

Ref: AJB/AB

Online Submission

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Dear Sirs,

ESMA Consultation Paper 2012/845: guidelines on key concepts of the AIFMD (the Consultation Paper)

Thank you for inviting responses to the Consultation Paper published on 19 December 2012.

We agree with ESMA's view that the term 'AIF' is problematic which is evidenced by the broad feedback received on DP/2012/117, and believe that the continued absence of an adequate definition is undermining credibility in AIFMD and will distort the operation of a single market. Any definition of an AIF must be built on clear legal concepts in an international environment if the AIF is to be identifiable and an attractive medium for investment.

The problem with the term 'AIF' is political and not legal though, and has arisen because the meaning of the term legally is narrower than the political objectives of AIFMD. In preparing these guidelines and recommendations under Article 4(1)(a), however, ESMA is required to construe AIFMD (and other referenced law) as drafted and avoid strategic and policy choices (in line with the ESMA Regulation and the *Meroni* doctrine). This presents a unique opportunity therefore, to clarify the legal meaning of AIFMD and we have focussed on this in addressing the questions below and suggesting changes to the proposed guidance in the Annex.

If identifying the proper legal scope of AIFMD results in some vehicles previously considered as AIF falling outside scope, then it falls to the Commission to make any additional proposals after appropriate consultation.

The Aztec Group is a specialist private equity fund administrator currently looking after approximately 70 private equity funds in Guernsey, Jersey, Luxembourg and the United Kingdom with a total value of around US\$75 billion (together with numerous investment vehicles). We see at first hand the direct benefits that private equity brings to the European economy in promoting industrial efficiency and growth, and believe that AIFMD is counter-productive in economic terms as well as in its self-stated objectives of increasing transparency and mitigating systemic risks.

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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 re-moved/included from the content of the guidelines.

Insofar as the term 'AIF' is an EU legal concept that is the focus of AIFMD and creates a pan European product, then it is appropriate for ESMA to propose guidelines establishing a harmonised interpretation of Article 4(1)(a). In looking at Article 4(1)(a), ESMA may also want to consider those other vehicles which are not AIF or are exempted from the provisions of AIFMD as the nature of these is inexorably linked with the definition of an 'AIF'. No clear reason is given for separating these topics in paragraph 5 or Annex II.

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?

Mindful of the ESMA Regulation, the proposed guidance correctly focuses on the constituent elements of the term set out in Article 4(1)(a), which include the following concepts:

- undertakings for collective investment (or **UCI**);
- raising capital; and
- a defined investment policy.

ESMA should also be mindful that AIFMD only extends to *"UCI that do not require authorisation pursuant to article 5 of the UCITS Directive"* because this is also specifically stated in Article 4(1)(a).

In paragraph 7, ESMA lists 2 further criteria that may be relevant in defining the term 'AIF':

- 'ownership of underlying assets' and
- 'control of underlying assets'.

We look at the first of these in relation to Q3 below, and note that the second is not referred to again in the Consultation Paper. As the concept of 'control' is neither included in Article 4(1)(a) nor otherwise stipulated by AIFMD (beyond Chapter V), its omission seems correct.

Paragraph 9 must also be correct as a matter of law where it states:

"It is only when all the elements included in the definition of AIFs under Article 4(1)(a) of the AIFMD are present that an entity should be considered an AIF".

AIFMD only applies to AIF as a matter of law and any extension of Article 4(1)(a) by competent authorities should be challenged as this would undermine the operation of a single market for AIF.

Paragraph 10 is problematic however:

"To the extent that the additional details provided in the draft guidelines are relevant for the definition of AIFs within the context of the AIFMD, they should be relevant for the purposes of the AIFMD only and be without prejudice of the interpretation of any similar concepts used in any other pieces of European legislation (e.g. the details provided in the proposed guidelines on the notion of 'collective investment undertaking' are relevant for the purposes of the AIFMD only and have no relevance for the purposes of the equivalent concept used in the Prospectus Directive (Directive 2003/71/EC, as amended))"

for 3 reasons:

- this is inconsistent with Article 4(1)(a); in particular, Article 4(1)(a)(ii);
- the negotiations surrounding AIFMD and the following legislative process must be construed in accordance with then existing EU law and concepts (reflecting what the Parliament voted on and so on); and
- an inconsistent approach in relation to AIFMD undermines the integrity of the European rulebook. It must be based on a coherent policy to create the necessary legal framework for complex financial products.

This approach is arguably *ultra vires* as it stands outside the legislative framework anticipated by the Treaty. Instead, we suggest that ESMA adopts the position that concepts used in AIFMD that are defined by the Prospectus Directive or other EU law should be interpreted in a consistent manner except where the Level 1 text otherwise provides or requires. This is sounder legally.

