

Comment

on “ESMA’s Consultation paper: Guidelines on key concepts of the AIFMD”

Register of Interest Representatives

Identification number in the register: 52646912360-95

Contact:

Dr. Henning Bergmann

Nicole Aretz

Telephone: +49 30 20225-5350

Telefax: +49 30 20225-5345

E-Mail: Henning.Bergmann@dsgv.de

DK-Az.: EG-INV-RE

Berlin, 13-02-01

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,000 banks.

Coordinator:

German Savings Banks Association
Charlottenstrasse 47 | 10117 Berlin |
Germany

Telephone: +49 30 20225-0

Telefax: +49 30 20225-250

www.die-deutsche-kreditwirtschaft.de

Comment on "ESMA's Consultation paper: Guidelines on key concepts of the AIFMD"

1. 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 suggested approach.

2. 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 appreciate that our comments on the Discussion Paper of 23 February 2012 have largely been taken up. In particular, it has been clarified that the conditions under which an AIF is considered as "open" must be satisfied cumulatively. The attempt of further limiting the broad definition of the AIFM-Directive has our support. It ensures that the rules will be applied with the legal certainty and legal unity necessary on a European level. Generally, we are in strong favour of an approach that tries to define the individual concepts of the AIFM-Directive uniformly.

3. 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.

In principle, we agree with the proposal. However, we suggest that paragraph 13 of the "Guidelines on key concepts of the AIFMD" will be amended as follows:

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) ...

(c) ...

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

Capital provided by any person or entity other than the persons mentioned in paragraph 13 above should be considered relevant for the purpose of the notion of 'raising capital'. This also includes capital provided by the legal person managing the undertaking or any of its affiliates. Therefore, an undertaking whose investors are its manager or any of its affiliates should be considered an AIF (subject to that undertaking satisfying the other criteria in the definition of 'AIF'). "

By including the explanation from paragraph 16 of the consultation paper it is clarified that in cases where an undertaking affiliated to the AIF invests in the AIF, it is still to be considered as an AIF within the meaning of the concept, although the AIF itself may be exempted from the scope of the AIFMD by dint of Art. 3(1) AIFMD. It is important, inter alia, from the tax perspective that such AIF continue to qualify as AIF.

4. Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance on the notion of 'raising capital' would imply.

./.

Comment on "ESMA's Consultation paper: Guidelines on key concepts of the AIFMD"

5. 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.

./..

6. Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for identifying a 'collective investment undertaking' would imply.

./..

7. 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.

./..

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

The fact that acquisition companies are excluded from the AIF definition can result in the liable equity capital having to be deducted in full. Example: Investments are made via a feeder vehicle as limited partner (1st level) in one or several acquisition companies (2nd level), which pool the funds of all the feeder vehicles and in turn themselves purchase shares in a real estate company (3rd level). The investor pays in the equity capital only to the feeder vehicle (1st level). Were the acquisition companies (2nd level) not to be qualified as AIF, then it is probable that the amount invested might have to be deducted from the liable equity capital. In consequence, an investment in such products becomes unattractive.

9. Which are in your view the key characteristics defining an ordinary company with general commercial purpose?

./..

10. 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.

Yes, we consider the clarification that one investor suffices for fulfilling the criterion "number of investors", unless in cases where the law prohibits more than a single investor, to be sensible.

11. 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.

./..

12. 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.

./..

Comment on “ESMA’s Consultation paper: Guidelines on key concepts of the AIFMD”

13. 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.

./.

14. 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?

./.