration activities are included in collective portfolio management, the AIFMD does not mandate that the functions of administration, marketing and activities related to the assets of the AIF be performed by the AIFM in the course of collective portfolio management. Therefore, subjecting the AIFM to liability for delegation of those functions that the AIFM has not itself delegated is inconsistent with the provisions in Article 20(3) of the AIFMD regarding the AIFM's liability to the AIF and its investors for those functions delegated by the AIFM to a third party.

28. An asset managers association mentioned that Article 5(1) of the AIFMD specifically refers to the single AIFM being responsible "for ensuring compliance with this Directive" – which is entirely different from taking on full ultimate liability for the actions or omissions of other service providers (which do not take on investment management functions and are not the AIFM's contractual delegates).

29. In addition, a couple of respondents were of the opinion that the approach suggested by ESMA would also be in contradiction with recital (11) of the AIFMD which expressly contemplates that there will be aspects of the operation of an AIF for which, in some fund structures, the AIFM will not be responsible.

30. Some asset managers associations were of the view that the relevant services (e.g. marketing and/or administration) are generally performed under a contract between the AIF itself (when the AIF is a corporate entity) and a third party and there is no justification for considering them as having been delegated by the AIFM to a third party and to consider the AIFM responsible. A respondent added that ESMA's approach assumes that all AIFM structures follow the UCITS-like management company model and that the management company appoints all the service providers.

31. An asset managers association pointed out that as regards "marketing" (which is one of the optional activities under Annex I of the AIFMD), the activities concerned are only those covered by the defini-

tion of "marketing" in Article 4(1)(x) of the AIFMD: therefore, if the AIFM hires an entity to distribute the units or shares of an AIF it manages on its behalf, it should be responsible for such distribution; however, if it distributes through a distributor it cannot be held liable for such distribution.

32. A depositary disagreed with the proposed extension of liability since an AIFM would be held liable for the sales and marketing activities of distributors, whereas from an investor protection perspective liability should not be moved from a sales unit (which knows the client best) to the fund providers.

Definition of AIF

1. **Types of AIF**

2. **Vehicles which are not AIFMs or AIFs or are exempted from the AIFMD**

Q1: Do you see merit in clarifying further the notion of family office vehicles? If yes, please clarify what you believe the notion of 'investing the private wealth of investors without raising external capital' should cover.

33. A respondent mentioned that recital 7 of the AIFMD focuses on investment undertakings which do not raise external capital and family offices are merely an example thereof. Along the same lines, some other respondents mentioned that family office vehicles are only one example of investing without raising external capital and the raising of external capital is the central feature of an AIF; furthermore, these respondents did not see any merit in seeking to define the notion of family office vehicles more precisely. One of these respondents added that it is already clear that the concept is that a family office vehicle does not look to third parties (i.e. "external capital" beyond the "family") for capital contributions.

34. The other respondents made the following suggestions in relation with any further clarification on the notion of family office vehicles:

- Some of the respondents recommended to maintain a broad, high level description of family relationships rather than trying to prescribe all relationships which might fall within a family relationship, in order to ensure that this relationship encompasses all recognised forms of family (relationships of blood or of law) and does not inadvertently exclude relationships such as civil partnership or adopted or foster children; on the contrary, a public authority suggested to limit the interpretation of family office vehicles to possible investors being strictly family only because any widening of the possible investor type (such as friends, etc.) could lead to abuse;

- Some of the respondents pointed out that when considering the identity or relationships of investors in a family investment vehicle, any definition should be sufficiently broad to cover other investment vehicles such trusts, estates, charities or vehicles through which family members may hold, invest or donate their assets;

- Several respondents claimed that family offices should not be prevented from raising external capital such as bank loans or debt finance;

- One asset managers association suggested that the notion of family offices should also cover (i) situations where banks use funds to optimize investment management for their clients with whom they entered into an investment management agreement and (ii) situations where funds are used as a wealth structuring tool;

- Another asset managers association mentioned that an indicator of a family investment vehicle is the lack of placement or marketing to obtain capital from third party, non-familial, investors; however, this does not exclude persons such as employees (or former employees) of the family office, whose expertise is essential to the efficient management of the family investment vehicle, from participating as investors;

- A respondent suggested the following criteria: (i) the vehicle does not raise capital from investors other than the family office investors; (ii) a family relationship between the investors exists; and (iii) the business relationship between the investors is likely to pre-date the relationship between the investors and the vehicle;

- Two respondents recommended to focus on the fact that a family office should not take up external capital in order to invest; two other respondents added that a family office vehicle's role is to manage and let grow existing wealth for the benefit of current and future members of the family;

- An investment managers association suggested taking into consideration the U.S. definition of a family office in the rules adopted under the Investment Advisors Act, 1940;

- A private equity association recommended to take into account the exception pertaining to 'family offices' under the Dodd Franck Act which was elaborated by the Securities and Exchange Commission;

- A respondent considered essential for the notion of family office vehicles what might be considered a family relationship and argued that this should cover any family relationship recognised by national law; the same respondent suggested not to restrict contributions to a family investment vehicle to money or assets which have a shared family-related source nor to money or assets which pre-date the relationship between the investors and the AIF or AIFM;

- A banking association was of the opinion that portfolio management within the meaning of MiFID should not be covered by the notion of family offices and mentioned that the definition of family offices can only refer to an undertaking which, regardless of its legal form, engages in bank-independent portfolio management for upper scale private customers;

- Another banking association mentioned that family offices should be defined as an undertaking (regardless of their legal nature) that manages large amounts of private wealth without reliance on banks.

Q2: Do you see merit in clarifying the terms 'insurance contracts' and 'joint ventures'? If yes, please provide suggestions.

Insurance contracts

35. A respondent considered not necessary to clarify further these terms. Two other respondents were of the opinion that it would not be appropriate to seek a harmonised legal definition of insurance contract which was even not thought necessary for the purpose of the insurance directives. An asset managers association added that if these terms were to be defined, it would be appropriate to define them in the context of a directive specific to the insurance sector.

36. Some respondents supported the introduction of additional clarifications on the term 'insurance contracts'. In particular:

- a real estate asset managers association mentioned that this would clarify whether so called 'unit linked' products are in the scope of the AIFMD;
- a depositary recommended to clarify that life insurance funds and their management are out of the scope of the AIFMD;
- a banking association pointed out that there exist hybrid forms between insurance and investment products the clear-cut legal categorisation of which is paramount;
- an asset managers association was of the opinion that activities in general (including contracts) and wrappers (i.e. insurance products) should be outside the scope of the AIFMD.

Joint ventures

37. Some respondents were not in favour of trying to define or clarify the commercial (non-legal) term "joint venture". One of them mentioned that there is a broad range of commercial arrangements entered into which could be affected and there is the risk of developing a definition which is too narrow. If such term was to be defined, this respondent suggested that an indication for a joint venture is often that investors are involved on certain key decisions.

38. A relevant number of respondents saw merit in clarifying the term "joint ventures". However, a couple of respondents raised the question whether the AIFMD constitute the appropriate legislative framework to define joint ventures at European level.