Paragraph 11 suggests a lack of confidence in the legal objectives of AIFMD (by entertaining political considerations) and, therefore, has no place in the guidance being published for clarificatory purposes. Competent authorities and market participants must be able to rely on this guidance in determining scope.

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.

Capital

Before examining the notion of 'raising capital', ESMA must consider the term 'capital' because Article 4(1)(a) is clear that a UCI must have capital in order to be an AIF. In this context, we would argue that the term 'capital' should be construed in its broadest possible sense as any asset (cash or otherwise) transferred into the ownership of the AIF.

The inclusion of the concept of 'capital' in defining an AIF undermines ESMA's assertion in paragraph 8 that asset ownership is not a key element of defining an AIF as Article 4(1)(a) expressly requires that an AIF is capable of owning assets (i.e. this is the pool of capital that constitutes the 'fund') independently of its investors (which is precisely what Article 2(1)(p) of the Prospectus Directive also reflects).

Capital raising

Mindful of ESMA's assertion in paragraph 10, capital raising should be construed as much as possible in accordance with the provisions of AIFMD. In this regard, the Directive is unambiguous in making clear that AIF raise capital by way of the issue of 'units or shares' in exchange for own-capital.

The phrase 'units or shares' is used 70 times in the text of the Directive to describe all aspects of the operation of an AIF as well as in Article 1 of the UCITS Directive, and it should be construed broadly to cover units in any 'contractual schemes' or shares in all forms of 'investment company'. As partnerships typically comprise either contractual schemes or investment companies across the EU, and mindful of the expanded definition of 'transferable securities' in Article 4(1)(18) of MiFID, it is not unreasonable to conclude that 'partnership interests' could also be included within this phrase provided that such interests are in a form 'negotiable on [a] capital market' (i.e. they are divided into similar capital raising parcels as units or shares and are capable of being privately or publically offered or placed). This is entirely consistent with reference to both public and private placement in AIFMD as well as with the definition of units as securities in Article 2(1)(p) of the Prospectus Directive.

Virtual pooling

Direct participation by persons in a negotiated commercial arrangement (i.e. a 'joint' venture or undertaking) by contrast, is clearly outside the scope of Article 4(1)(a) where the arrangement issues no securities¹ and has no separate capital or substance. Such a contractual arrangement is a virtual pooling arrangement where each participant maintains its own, separate capital account and the capital of the participants is simply managed as a whole.²

This type of arrangement is most likely to cover institutional investment partnerships (in contractual form) that are sometimes used to facilitate direct investment by institutions (i.e. acting in parallel) in long term/developmental private equity, venture capital, real estate and infrastructure assets. Our main concern in writing is 'private equity', which is referred to 3 times in the Recitals and once in Article 69 (Review). There is nothing in these 4 references, however, to remotely support the legal proposition that Article 4(1)(a) should be interpreted to include non-AIF.

Drafting

The specific drafting of paragraph 11 of the proposed guidance is concerning, because:

- it does not focus on the meaning of capital raising and whether or not it occurs; and
- it focuses instead on methods of capital raising in a repetitious manner that seeks to broaden the meaning of the phrase to include all forms of 'financial promotion' (in a UK sense).

This is clearly policy driven and we would argue, unnecessary. Capital raising is a simple factual question and should be understood in the context of 'marketing' under AIFMD. Marketing is defined at Level 1 in sufficiently broad terms to address ESMA's concerns.

As a matter of construction, ESMA should further note that the concept of capital raising does not capture the sub-sale or other syndication of units or shares where this is not done at the initiative of the AIFM or on its behalf.

Third parties

The safe harbours prescribed by paragraphs 14 to 16 (inclusive) appear reasonable however they could prove difficult/arbitrary to apply in practice, because, the facts may not be clear cut. For example, (i) should familial relations of any of the categories of person mentioned in paragraph 15 also be included, or (ii) should the reference to group entities in Article 3(1) exclude other closely affiliated entities? Moreover, it will be necessary to take a view on the likelihood of third party capital when structuring a new AIF and perhaps seeking authorisation; when the precise identity of future investors may not be known.

We would suggest amending paragraph 13 of the proposed guidance therefore, to focus on capital raising by the AIF rather than subscription by investors and broaden the scope of the safe harbours to include those acting in close concert. We have not defined this term as we feel that its meaning should be sufficiently clear.

ESMA may wish to go even further and develop a more general concept 'soliciting third party capital' because there is a real risk that paragraph 13 could prove too narrow in an international business environment.

¹ Non-negotiable participations would not even constitute 'financial instruments' for the purposes of Section C of Annex 1 of MiFID.

