

**EFAMA REPLY TO
DISCUSSION PAPER ON ESMA'S POLICY ORIENTATIONS ON POSSIBLE
IMPLEMENTING MEASURES UNDER ARTICLE 3 OF THE ALTERNATIVE
INVESTMENT FUND MANAGERS DIRECTIVE**

THRESHOLD – CALCULATION AND OSCILLATION

Question 1: Do you agree with the proposed approach in relation to the procedure to identify the AIFs under management?

EFAMA¹ agrees with the proposed policy orientation identified by ESMA for the identification of the portfolios of AIF under management and calculation of the value of assets under management by a particular AIFM. Identification of the AIFs for which it is the AIFM and the calculation of the value of assets under management should be left to the AIFM.

In this regard, some EFAMA Members pointed out that the identification of the portfolios of AIF under management by a particular AIFM is best left to the relevant national regulator and the requirements it imposes on the AIFM to report to it. It should be an obligation on the AIFM to report the relevant information correctly. The value of the assets will usually be the subject of an annual, externally audited report and will follow the methodology set by relevant domestic recognised accountancy standards. In addition specific asset types might be valued in accordance with industry guidelines setting out best practice.

Question 2: Do you agree that where available, the gross asset value for AIFs using leverage or net asset value for AIFs not using leverage should be used to calculate the total value of assets under management? Should ESMA consider the extent to which AIFs which produce gross and net asset values apply different valuation methodologies to the underlying assets?

EFAMA considers that there should be consistency between the determination of total value of assets under management (and the determination of leverage) in this context and the determination of total value of assets under management (and definition of leverage) for other parts of the AIFMD.

Some EFAMA Members pointed out that valuation methodologies should comply with generally accepted accounting standards in the relevant jurisdiction. They considered that it would not be reasonable and could lead to confusion and entail additional cost if ESMA required application of a

¹ EFAMA is the representative association for the European investment management industry. It represents through its 27 member associations and 55 corporate members approximately EUR 14 trillion in assets under management, of which EUR 8 trillion was managed by approximately 53,000 funds at the end of 2010. Just under 36,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds.

separate set of valuation standards for the purpose of calculating assets under management in this context.

Furthermore, EFAMA invites ESMA to consider in this context the definition of leverage as set out by the relevant task force. Differences in determination of leverage will increase operational costs and may lead to operational errors.

Further, the approach to be followed should be proportionate and reasonable. EFAMA therefore agrees with ESMA that gross or net value might have to be adjusted for some types of AIFs, for instance when large capital commitments are involved. Indeed, in such cases, the valuation of the assets can significantly differ depending on how the commitments are taken into account.

Question 3: Do you consider that where gross and net asset values are not calculated regularly the AIFM can include portfolio valuations, taking into account the type of underlying asset?

EFAMA also considers that for cases where gross or net value is not calculated on a frequent basis, the AIFM can include estimations of the value of the assets in the portfolio.

Question 4 Can you suggest alternative approaches which could be used for AIFs which do not produce regular gross and net asset value calculations e.g. real estate, private equity? Can you provide information on best practice in relation to the calculation of the total value of the assets under management of AIFs in the sector in which you operate?

--

Question 5: Do you have any other suggestions in relation to the procedure for calculating the total assets under management, including leverage?

Most EFAMA Members believe that as far as possible the same rules should be applied to both open-ended and closed-ended funds, provided that these rules allow for enough flexibility to apply to both types of funds.

However, some EFAMA Members explicitly welcome the approach taken by ESMA which recognizes that "... there may be a need for differentiation between open-ended funds and closed-ended funds for the calculation of the value of assets under management. For the latter, the net asset value may not be relevant and perhaps other methods could be used, such as acquisition cost of assets held, or commitments less realizations at cost for private equity and venture capital AIFs."

Question 6: Do you agree that gross asset value, when available, is an appropriate measure of the leverage generated by the AIF?

Please refer to the answer to Question 2. EFAMA therefore invites ESMA to consider in this context the definition of leverage as set out by the relevant task force.

Question 7: Can you suggest an alternative measure of leverage?

Question 8: In particular can you suggest a method by which leverage created at the level of an AIF-controlled entity, other than portfolio companies of private equity funds, can be captured in the calculation?

EFAMA would be grateful if ESMA could clarify what is meant by “an AIF-controlled entity, other than portfolio companies of private equity funds”.

EFAMA Members pointed out that the AIF is not liable for the debts of such entities, unless it has issued a formal guarantee for such leverage. Its exposure is limited to the invested capital in the portfolio companies and other entities.

Furthermore, in many cases, it will be very difficult to require AIFM to take into account leverage at the level of AIF-controlled entities. For example, in case of fund of funds, it is impossible to receive information regarding the leverage used in the underlying funds “real time” and to include such information into the calculation at the AIF level.

EFAMA therefore believes that AIFM should not be required to take into account leverage at the level of the underlying assets.

Question 9: Do you support the proposal for AIFs to calculate the total value of assets under management at least annually?

EFAMA supports ESMA's proposal to calculate the total value of assets under management at least annually. Given the wide range of AIF, EFAMA considers that the information provided in the audited annual report should be the basis for determining the value of AIF assets under management with the AIFM being allowed to use a different total assets under management figure when it has changed significantly from the last annual reports of the AIF it manages.

