

BVI's response to the ESMA's consultation pertaining to guidelines on key concepts of the AIFMD (ESMA/2012/845)

BVI¹ welcomes the opportunity to submit comments on the proposed guidelines specifying some key concepts of the AIFMD.

While appreciating the benefits of adopting guidelines instead of more rigid instruments such as technical standards for clarifying the elements of AIF definition, we believe that it would be helpful to render the future standards more reliable. The proposed guidelines contain some disclaimers as to their conclusiveness (e.g. in paragraph 10 and 18 of Annex V) and thus make it very difficult for market participants to assess their practical implications. We understand that ESMA intends to keep the boundaries of the AIF definition flexible and is reluctant to exempt products solely on the basis of them lacking single characteristics. **On the other hand, however, it should be possible for ESMA to ensure more legal certainty for "core AIFs" by stating that the AIF quality should be at least assumed for vehicles which cumulatively fulfill the criteria for each relevant AIF concept as specified in sections VI to IX of Annex V.**

Q1: *Do you agree with the approach suggested above on the topics which should be included in the guidelines on key concepts of the AIFMD? If not, please state the reasons for your answer and also specify which topics should be removed/included from the content of the guidelines.*

We agree with the proposal to focus the current guidelines on key elements of the AIF definition and to decide about the need for further convergence tools at a later stage. Especially, we subscribe to the view that ESMA should first assess the extent of regulatory convergence already achieved by the Level 2 delegated regulation recently adopted by the EU Commission.

Q2: *What are your views on/readings of the concepts used in the definition of AIF in the AIFMD? Do you agree with the orientations set out above on these concepts? Do you have any alternative/additional suggestions on the clarifications to be provided for these concepts?*

We support the selection made by ESMA with respect to the concepts of the AIF definition in need of further clarification. In particular, we agree that the concept of "ownership of underlying assets" should not be considered a key element in defining an AIF and would be very difficult to grasp due to the divergences in national ownership rules relevant at the fund level.

¹ BVI represents the interests of the German investment fund and asset management industry. Its 78 members currently handle assets of EUR 2.0 trillion in both investment funds and mandates. BVI enforces improvements for fund-investors and promotes equal treatment for all investors in the financial markets. BVI's investor education programmes support students and citizens to improve their financial knowledge. BVI's members directly and indirectly manage the capital of 50 million private clients in 21 million households. BVI's ID number in the EU register of interest representatives is 96816064173-47. For more information, please visit www.bvi.de.

Q3: *What are your views on the notion of “raising capital”? Do you agree with the proposal set out above? If not, please provide explanations and possibly an alternative solution.*

Q4: *Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance on the notion of “raising capital” would imply.*

We agree with the general approach suggested by ESMA with regard to the notion of “raising capital” as well as with the guidelines proposed in section VII of Annex V. In these terms, we particularly welcome the clarification that “raising capital” can be limited to some kind of commercial communication or indeed, to steps procuring the transfer or commitment of capital with a view to generating a pooled return for investors.

Moreover, we subscribe to the view that a vehicle raising capital solely from the members of its governing body, its employees or other persons listed in paragraph 13 of Annex V should not be considered an AIF. However, the proposed treatment of the “legal person managing the undertaking” (AIFM or an external manager) is not very clear. According to paragraph 15 of the consultation paper, capital provided by such person shall not be considered for the purpose of “raising capital”, whereas paragraph 16 suggests that it should be relevant in this respect. For the sake of consistency, we suggest applying the exception under paragraph 13(a) of Annex V only to members of the governing body of the undertaking managing an AIF.

In addition, if persons listed in paragraph 13 of Annex V invest in an AIF alongside other “external” investors, they should be conferred the same rights and enjoy the same legal status as other AIF unitholders. This view appears to be shared by ESMA in paragraph 17 of the consultation paper, but is not clearly endorsed by the proposed guidelines.

On balance, we suggest the following modifications to para. 13 and 14 in Annex V:

13. Without prejudice to paragraph 14, when capital is invested in an undertaking by a natural or legal person or body of persons who is one of the following:

(a) a member of the governing body of that undertaking or **of** the legal person managing that undertaking;

(b) an employee of the undertaking or of the legal person managing the undertaking whose professional activities have a material impact on the risk profiles of the undertakings they manage and into which he or she invests;

(c) a member of a *pre-existing group*, for the investment of whose private wealth the undertaking has been exclusively established;

this is not likely to be within the scope of raising capital.

14. The fact that an investor being one of the natural or legal persons or body of persons mentioned under paragraph 13(a) **to (c)** invests alongside an investor not being one of the natural or legal persons or body of persons mentioned under paragraph 13 should not have the consequence that the criterion ‘raising capital’ is not fulfilled. Whenever such a situation does arise, the investor **not** being one of the natural or legal persons or body of persons mentioned under paragraph 13 should enjoy full rights under the AIFMD.