39. Some respondents mentioned that criteria to be considered in relation to a given entity could include the following ones:

- it is created by two or more companies;
- it has moral personality;
- its objective is to pool resources in a common goal;
- it is controlled by the pooled actors (i.e. the community of ventures'/investors – rather than a fund manager – is responsible for making strategic decisions on the management of the assets);
- it has no investment policy;
- it does not raise capital from a number of investors;

- the number of investors allowed to participate is limited to 50 investors;
- it facilitates parallel investment through a common platform rather than pooling;
- it is the natural result of a business proposition, rather than a business proposition in itself.

40. An asset managers association was of the opinion that when investors are directly involved in the day-to-day management of the portfolio, the vehicle could be considered a joint venture, rather than an AIF (within which investors do not have any role in the management).

41. Two real estate asset managers associations mentioned that in the real estate context this concept will normally involve a small number of participants (in general two and not much more than two) agreeing to develop or manage an asset or a portfolio of assets for their mutual profit and having a contractual right to participate in the key strategic decisions relating to the undertaking (known as "reserved matters" and covering topics like, for instance, the acquisition or disposal of a property, the decisions to carry out development requiring capital expenditure, the raising by the joint venture of debt finance and changes to its overall gearing level, etc.), without generally all participating in its day-to-day management. One of these respondents highlighted that this represents the main difference as compared to an AIF, where the AIFM would have broad discretions in managing the AIF, within the bounds set by the AIF's defined investment policy, without needing to secure the agreement of its investors to particular actions.

42. Similarly, an alternative investment managers association considered that participation in the day-to-day management of a joint venture is not a useful criterion and mentioned that a key element for distinguishing between a joint venture and an AIF is whether the participants in the undertaking have a contractual right to participate, and actually participate, in key strategic decisions relating to the undertaking (referred to as 'referred matters'): these may include (i) the acquisition or disposal of assets by the joint venture, (ii) the raising by the joint venture of debt finance and its gearing level, (iii) capital distributions by the joint venture to investors and issues of shares or other interests by the joint venture to any party and (iv) appointment of professional advisors (including auditors). Two respondents suggested that co-investment vehicles (often set up as special purpose vehicles) commonly used by AIFs (particularly in private equity and real estate context) should be specifically excluded from the definition of an AIF since more similar to joint ventures.

43. A couple of respondents were of the opinion that where control over significant portfolio and risk management decisions is not transferred to an external fund manager, but it is exercised jointly by all investment participants, the investment vehicle should not be considered to be an AIF, but a joint venture (in the context of non-listed real estate vehicles, 'club deals' should also be considered joint ventures, provided that they fall within this definition). One of these respondents (a real estate asset managers association) also suggested the following as regards the notion of joint ventures:

- the number of participants is not relevant, but will generally be relatively low; and
- the possibility of outsourcing certain day-to-day administrative management functions (i.e. non-strategic), including those of Annex I, paragraph 2 of the AIFMD, to an external administrative manager should be allowed without re-classifying the joint venture as an AIF.

44. An association of pension funds was of the opinion that the notion of joint ventures should also include pension funds' pooling vehicles partnering with one or several other market parties (typically other in-

stitutional investors) in order to jointly create a joint venture vehicle with the sole purpose of (directly or indirectly) holding one or several assets/investments.

45. A venture capital association suggested to take into account the notion of joint ventures developed by the European Commission in the Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 1-4): according to such notion, "joint ventures" are defined as "undertakings which are jointly controlled by two or more other undertakings".

Q3: Do you see merit in elaborating further on the characteristics of holding companies, based on the definition provided by Article 4(1)(o) of the AIFMD? If yes, please provide suggestions.

46. Two respondents were of the opinion that since the legislator excluded holding companies from the scope of the AIFMD, such exclusion could not be regarded as a mean of circumventing the AIFMD. A third respondent mentioned that it should be ensured that neither holding companies nor securitisation special purpose entities are used to such purpose.

47. Some respondents saw merit in further elaborating on the characteristics of holding companies. In particular, these respondents expressed some concerns regarding the definition in Article 4(1)(o) of the AIFMD since not all holding companies have their shares admitted to trading on a regulated market in the EU (i.e. many holding companies are either not admitted to trading on a regulated market or are admitted to trading on markets outside the EU).

48. A public authority was of the view that it would be appropriate to elaborate on the characteristics of holding companies, particularly in relation to the percentage of shareholdings in other companies (i.e. whether or not a company which has a minority participation in another company should be considered as a holding company).

49. An asset managers association suggested to clarify that wholly-owned SPVs and subsidiary/intermediate/conduit vehicles are excluded from the scope of the AIFMD (either by including them in the definition of holding companies or otherwise) since they do not raise capital publicly and are often funded by loan/debt instruments issued to the relevant AIF.

50. Two real estate asset managers associations noted that the definition of holding company is clearly set out in Article 4(1)(o) of the AIFMD and mentioned that it could be helpful if ESMA could give some guidance as to what Articles 3(a) (which clearly states that the AIFMD should not apply to holding companies) and Article 4(1)(o) of the AIFMD are intended to achieve and how they should be construed.

51. A venture capital association asked to elaborate the condition that the listed "holding entity" should operate on its own account: this should mean that the relevant entity will not be a holding company which has entered into an investment management agreement or any other agreement whereby the legal benefits of its management are held in trust for the benefit of investors. The same respondent also asked to clarify that an intermediary holding company – held by one or more parent companies which are part of the same group – will not be considered as "generating return for its investors", but just for affiliated companies.

52. Several respondents were of the opinion that there is no need of elaborating further on the characteristics of holding companies. In particular, one of them argued that the holding company exemption is precise and contains a number of conditions (also for anti-avoidance purposes); therefore, this respondent disagreed that such exemption provides a means of circumventing the provisions of the AIFMD.

53. A private equity and venture capital association argued that the difference between holding companies and AIFs is already set out by the combined reading of Article 4(1)(o) of the AIFMD and paragraph 28 of the DP since in the latter it is clearly stated that a collective investment undertaking should have the purpose of generating a return for its investors through the sale of its investments, whereas, according to the definition of the holding company, the latter shall be an entity acting on its own account whose purpose is to manage the underlying assets with a view to generating value through the life of the undertaking. This stakeholder further added that the purpose of a private equity or venture capital fund is the investment purpose of generating a return from sales of interests in the investee companies, not the commercial one of carrying out the business strategies of the investee companies. Notwithstanding the above, this respondent mentioned that it could be appropriate if ESMA clarified that:

- the term holding "company" should be regarded as covering all types of holding entity or vehicle which meet the defined criteria (e.g. LLPs, limited partnerships or even entities which may be subject to another regime, e.g. Luxembourg SOPARFIS); and

- entities which are in company law terms normally described as holding companies but which would not meet other criteria of the definition of an AIF (e.g. because they do not raise external capital or do not have a defined investment policy) do not need to rely on the specific holding company exclusion. This would be the case in relation to the acquisition vehicles which a private equity or venture capital AIF, or its AIFM, put in place in order to acquire the underlying investee company and keep it segregated from other portfolio companies in order to facilitate future sale.

Q4: Do you see merit in clarifying further the notion of any of the other exclusions and exemptions mentioned above in this section? If yes, please explain which other exclusions and exemptions should be further clarified and provide suggestions.