Question 10: Please provide your views on the impact of requiring the calculation of the total value of assets under management or monitoring it on a quarterly basis.

EFAMA Members believe that as a general rule, the calculation of the assets under management on an annual basis is sufficient. Calculation of the total value of assets under management on a quarterly basis would be too burdensome and costly, especially in the case for example of real estate funds which have to resort to external valuers to determine the value of the assets in the portfolios of the AIFs they manage.

Question 11: Can you suggest any alternative procedure for the calculation of the total value of assets under management throughout the period that would provide an accurate picture of the total assets under management?

No.

Question 12: Do you have a view on which option ESMA should apply, taking into account that excluding cross-holdings may result in the exclusion of certain AIFMs which perhaps should be included (such as those managing significant master-feeder structures)?

For "internal" fund of fund structures, ie in cases of AIFs invested in AIFs under management by the same AIFM, EFAMA prefers Option 2. It is standard statistical practice to avoid the double-counting of assets managed within "internal" fund of funds structures.

On the other hand, for these purposes, where AIFM1 invests one of its AIF in the units or shares of another AIF (or UCITS) managed by a different AIFM2, it would be reasonable to count those AIF (or UCITS) units as part of the AUM of AIFM1, as well as part of the AUM of AIFM2.

Question 13: Please give reasons for your choice, taking into account the potential cost and administrative burden of excluding cross-holdings while considering the effect of leverage.

Applying Option 1 in cases of "internal" fund of fund structures would result in double counting some assets managed by the AIFM and would artificially increase the total value of its assets under management. As these assets only exist once, they should not be taken into consideration regarding systemic risk twice.

Question 14: Do you agree with the proposed approach to addressing circumstances where the threshold occasionally exceeds the limits?

Some EFAMA Members believe that the Level 1 text is sufficiently clear and that there should not be need for further implementing measures.

Other EFAMA Members agree with the proposed approach in order to ensure a proper harmonization at European level. However, they would like to highlight that it is the decision of the AIFM, and not of the national authorities, to assess whether the threshold is temporarily exceeded.

Question 15: Do you have any alternative suggestions?

REGISTRATION PROCEDURE

Question 16: Do you agree with the proposal to require information on the value of assets under management of AIFs? Please provide information on any potential cost impact.

EFAMA agrees to the proposal to require information on the value of assets under management of AIFs.

Question 17: Do you agree with the minimum information which must be provided in relation to the AIF's investment strategy? Do you consider that the information requirement would be sufficient or can you suggest additions or amendments to the proposal?

EFAMA considers that description of the investment strategy should be strictly limited to the information described in article 3(3)(c) of the AIFMD. AIFM should not be required to provide any additional pieces of information. Furthermore, EFAMA agrees that there needs to be an alternative to the AIFM's being required to provide its offering document, and that the description of the investment strategy as set out in the second bullet point seems to be a suitable alternative.

Question 18: Do you agree that the information referred to in Article 3 (3)(d) should be provided at least annually?

EFAMA agrees that the information referred to in Article 3(3)(d) should be provided annually.

Question 19: Are there any other matters which should be considered?

Some EFAMA Members mentioned that it would be preferable if different means of communication (letter, fax, email, web based form) be accepted for reporting to authorities so that managers may choose the most appropriate and efficient way of reporting.

Question 20: Do you think that ESMA should be more prescriptive in relation to what constitutes a permanent or temporary increase above the threshold, for example by specifying the term "occasionally"? Do you have any suggestions?

Some EFAMA Members would prefer a definition of what constitutes a permanent or temporary increase above the threshold in order to ensure a proper harmonization at European level. They fear legal uncertainty without such definition.

Other EFAMA Members warn against a too prescriptive approach which would not be practicable for all AIF covered by the AIFMD. Even for open ended funds the frequency of monitoring should depend upon the frequency upon which the assets under management are calculated. 'Continuous monitoring' would not be feasible.

Question 21: Do you have any alternative suggestions?

Some EFAMA Members propose to define a permanent increase when the threshold has been exceeded for the previous 3 quarters.

OPT-IN PROCEDURE

Question 22: Do you agree that all AIFMs which are obliged to be authorized, or which choose to be authorized under the opt-in procedure, should be subject to the same authorization procedure under Article 7?

EFAMA agrees that AIFMs which are obliged to be authorized or which choose to opt-in should be subject to the same authorization procedure as under Article 7. This would also allow avoiding additional complexity and confusion.

Question 23: Do you agree that AIFMs previously registered under Article 3(2) of the AIFMD should submit all documents required under Article 7?

EFAMA does not agree that the AIFMs previously registered should submit all documents required under Article 7. This would constitute an unnecessary burden on the AIFM and generate unnecessary cost. Furthermore, it would also duplicate work at the level of the competent authorities receiving once again information which has previously been provided to them.

Question 24: Alternatively, should AIFMs only be required to submit information not previously provided for registration purposes and to update information previously provided?

EFAMA agrees that AIFMs should only be required to submit information not previously provided for registration purposes or update information previously provided.

Question 25: Please provide justification for your preferred choice between the two alternatives set out under questions 23 and 24.

EFAMA prefers the Option presented under Question 24. Previously submitted information and documentation which is still up to date should not need to be provided again to avoid unnecessary burdens and cost.

Brussels, 16 May 2011

* * *