Lastly, we expect no changes to the established business concepts in the AIF management and hence, no specific costs or benefits resulting from the proposed guidance on “raising capital”.

Q5: *Do you agree with the proposed guidance for identifying a “collective investment undertaking” for the purposes of the definition of AIF? If not, please explain why.*

Q6: *Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for identifying a “collective investment undertaking” would imply.*

We agree with the characteristics for establishing a “collective investment undertaking” as proposed in section VI of Annex V. Especially, the criterion requiring investment of pooled investors’ capital with a view of generating a pooled return should provide a sound basis for distinguishing AIFs from e.g. banking products where investments take place on the bank’s own account and investors hold solely claims against the bank’s balance sheets.

Also in this regard, we perceive no costs or benefits to be incurred from the proposed guidance on “collective investment undertaking”.

Q7: *Do you agree with the analysis on the absence of any day-to-day investor discretion or control of the underlying assets in an AIF? If not, please explain why.*

We concur with the ESMA’s view that a daily discretion or control over the management of the underlying assets by AIF investors is incompatible with the notion of collective investment. On the other hand, we welcome the clarifying statement in paragraph 23 of the consultation paper that some general influence or even the necessity to obtain prior approval from investors on certain high-level decisions should not deprive a vehicle of its AIF status.

Q8: *Do you agree that an ordinary company with general commercial purpose should not be considered a collective investment undertaking? If not, please explain why.*

Q9: *Which are in your view the key characteristics defining an ordinary company with general commercial purpose?*

We fully share the opinion that an ordinary company with general commercial purpose should not be considered a collective investment undertaking. In order to warrant legal certainty, the concept of an ordinary company with general commercial purpose should be subject to further specification.

In our view, it is worth referring to the approaches established under national commercial and tax law for distinguishing commercial companies from other vehicles. According to the criteria developed by German civil courts, a commercial company is any undertaking pursuing an accepted, outwardly oriented activity which is set up for an indefinite duration and aims at generating profits. The last element has a particular importance in this context. In order to facilitate unequivocal distinction from investment management performed by collective investment undertakings, it should be made clear that an ordinary company makes profits out of production, services or trading, but not (at least not primarily) from the investment of capital.

Very similar criteria can be found in Article 9 of the Council Directive 2006/112/EC² which contains a definition of “economic activity”. According to this provision, any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions,

² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

shall be regarded as “economic activity”. In addition, this definition encompasses the exploitation of tangible and intangible property for the purpose of obtaining income therefrom on a continuing basis.

Consequently, we suggest the following supplement to paragraph 9(a) of Annex V:

- (a) is not an ordinary company with general commercial purpose **which is primarily directed at making profits out of production, trading, supply of services;**

Q10: *Do you agree with the proposed guidance for determining whether a “number of investors” exists for the purposes of the definition of AIF? If not, please explain why.*

Q11: *Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for determining whether a “number of investors” exists would imply.*

We agree with the proposed guidance concerning the notion of a “number of investors”. In particular, we entirely share ESMA’s view that the lynchpin for assessing this element should be the applicable restrictions on raising capital. An undertaking which is not prevented in a legally binding manner from raising capital from more than one investor should be considered collective for the purpose of the AIF definition.

As this approach is consistent with the current regulatory framework in Germany, we do not expect any costs or benefits to arise from the proposed guidance for German AIFMs.

Q12: *Do you agree with the proposed indicative criteria for determining whether a “defined investment policy exists for the purposes of the definition of AIF? If not, please explain why.*

Q13: *Please provide qualitative and quantitative data on the costs and benefits that the proposed indicative criteria for determining whether a “defined investment policy” exists would imply.*

We support the indicative criteria for determining a “defined investment policy” as proposed in paragraph 16 of Annex V. In this regard, we agree with the assumption that the factors presented in subparagraphs (a) to (d) should be deemed mere indicators for the existence of a “defined investment policy”.

On the basis of the proposed guidance, we do not perceive any additional costs or benefits for German AIFMs.

Q14: *Do you consider appropriate to add in Section IX, paragraph 16(b) of the draft guidelines (see Annex V) a reference to the national legislation among the places where (in addition to the rules or instruments of incorporation of the undertaking) the investment policy of an undertaking is referenced to?*

From the perspective of the regulated fund industry, it is difficult to see in which cases additional reference to the national legislation should be of relevance for establishing a “defined investment policy”. Usually, the range of eligible assets and restrictions on asset allocation stipulated by national law are reflected in the individual fund rules or instruments of incorporation.

On the other hand, we cannot identify any detriments or misdirecting implications from such additional reference and thus would not object to including it in the final guidelines.