54. Several respondents were of the opinion that the other exclusions and exemptions are generally sufficiently clear or at least fully addressed in the text of the AIFMD. A depositary argued that it should be left to the national competent authorities to allow for the necessary flexibility and proportionality in the implementation and application of the AIFMD in the Member States.

55. However, several respondents made various requests of clarifications of certain notions; the requests aimed at:

- clarifying the reference to "employee participation schemes" or "employee savings schemes" in Article 2(2)(f) of the AIFMD: a respondent suggested to recognise that the definition of employee in such schemes generally needs to be broadened to include personnel of the relevant undertaking who are not necessarily employees according to employment law (e.g. directors, officers, members of an LLP) and each case close relatives and trustees;

- clarifying how the group exemption in Article 3 of the AIFMD applies to the so called intra group pooling fund structures (top funds investing in base funds): it can happen that a specific intra group investor qualifies as an AIF and, therefore, the exemption does not apply to the base fund whereas the top fund itself is exempted and the fund structure will only be used for investments within the group without raising capital from a number of external investors;

- including in the group exemption indirect subsidiaries (as it is the case for the equivalent MiFID exemption): for this exemption to become relevant, it is necessary for the vehicle concerned to all fulfil the other criteria for being an AIF, otherwise it will not need to use the group exemption and it will therefore not be relevant whether one of the group participants is itself an AIF;

- clarifying that 'securitisation special purpose entities' are not in the scope of the AIFMD when they fulfil the criteria outlined in Article 4(1)(ao) of the AIFMD; in particular, a respondent asked to clarify how the securitisation special purposes entities exemption might apply to structured financial instruments (SFIs) and mentioned that physically backed SFIs, such as physically backed ETCs, issued by stand-alone special purpose entities have many of the features of securitisation; a banking association asked to clarify the notion of 'securitisation special purpose entities' as some Member States do not have a definition of this notion;

- clarifying that pooling investment vehicles through which only pension funds' assets are being managed, fall outside the scope of the AIFMD;

- clarifying that 'sukuk' and 'clearing services' do not fall within the definition of collective investment undertakings and, therefore, are out of the scope of the AIFMD;

- clarifying whether SPAC (Special purpose acquisition company) and SIV (Structured investment vehicles) are excluded from the scope of the AIFMD;

- ensuring the clean interaction between the different exemptions (e.g. a joint venture may take the form of a holding company or of a family office);

- clarifying that investment vehicles (for instance limited partnerships) in which the only external investor is the institutional investor which conferred the mandate on the investment manager to structure such vehicle are not AIFs.

3. Mapping Exercise

56. A private equity and venture capital association commented on the mapping exercise carried out by ESMA by saying that:

a) private equity funds frequently invest in small companies and may provide development capital at all levels;

b) venture capital funds invest beyond start-ups, and existing and medium sized firms can still need significant venture funding;

c) both private equity and venture capital funds, though more frequently the latter, invest in life sciences.

57. Some respondents suggested to add to the list resulting from the mapping exercise the following funds:

a) non-UCITS funds that invest in asset classes that are similar to those in which UCITS invest, and which respect UCITS diversification and leverage requirements, but which are closed-ended or are not open to the public; and

b) non-UCITS that are not labelled as UCITS for the simple reason that their managers decided not to subject them to the UCITS Directive (for example because they do not use the passport).

4. Proposed Criteria to identify an AIF

Q5: Do you agree with the orientations set out above on the content of the criteria extracted from the definition of AIF?

58. A banking association asked to clarify whether the listed criteria are absolute preconditions for an entity to be considered as an AIF or are merely of indicative nature.

59. A couple of respondents suggested to clearly state that the proposed criteria to define an AIF have to be looked at jointly: it is not because one of them is fulfilled that the structure under consideration is necessarily an AIF. Similarly, a banking association asked to clarify whether all criteria have to be met simultaneously or if only the majority of criteria have to be met.

Raise Capital

60. A real estate asset managers association broadly agreed with the approach taken by ESMA, but was of the opinion that further criteria could be developed to identify the types of capital raising that a normal company undertakes versus that which a fund more typically takes, including the fact that a shareholder in a company will typically buy or sell shares through the secondary markets rather than through specific company issuances.

61. A private equity and venture capital association mentioned that the notion of 'raising capital' implies some kind of activity geared towards collecting funds for the purpose of making collective investment in order to generate returns and it is not necessary to refer to the commercial nature of this activity as done in paragraph 25 of the DP since the intrinsic purpose renders this activity commercial per se.

62. The same association expressed specific agreement with the views set out under paragraphs 25 and 26 of the DP. This respondent added that 'raising capital' must involve a person (who might be called a "sponsor", but who may or may not be the AIFM, and may or may not itself be an investor or otherwise a participant in the fund) taking active steps by way of business to procure the commitment of third party (i.e. external) capital (which commitment must be more than merely nominal) with a view to the sponsor, or someone affiliated with the sponsor, making a profit (which could be income or capital gains but which must be more than merely nominal or de minimis) from the management of capital raised from the third (or external) party. Such notion would imply that vehicles solely for participation by those connected with the manager in order to align their interests with the third party investors will not be treated as AIF.

63. Furthermore, according to a couple of respondents, 'carried interest' vehicles, which certain senior executives of the AIFM participate to with a modest capital contribution in the private equity context and the purpose of which is to regulate the rights of the executives among themselves, would not be considered as AIFs. These respondents argued that there is no 'capital raising' (or external capital) in respect of these carried interest limited partnership as well as in respect of similar or different vehicles used to effect executive co-investment in transactions alongside the AIF with an executives' commitment which is more than merely nominal, on the assumption that the only investors in the carried interest/co-investment vehicle are executives of the private equity firm, or members of their family. Furthermore, they argued that employee savings and participation schemes that are excluded from the AIFMD may encompass such arrangements.

64. An asset managers association was of the opinion that the land example in paragraph 25 of the DP should be removed as it could imply that a "time share" arrangement marketed by a promoter to investors could conceivably fall within the scope of the definition.

65. Some respondents disagreed with the statement in paragraph 27 of the DP that the absence of capital raising is not conclusive evidence that an entity is not an AIF since they argued that ESMA may not remove an element of the definition of AIF in the text of the AIFMD. However, one of these respondents agreed that indirect capital raising should be covered, but was of the opinion that, in case an existing company formed a new subsidiary in order to purchase assets from the first (liquidated) AIF without raising further capital and the cash it paid for those assets was distributed to the investors in the liquidation of the first AIF, there would have been any capital raising (direct or indirect) sufficient to make the acquiring company an AIF.

66. A private equity and venture capital association pointed out that the linking of the capital raising to both:

- investing in accordance with the defined investment policy; and
- that investment being for the benefit of those investing the capital raised

is very important in the definition of AIF given by the AIFMD and the interrelationship of the individual elements of such definition is also crucial to the definition.

67. A stakeholder asked to further elaborate on the relevance of nominee arrangements and mentioned that a look-through approach should be undertaken only to determine whether there is on one level a scheme that fully qualifies as AIF (i.e. all the criteria must be met by this scheme).

Collective Investment

68. Several respondents agreed with the views expressed by ESMA in paragraph 28 of the DP, but mentioned that it should be legitimate for AIF to have the general purpose of generating return for investors regardless of whether such return is achieved by sale and/or continuous management of its investments (with the latter generating income on a regular basis) and that the return to the AIF during the lifetime of the product should be taken into account. Therefore, some of these respondents suggested the following amended wording: "A collective investment undertaking should have the purpose of generating a return for its investors through its investments or the sale of its investments as opposed to an entity acting […]".

69. A couple of respondents mentioned that the purpose of a closed-ended fund may be to generate value during the life of the undertaking and, therefore, suggested to delete the second sentence of paragraph 28 of the DP.

70. An asset managers association asked confirming that "virtual pooling arrangements", where a number of funds, managed accounts and/or other investors have a common investment strategy, investment manager and administrator, do not constitute AIF. Indeed, this pool does not have a separate legal personality and is an accounting construct.

71. A respondent mentioned that an entity should not be deemed to have the purpose of collective investment simply because it does not act for its own account, whereas another respondent asked to clarify whether the reference to "own account" refers to legal or economic ownership of financial instruments.

72. Two private equity associations underlined the importance of both the collective nature of the exercise and the purpose of the undertaking when trying to identify an AIF.

73. Two real estate asset managers associations mentioned that European listed property companies should not be regarded as collective investment undertakings mainly because they place great importance on their customers (tenants, visitors) and employees as well as investor relationships, whereas a fund will have a more investor focused approach.

74. A respondent pointed out that Article 4(1)(a) of the AIFMD provides for a certain gradation of the importance of the criteria that need to be taken into consideration to determine whether or not an entity is an AIF and was of the opinion that the "collective investment undertaking" is the first criterion that needs to be considered and supersedes all the others. This respondent suggested to define a collective investment undertaking as an entity which does not actively manage its assets, i.e. the value of the assets themselves is independent of the actions of the AIF or if it does actively manage the assets, it is with the systematic goal to sell the asset in order to generate return for its investors.

Number of Investors

75. Several respondents endorsed ESMA's approach focusing on the content of the AIF's rules or instruments of incorporation. However, one of them recommended a flexible approach as regards existing structures (e.g. some existing closed-ended funds are set up for a single client, but this is not reflected in the instruments of incorporation or the AIF rules).

76. Two respondents were of the view that the presence of a number of investors should remain de facto during the life of the fund (not only in the provisions of the AIF's rules or instruments of incorporation). An asset managers association expressed similar views and added that if an entity is restricted by another legally binding document or legislative/regulatory provision other than the fund rules or instruments of incorporation, it should similarly not be considered an AIF.

77. Few respondents disagreed that it should be mandatory for a specific provision to be made in the instruments of incorporation in order to reach the conclusion that a collective investment undertaking with a single investor is not an AIF; one of these respondents argued that there are likely to be very many arrangements which happen to involve a single investor where there will be not a limit on the number of investors in the instruments of incorporation.

78. A banking association asked to clarify whether funds having one single investor should fall under the scope of the AIFMD when they are potentially open also to several investors or only in case of actual participation of any second investor. Another banking association asked to specify what the minimum number of investors is.

79. On the single investor representing a number of underlying beneficial owners, the following comments were made:

- A couple of investment managers associations asked to clarify that investments by a pension fund or by an insurance company into an AIF should not be considered as investments by a number of investors;

- One respondent asked to clarify that investments made by firms performing portfolio management which buy AIF on behalf of their clients should not be considered as investments by a number of investors;

- A private equity and venture capital association asked to clarify that, in the case of a limited partnership having only one limited partner and one general partner, where the general partner is part of the management group or the profit share of the general partner is limited (for example to cover the costs of administering the AIF plus audit costs), the limited partnership should not be regarded as raising capital from a number of investors;

- Few respondents pointed out that if an AIF, which is itself a collective investment undertaking invests into another undertaking in accordance with its defined investment policy (master/feeder structures and fund of funds), that cannot of itself turn the undertaking in which it invests into an AIF; it is only if it meets the other tests for being an AIF (including but not limited to raising capital from a number of investors) that the investee undertaking will be an AIF;

- An asset managers association mentioned that ultimately it should be up to the board of directors of the vehicle to determine whether an investor represents a number of underlying beneficial owners based upon (i) information and representations received from the investor purchasing the interest in the vehicle and (ii) the legal nature of the relationship between that investor and any other persons that may be linked to such investor;

- A respondent was of the opinion that the look through to underlying beneficial owners should not apply to single investor SPVs;

- A venture capital association argued that no look-through should be necessary if the sole investor contributes capital to the undertaking which it manages on a discretionary basis, but the look-through should be required if the sole investor does not have a discretionary mandate to manage the funds of the ultimate beneficial owners;

- One respondent mentioned that a nominee arrangement is not of itself an AIF: many firms which are managing individual investment portfolios register their clients' investments in a single nominee name, but the nominee has not raised capital and the investors' interests are separate;

- An asset managers association asked to clarify that where a single nominee invests in a vehicle on behalf of a single beneficial owner, this should not result in the vehicle being deemed to be an AIF.

Defined investment policy

80. Several respondents agreed with the guidance proposed in paragraph 31 of the DP.

81. A couple of respondents suggested to also take into account whether certain terms such as 'portfolio' or 'investment guidelines' are included in the investment policy and recommended that when assessing whether or not an entity has a defined investment policy a global view should be taken in order to allow for the absence or low degree of fulfilment in respect of some factors being offset by the clear presence of other factors.

82. A private equity and venture capital association mentioned that:

- the relationship between the entity and the investor which binds the entity to follow the investment policy need not necessarily be a contractual relationship (the duty to follow the investment policy may arise under contract, trust law, statute or in some other circumstances);

- there is a necessary link between the capital raising and the defined investment policy contained in the AIF definition's reference to the capital being raised with a view to its investment in accordance with the policy and, therefore, the defined investment policy needs to be communicated clearly to investors, binding subject to any agreed variation mechanism, etc.;

- a defined investment policy implies some discretion to be exercised by the AIFM rather than dictating exactly what is to be acquired and done so that there is no portfolio or risk management discretion left.

83. An asset managers association was of the opinion that it should be underlined that the relevant criteria are indicative only and the changes to the investment policy to be disclosed to the investors should be "material changes" only.

84. A respondent mentioned that:

- the changes to the investment policy should not be considered as one of the elements of the definition of investment policy since this is a matter of the contractual provisions rather than part of the definition of the investment policy;

- the importance of the obligation for AIFs to "conform to other restrictions designed to provide risk diversification" should be underlined since this could help to distinguish AIFs from other types of vehicles which collect capital from investors with the purpose of investing in one specific business;

- the guidelines to invest in "particular geographic regions" is not an essential element which qualifies the investment policy.

85. A real estate asset managers association suggested to draw further contrast between where a business strategy differs from a defined investment policy and, therefore, to expand on the following points:

- whereas a defined investment policy contractually binds a fund to follow the investment policy (as agreed with investors), a business strategy is flexible in nature;

- whereas a defined investment policy will generally be fixed no later than when the investors' commitment to the fund becomes binding and is often fixed at the beginning of the life of a fund, a business strategy is never formally fixed, but rather exists at the discretion of management, and is not incorporated formally into the statutory documents of a business.

86. Two other real estate asset managers associations expressed similar views. In particular, one of them mentioned that for a defined investment policy it is necessary that the fund pursues an investment strategy that has been agreed with the investor before the investment decision has been taken and cannot be modified without the approval of the investor, whereas a business strategy and the formulation of business goals are part of every rational economic decision and are necessary for the decision-making in an economically active undertaking.

87. A respondent was of the opinion that the use of a defined investment policy is different and more specific for funds than the strategy of a company with general commercial purposes: a defined investment policy can be identified as being more specific and prescribed in relation to how investors' money can be used or invested than simply investing in the assets or working capital for the commercial objectives of the business. Furthermore, two respondents disagreed with the criterion of the investment policy's disclosure to investors since this might easily overlap with a business strategy, which can be clearly disclosed to investors in company prospectuses, websites, other company marketing materials, or shareholders communications; in addition, they felt that this criterion is superfluous to the extent that the defined investment policy is part of the contractual agreement between an investor and a fund.

88. A couple of respondents recommended clarifying that a restriction imposed by legislation (e.g. leverage limits, trading activity, minimum distribution requirements, risk management, etc.) in order to obtain certain taxation benefit should not be considered as a defined investment policy (i.e. a restriction imposed by law to a company that chooses to benefit from the REIT regime should not be considered as an investment policy).

89. A respondent was of the opinion that the proposed criteria for the defined investment policy would imply that any company bylaws whatsoever could be considered as an investment policy and suggested that an investment policy needs to be "a contractual relationship between the investors and the entity that bind the entity to follow the investment policy beyond the simple legal relationship that is created between the entity and its investors by its bylaws".

90. Two banking associations mentioned that the defined investment policy needs to become part of the constitutional documents of the entity only if the AIFM is the internal manager of an AIF and not if the AIFM is the external manager.

91. A respondent suggested clarifying that also single assets funds are captured within the scope of the AIFMD; indeed, not all AIFs necessarily invest in a number of investments: for instance, non-tradeable closed-ended funds usually invest in a single asset, e.g. one real estate, one ship or one aircraft.

Q6: Do you have any alternative/additional suggestions on the content of these criteria?

92. A private equity and venture capital association suggested that the guidance on 'collective investment' should make it clear that managed accounts, i.e. a portfolio of assets managed on behalf of one investor, are not caught by the definition of AIF and that this also applies when that investor's investments are held by the same nominee or custodian as are investments of other clients and notwithstanding that investments may be made for several clients in parallel by agreement. This respondent was of the opinion that the same should apply when a single client's investments are placed in a special purpose vehicle, such as a limited partnership in which that investor is the sole limited partner.

93. A respondent was of the opinion that the (legal) relation between investors and the AIF or AIFM might be a fact that could be taken into consideration when identifying an AIF: the investment contract between the investor on the one side and the AIF/AIFM on the other side and the related specific fiduciary duties of the AIFM could be taken into account as well when determining and classifying types of AIFMs under the AIFMD.

94. A real estate asset managers association suggested the following additional criteria for differentiating investment funds and ordinary business undertakings:

- Valuation approaches: funds – even when listed/traded on major stock exchanges – are most often valued by investors using metrics that look mainly at the assets under the funds' control (such as the net asset value), whereas corporate and other business undertakings are often valued by using a combination of cash flow analysis, asset-to-liabilities ratios and growth in earnings or dividends;

- Raising debt capital from public markets: generally, only corporate entities (or securitisation special purpose entities) issue unsecured debt securities into public markets.

95. Another real estate asset managers association mentioned that where a fund owns its ultimate investment through a complex ownership structure that includes different wholly owned entities, the AIF should be identified as the fund entity which has raised capital from investors.

96. A respondent suggested adding the element of diversification to the different criteria.

97. Another respondent mentioned that an AIF must involve 'investment management' and suggested to provide guidance on whether a given structure involves such an element. The guidance should focus on the following indicia of investment management:

- the extent to which the issuer has a designated investment manager;

- the extent to which the issuer (or any person on the issuer's behalf) has any discretion or control over the capital raised;

- the extent to which there is any actual investment of that capital;

- to the extent the issuer is tracking a strategy index, whether the index embeds some level of actual investment management.

Q7: Do you agree with the details provided above on the notion of raising capital? If not, please provide explanations and an alternative solution.

98. A large number of respondents agreed with the details provided.

99. In particular, two asset managers associations supported the statement according to which the absence of capital raising is not conclusive evidence that an entity is not an AIF and mentioned that situations where an AIFM is approached by an investor/group of investors with a specific concept for the AIF set-up should by no means be relevant for the question whether or not an entity qualifies as AIF.

100. A couple of respondents mentioned that fund structures with more than one level should remain outside the AIF definition, as long as the entity on the lower level does not acquire new capital, but only structured through the investment strategy of the upper entity (e.g. in case of an affiliated company (SPV) used for tax reasons, the latter does not collect capital and therefore does not raise capital, which was in turn acquired by the parent entity (AIF)).

101. An asset managers association argued that the concept of capital raising should be understood in the context of what constitutes marketing under the AIFMD and, for instance, two commercial companies establishing a joint venture vehicle in order to develop an investment strategy would not be regarded as raising capital although the creation of such joint venture vehicle necessarily entails some kind of communication by way of business.

102. An investment managers association mentioned that the language in paragraph 26 of the DP is rigid and could have the unintended consequence of capturing transactions which are not capital raising. This respondent also suggested to refer to the absence of "direct" capital raising in paragraph 27 of the DP in relation with the conclusive evidence that an entity is not an AIF.

103. A respondent suggested that a key factor for the notion of raising capital is that capital is raised from external, or unconnected sources, for investment in accordance with a defined investment policy.

104. An association of pension funds considered important to establish what should be qualified as 'external capital' and mentioned that this should not include the case where parties agree to deposit funds or assets by means of a mutual business agreement without inviting a larger group of (potential) participants to that effect without knowing upfront who will in the end participate.

105. A couple of respondents recommended not to set aside the raising of capital (as the language in paragraph 27 of the DP may imply) since this is one of the few clear elements to define an AIF.

106. A private equity association mentioned that an additional criterion to assess the absence of fund raising could be the absence of any material drafted for placement or distribution purposes (e.g. offering memorandum, prospectus or issuing document).

Q8: Do you consider that any co-investment of the manager should be taken into account when determining whether or not an entity raises capital from a number of investors?

107. Almost all respondents considered that internal co-investments of the manager should not be taken into account since the reference to 'raising capital from a number of investors' is intended to cover (multiple) third parties where capital is raised from. One of these respondents also suggested excluding any investment by an affiliate of the AIFM, while another respondent suggested to exclude capital contributed by executives and other connected parties of the manager.

108. An asset managers association expressed a similar view and mentioned the case of a new open-ended fund, which starts its activity simply by using the seed capital of the manager with the purpose to propose itself to investors with an effective track record. Another asset managers association proposed not to consider ancillary investors – only required to set up the structure.

109. A private equity association mentioned that the investment of the manager is a mere consequence of the primary investment by investors and the act of raising capital from investors actually precedes any co-investment by the manager.

110. A private equity and venture capital association was of the opinion that any capital committed by the AIFM, an affiliate, its owners, partners or other executives, or their family or close associates should be ignored for the purposes of assessing whether there is "capital raising" and/or capital raising "from a number of investors". Co-investment of the manager (or related persons) should not be taken into consideration because to do so would undermine the separation between manager and investor in the definition of AIF in Article 1(a)(i) of the AIFMD which envisages a separation between the undertaking, acting through its AIFM which raises capital and the investors from whom it raises capital.

111. A couple of respondents considered that any co-investment of the manager should be taken into account when determining whether or not an entity raises capital from a number of investors.

Q9: Do you agree with the analysis on the ownership of the underlying assets in an AIF? Do other ownership structures exist in your jurisdiction?

112. The large majority of respondents agreed with the analysis in paragraph 33 of the DP.

113. However, few of them mentioned the existence of different ownership rules for the underlying assets in certain countries (Germany, the UK, Hungary and Ireland) which do not distinguish between beneficial and legal ownership.

114. A respondent mentioned that whether or not an investor has any beneficial or legal ownership rights depends on the legal nature of the AIF and the applicable law (e.g. a shareholder's rights will be different in nature to the rights of a trust beneficiary).

115. A real estate asset managers association mentioned that the ownership of shares or units in a corporate undertaking does not usually imply any claim of ownership on the assets of that undertaking, but rather direct equity participation in the undertaking itself; even if the investors of a fund do not have in fact an indirect ownership interest in the assets of the fund, those investors will nevertheless typically view themselves as being indirect owners of the assets, whereas the shareholders in an ordinary business undertaking will see themselves as co-owners of the business, but not of the underlying assets of the business. Similarly, one member of an asset managers association argued that the proposed criteria seemed too broad as they could apply to any financial instrument or any company.

116. A respondent agreed in broad terms with ESMA analysis, but mentioned that under the German law assets belonging to the fund may be jointly owned by investors also in legal terms; however, also in this case the AIFM is entitled by law to dispose of the fund assets and to exercise any corresponding rights in its own name.

117. An asset managers association mentioned that the proposed ESMA analysis might cause interpretation issues with regard to tax-transparent vehicles, which are contractual vehicles that facilitate direct investments by investors. This respondent suggested including a specific reference to the effect that contractual vehicles and partnerships are not excluded by the ownership of underlying assets' criterion.

118. A private equity and venture capital association added that if investors who did individually directly own assets decided to have them managed in parallel, or even held by the same nominee but for each of them separately, that would not be sufficient for an AIF.

119. An investment managers association did not agree with the analysis and was of the opinion that on this point ESMA went beyond the mandate received for developing technical standards. A private equity association argued that the definition of Article 4(1)(a) does not permit to extract the "ownership of underlying assets" as a criterion to test whether or not an undertaking is an AIF.

Q10: Do you agree with the analysis on the absence of any investor discretion or control of the underlying assets in an AIF? If not, please explain why.

120. A large number of respondents agreed that investors have day-to-day no discretion or control over the underlying assets in an AIF (although certain high level decisions may require prior approval by the investors or investors may have some means to exercise influence over the fund investments without being able to dispose of them directly, e.g. investors may be represented in investor committees).

121. An asset managers association agreed with the analysis, but suggested to better specify the difference between controlling the assets and controlling the AIFM activity in order not to affect the right of the investors to exercise control over the managing activity of the manager.

122. Several other respondents also agreed with the analysis in paragraph 34 of the DP. However, one of them suggested omitting the words "day-to-day" since it is not clear what they add to the reference to investors not having discretion or control. Other respondents mentioned that the key point to focus on is not whether investors have "day-to-day" discretion or control over the AIF's assets, but rather whether they can and do participate in the making of key, strategic decisions relating to the management of the AIF. On the contrary, another respondent mentioned that the distinguishing feature of an AIF is that an AIF is not involved in the day-to-day operations of its assets and suggested to add that feature.

123. A real estate asset managers association was of the opinion that neither investors in funds nor shareholders in business undertakings are likely to have day-to-day discretion or direct control over the assets and, therefore, suggested that a more helpful measure might be whether the ownership of a share or unit allows the bearer to participate in the key decisions or overall corporate governance of the entity (as it is the case for a fund) other than voting their ownership interests on typical corporate matters (as it is the case for normal business undertakings).

124. A respondent pointed out that the core issue is that the AIFM has responsibility for management in accordance with the defined investment policy and saw no need for superimposing the concept that an investor has "day to day no discretion or control".

125. A banking association asked to clarify whether in case the AIF's entire portfolio management is outsourced/delegated from the AIFM to the investor(s), the control over the AIF's assets exercised by the investors is so substantial that the AIF shall no longer qualify as an AIF.

126. Some respondents disagreed with ESMA analysis.

127. A couple of them mentioned that in the professional fund business it is quite common that investors have at their disposal some means to exercise influence over the fund investments (e.g. through representation in investor committees); according to one of these two respondents, in some cases, investors' involvement may be stronger and take place on a daily basis (e.g. in case of institutional investors like banks), whereas the other respondent mentioned that investors' control will never amount to a daily management function. Therefore, according to the first respondent this criteria should not be overrated, also considering that it is not part of the AIFM definition in Article 4(1)(a). The second respondent similarly argued that the definition of Article 4(1)(a) does not permit to extract the "control of underlying assets" as a criterion to test whether or not an undertaking is an AIF.

128. A stakeholder argued that in non-tradeable closed-ended funds every material decision concerning the asset lies in the hands of the investors.

129. An asset managers association was of the opinion that on this point ESMA went beyond the mandate received for developing technical standards.

5. Proposed criteria to determine the application of the AIFMD to certain types of AIF

Q11: Do you agree with the proposed definition of open-ended funds in paragraph 41? In particular, do you agree that funds offering the ability to repurchase or redeem their units at less than an annual frequency should be considered as closed-ended?

130. Several respondents supported the definition elaborated by ESMA. Similarly, a couple of respondents considered the proposed definition acceptable, but qualified as essential the statement according to which the relevant interpretation is given for the purposes of the AIFMD only.

131. An asset managers association was of the opinion that the definition is reasonable, even if it mentioned that there may be cases where there are reasons for redemption to be allowed less frequently than annually, given the wide universe of funds the AIFMD will apply, and, therefore, suggested flexibility in that respect.

132. A private equity and venture capital association welcomed the clarification that open-ended funds must provide redemption rights and suggested that the minimum frequency for repurchase or redemption should be 24 months, in line with the German requirement for the qualification as open-ended fund. An asset managers association suggested that six months would be an appropriate threshold to consider whether an AIF is open-ended or closed-ended.

133. A real estate asset managers association agreed in principle with the definition, but requested to cover the case of funds where investors have the right to submit a redemption notice at least annually, but redemptions may not be permitted for a specific initial period after subscription or it could take longer than a year to redeem (e.g. if redemption are limited to a certain percentage of the fund equity each quarter); this respondent as well as a depositary also requested to cover situations where the manager may have the option to suspend redemptions for a specific period of time or conditions (e.g. notice period, amounts, payment periods) may apply to the redemption of units. Similarly, several other respondents mentioned that a fund may still be considered open-ended even if the redemption rights of investors is subject to any limitations (e.g. maximum amount of redeemable capital) or if it applies under special circumstances side pockets, gates or suspensions of liquidity. One of these respondents added that a more than annual frequency of redemption or repurchase should not automatically mean that a fund is considered as open-ended.

134. An association of pension funds suggested to clarify that for the purposes of the definition of closed-ended funds the (less than annual or otherwise) redemptions occur "at the request of the investor": according to this respondent, there may be situations where there are limited redemption facilities, while redemption possibilities are facilitated (under certain conditions) upon the manager's initiative/request.

135. A respondent proposed to elaborate further guidance on alternative redemption possibilities as e.g. entities (outside the AIF) which undertake to buy units on request of investors and whether this is deemed to be a redemption under the provisions of the AIFMD.

136. An asset managers association warned that the proposed definition of open-ended funds risks being too strict and suggested that the frequency of subscriptions or redemptions should be only one criterion to be taken into consideration. The views of the members of this association were split on the frequency of subscriptions or redemptions: some of them considered one year too long while others considered it as too short.

137. Another asset managers association was of the opinion that the definition of open-ended and closed-ended funds should not be based on the frequency at which a fund gives investors the possibility to repurchase or redeem the unit/shares and, therefore, suggested to delete the reference to annual repurchases or redemptions from paragraph 41 of the DP.

138. A banking association considered that the proposed definition is not appropriate and that the differentiation between open-ended and closed-ended funds should not be confined to AIFs but should also be applicable to UCITS. Another banking association disagreed with the proposed definition since differing from other EU legislations and suggested to refer to the definition of open-ended fund under the UCITS Directive.

139. A respondent recommended that instead of establishing set (annual) time period for redemptions, the factors to be taken into account to determine whether or not a fund is open-ended or closed-ended should be based on factors like an individual investor's right to demand redemption, the policy of the fund towards suspending redemptions and the asset class it is exposed to (e.g. a fund with liquid assets which did not provide redemptions for a period of six-months might – generally – be considered closed-ended; if the fund were invested in illiquid assets, such as property, but offered redemptions on a six-months basis, it might reasonably be considered to be open-ended). This respondent was of the opinion that the status of an AIF (as to whether it is open-ended or closed-ended) should be assessed

by the AIFM and subject to the review of the AIFM's home regulatory authority on a case-by-case basis.

140. A stakeholder recommended to clarify the notion of "no redemption rights exercisable" under Article 21(3) of AIFMD relating to the possibility for AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments to appoint an alternative depositary: it requested to clarify that this notion should not mean that there are no redemption possibilities at all, but that there are no unconditional rights for full redemption.

Q12: Do you see merit in clarifying further the other concepts mentioned in paragraph 37 above? If so, please provide suggestions.

141. Some respondents did not see merit in additional clarifications to be provided.

142. The following requests for additional clarification were made:

- a large number of respondents asked to clarify the concept "leveraged/employs substantial leverage" since the guidance given on this point in the AIFMD Advice is very broad and indefinite and it is not clear how "the type of AIF under management including its nature, scale and complexity" shall allow any conclusions for the level of leverage employed by the AIF: one respondent recommended that the minimum level where leverage could be considered substantial is where it represents an amount which is twice as much as the NAV of the AIF;

- a couple of respondents asked to clarify the definition of contracts with prime brokers;

- few respondents asked to clarify the meaning of "significant size".

143. A private equity and venture capital association mentioned that there may be some merit in addressing which types of AIF are capable of internal management and which are not, although recognising that the situations and structures involved may vary too widely to give certainty.

Appointment of AIFM

144. A couple of real estate asset managers supported the statement made in the last sentence in paragraph 45 of the DP relating to the AIF's freedom to choose which entity should become the AIFM.

145. Two asset managers associations asked to clarify that the agreement for the delegation of functions mentioned in paragraph 47 of the DP must be entered into by the AIFM, not the AIF, and the third party as it sets out the framework for the performance of tasks for which the AIFM bears legal responsibility.

146. A private equity and venture capital association mentioned that it is not entirely clear whether:

- where the AIF does not have legal personality the definition of an AIFM, which requires a legal person whose regular business is managing one or more AIF, means that the AIF could not be internally managed; and,

- with respect to limited partnership structures (which may have the legal personality or not), the general partner representing the partnerships should be regarded as an external AIFM or could it be seen as the corporate organ carrying on the internal management of an internally managed AIF: in particular, this respondent argued that whereas the management by a managing general partner could be regarded as internal management because the managing general partner is just acting as a partner as permitted under the partnership agreement, in terms of investor protection it would be logical to treat the managing general partner as an external AIFM (since in case of internal management claims made by an investor are borne by the AIF and ultimately by all investors).

Treatment of UCITS management companies

Q13: Do you agree with the above analysis? If not, please provide explanations.

147. The proposed analysis received a very broad support.

148. One member of an asset managers association asked to explicitly clarify in paragraph 49 of the DP that a UCITS management company not holding an AIFM licence may only render services to AIFs under a delegation agreement with the appointed AIFM.

149. Another respondent suggested (i) specifying which information or documents a UCITS management company applying for authorisation as an AIFM is not required to provide to competent authorities under Article 7(4) of the AIFMD and (ii) clarifying the conditions applying to AIFMs authorised under the AIFMD managing UCITS. Similarly, a banking association mentioned that, in order to avoid multiple reviews of the same scenario, whenever the AIFMD requires an identical review, it should be permissible to use the information obtained during the authorisation as a UCITS.

150. An asset managers association asked specifying that the services that a UCITS management company may provide to AIFs are those listed in Annex I of the AIFMD.

151. A private equity and venture capital association mentioned that a UCITS management company which acts as an AIFM in relation to AIFs will be required to obtain additional authorisation under the AIFMD to act as an AIFM only in those circumstances in which a non-UCITS AIFM is required to obtain authorisation as an AIFM (e.g. no authorisation will be required if the UCITS management company falls within one of the cases set out in Article 3 of the AIFMD or within the transitional provisions of Article 61 of the AIFMD).

152. This respondent also mentioned that the reference to conflicts of interest in paragraph 51 of the DP was unclear since Article 14 of the AIFMD imposes requirements on all AIFMs in relation to conflicts of interest and to the extent that conflicts arise between the UCITS activities of UCITS managers and their activities as AIFM, these need to be identified and addressed in accordance with Article 14 of the AIFMD.

Treatment of MiFID firms and Credit Institutions

Q14: Do you agree with the above analysis? If not, please provide explanations.

153. Several respondents agreed with ESMA's analysis of the treatment of MiFID firms and credit institutions.

154. A private equity and venture capital association mentioned that the obligation to comply with the requirements of Article 20 of the AIFMD in relation to delegation is imposed on the AIFM and not on the delegate and also asked ESMA to recognise that certain services that may be provided by credit institutions and investment firms do not involve a delegation under Article 20 of the AIFMD:

- acting as a depositary or a sub-delegate as a depositary;
- another activity which would not otherwise be undertaken by the AIFM (as it falls outside the scope of Annex I), such as the provision of market data;
- where the terms of an AIFM's appointment is limited to risk management and portfolio management, other activities falling outside of the scope of Annex I paragraph 1.

155. A large number of respondents disagreed on the approach set out in the DP according to which a dual authorisation under the AIFMD and MiFID should not be possible.

156. A private equity and venture capital association mentioned that a firm which is authorised under MiFID can be appointed the AIFM for an AIF in circumstances where the MiFID firm does not require authorisation as an AIFM (e.g. where the exemptions in Article 3 or the transitional provisions in Article 61 of the AIFMD apply). Some respondents also argued that further consideration to the possibility of dual registration should be given, notwithstanding the wording of Article 6(2) of the AIFMD.

157. A respondent argued that Article 6(8) of the AIFMD permits to MiFID firms to submit an application for authorisation under the AIFMD on a voluntary basis; this respondent further added that such voluntary submission in many cases will only make sense for the MiFID firm if its relevant national jurisdiction does also authorise external AIFMs to provide the services listed in Article 6(4) of the AIFMD.

158. A depositary did not see any justification for the prohibition for firms authorised under MiFID or the Banking Consolidation Directive to be the appointed AIFM for an AIF or obtain an authorisation under the AIFMD and mentioned that the fact that MiFID firms would have to resign their MiFID authorisation and become authorised as AIFMs would lead to an unnecessarily bureaucratic and disproportionate process, without any particular investor protection benefit.

159. On the contrary, an asset managers association recommended that MiFID firm should be forbidden to perform the activities specific to AIFMs or UCITS management companies to prevent conflicts of interests which might very easily arise from extending MiFID firms' scope of activities to collective portfolio management.

160. Few respondents mentioned that there is nothing in the AIFMD text which prohibits an AIFM from holding a MiFID licence so long as the scope of its activities are limited to those set out in Article 6 of the AIFMD. Similarly, an asset managers association asked to reconsider the analysis in paragraph 54 of the DP to recognise that as long as the AIFM restricts itself to the services mentioned in Article 6(4) of the AIFMD (and does not provide services other than services listed in Article 6(4)) it should be permitted to hold a MiFID license permitting it to exercise the services listed under Article 6(4) if Member States require a separate MiFID license for such activities. Indeed, the situation under the UCITS Directive currently differs strongly between Member States: for the same investment services, UCITS management companies in some Member States need an "extended UCITS license", in other

Member States are allowed or even under the obligation to hold separate MiFID licenses limited to the services in Article 6(3) of the UCITS Directive in addition to the UCITS management company license.

161. Another asset managers association also mentioned that under the UCITS Directive there are currently divergent approaches to capital requirements across Member States for firms carrying on a mix of both MiFID and UCITS/AIFMD activities: most jurisdictions apply the UCITS capital requirements for those firms, but a few (including the UK) apply the CRD capital requirements.

162. A real estate asset managers association asked to clarify that a firm authorised under the AIFMD does not require a separate licence to carry out certain MiFID services, but that this does not prevent the firm from also acquiring a separate MiFID licence.

163. Several respondents were of the view that the additional non-core MiFID activities covered by Article 6(4) of the AIFMD should also be passportable under the AIFMD, as it is the case for the equivalent activities under the UCITS Directive (according to Articles 16 to 18 of such directive), even if the AIFMD does not expressly include such a passport, and asked ESMA to clarify this. In particular, a couple of respondents pointed out that given that AIFMs performing the Article 6 core and non-core services are subject to similar obligations to those to which a MiFID firm is subject and they may not be dually authorised under MiFID, they should benefit from similar rights to passport these services. One of these respondents added that the fact that (i) there is no available framework other than MiFID under which the relevant investment services could be categorized and (ii) the AIFMD does not cover investment services in terms of initial licensing but only acknowledges the possibility for a Member State to determine on a discretionary basis whether or not the AIFM is also entitled to provide certain MiFID services provide grounds for considering that the passporting of the relevant investment services should take place under MiFID and there is no reason for prohibiting that.

164. A couple of banking associations noted that paragraph 53 of the DP mentions that AIFMs may assume safekeeping functions for external AIFs and that in order to prevent conflicts of interests between AIFMs and custodian bank tasks and to ensure an effective control of AIFMs by custodian banks, there should be a clear separation of functions between the AIFM and custodian banks.

Annex VI – Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) No …/..

supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers

of […]

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010[9], and in particular Article 4(4) thereof.

Whereas:

(1) [Subject-matter] It is essential that regulatory technical standards determining types of AIFM to supplement the rules in Directive 2011/61/EU apply as soon as practicable following the transposition deadline of that Directive so that the new requirements are applied to AIFMs in a uniform manner.

(2) [Article 2 – Open-ended and closed-ended]] It is desirable to distinguish whether an AIFM is managing an AIF of the open-ended or closed-ended type to correctly apply the rules on liquidity management, the valuation procedures and the transitional provisions of Directive 2011/61/EU to AIFMs.

(3) [Article 2 – Open-ended and closed-ended] Any change in the redemption policy of an AIF implying that that the AIFM managing it may no longer be considered as managing AIFs of the open-ended type or AIFs of the closed-ended type, should lead the AIFM to cease to apply the rules relating to the old redemption policy of the AIF it manages and to apply the rules relating to the new redemption policy of such AIF.

(4) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(5) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested

9 OJ L 174, 1.7.2011, p. 1.

the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

HAS ADOPTED THIS REGULATION:

Article 1- Types of AIFMs

1. An AIFM may be either of the following:

   – an AIFM of open-ended AIF(s);

   – an AIFM of closed-ended AIF(s).

2. An AIFM of open-ended AIF(s) shall be considered to be an AIFM which manages AIF(s) whose unitholders or shareholders have the right to redeem their units or shares out of the assets of the AIF where all the following conditions are present:

(a) the right may be exercised at least once a year;

(b) the transaction is carried out at a price that does not vary significantly from the net asset value per unit/share of the AIF available at the time of the transaction;

(c) no restriction or power provided for in the rules or instrument of incorporation of the AIF or any prospectus to apply special arrangements, such as side pockets, gates, suspensions, lock-up periods or other similar arrangements arising from the illiquid nature of the AIF's assets, is to be taken into account for this purpose.

The lock-up period referred to in the first subparagraph shall be considered to cover any minimum holding period during which unitholders/shareholders shall not have the right to exercise their redemption rights. Whether that period is set at the AIF level, with reference to the date of creation of that AIF or the date of comencement of activities, or at each individual unitholder/shareholder level, with reference to his or her date of subscription, shall be of no significance.

3. An AIFM of closed-ended AIF(s) shall be an AIFM managing AIF(s) other than the one described in paragraph 2.

4. Where a change in the redemption policy of the AIF(s) has the effect of changing the type of AIF(s) an AIFM manages, that AIFM shall follow the rules appropriate to the new type of AIF(s).

Article 2 – Entry into force

This Regulation shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]