² The UK authorities may find it helpful to refer to sections 355 and 356 of Taxation (International and Other Provisions) Act 2010 as well as HMRC's INTM180010 onwards.

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

Please refer to the end of this letter.

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.

The term 'UCI' is the key component of identifying both the AIF and the UCITS. These products are essentially EU regulatory designations that overlay national law and, therefore, must be understood in accordance with established EU jurisprudence if they are to be accurately transposed into national law.

Undertaking

The proposed guidance should construe the term 'undertaking' in its widest form as a composite legal arrangement to facilitate an activity. The importance of this term is that it defines the parameters of any pooling of investor interests (or, in other words, the parameters of each AIF).

We do not necessarily share the SMSG's view that there must be a profit intention and not do believe that an undertaking necessarily needs own-capital.

Collective investment

Read together with Part 1 (Raising Capital) however, paragraph 20 must be correct in suggesting that the following are indicative of a UCI:

- the pooling together of the capital raised by an undertaking through the issue of units or shares;
- for the purpose of generating a 'pooled return' from the 'pooled risk' of making investments etc.

Pooling, as a concept, is not specifically referred to by AIFMD however it is implicit from the identification of UCITS as a form of UCI in Article 4(1)(a). This is because 'pooling' is an established part of UCITS jurisprudence. The association of AIF and UCITS is made approximately 21 times in AIFMD.

The pooling of capital is not defined by AIFMD or UCITS, but each Directive makes clear that this is achieved by raising capital through the issue of units or shares that establish an interest in a 'common fund' or an 'investment company'. The value of this pool is divisible by the units or shares in issue that are each attributed a 'net asset value' or NAV (see in particular, Article 19(3) of AIFMD). Reference should also be made to Article 1 of the UCITS Directive and the definitions in Article 2 of that Directive.

The 'pooled return' is defined in broader terms by Section II of the proposed guidance to cover the 'return' (a singular noun) from the 'pooled risk' stemming from investment activity. This is consistent where capital has already been pooled and only emphasises the importance of pooling in deciding what constitutes 'collective' (i.e. a composite pool) as opposed to 'co' investment (i.e. a virtual pool for accounting purposes only).

We do not believe that the identification of UCI's in the proposed guidelines is inconsistent with its use in Article 2(1)(o) of the Prospectus Directive as suggested by ESMA, once risk-spreading and reference to a public offering are necessarily discounted.

Different returns

Once pooling in an undertaking has been identified, ESMA is correct to assert the irrelevance of the existence of tailored 'dividend' policies for different classes of investor; in particular, as it is relatively common. Dividend policies are irrelevant in determining whether pooling occurs, it simply indicates different bases for calculating returns from the AIF.

Policy questions

1. Paragraph 20 focuses on 'pooling' in defining AIF rather than 'collective' or 'mutual' investment, which seems narrower in focus. The true meaning of the term 'UCI' however, may be broader and cover 'virtual' pooling arrangements under national law.³ This is not a problem in relation to AIFMD, because, the additional inclusion of the concept of 'raising capital' in Article 4(1)(a) excludes virtual pooling arrangements. See Q3 above.
2. The differentiation in paragraph 20 of an AIF with *"an entity whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity"* has no obvious legal basis and is not helpful because an AIF may be directly or indirectly involved in the management of the assets it acquires (see Chapter V of AIFMD).

To illustrate the point, while a buy-out vehicle may take care in practice to avoid managing the [otherwise self-managed] assets that it acquires (to avoid shadow directorship risks), a real estate (or other leasing) vehicle may take a much more active role in relation to the [otherwise unmanaged] assets that it acquires. In this respect, everything will depend on the nature of the assets acquired by the vehicle in question.

We would speculate that this differential has been included for policy reasons to prevent ordinary commercial vehicles falling under the exemptions in Article 3 of MiFID. See Q8 below.

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

Please refer to the end of this letter.

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.

Agreed. It is the absence of day-to-day control of the [capital or] underlying assets (as opposed to collective rights) of the AIF that necessitates the protections envisaged by AIFMD.

³ The UK authorities may recognise these as collective investment schemes falling under section 235(3)(b) of Financial Services and Markets Act 2000. These CIS could well continue to fall under MiFID exemptions.

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.

While the suggestion that an ordinary commercial vehicle should not be construed as a UCI is certainly attractive, it is unhelpful as no legal differential exists. Categorisations cannot be made by reference to subjective commercial statements unless the law is to be applied selectively (which would result in a proliferation in artificial financial structuring).

To give an example, few substantive differences may exist between an ordinary holding company pursuing an active buy and build strategy (e.g. a chain of separate pharmacists) and a so-called private equity [fund]. Similarly, a vehicle that buys and leases real estate could be construed as a general commercial venture.

It is necessary to identify general commercial vehicles therefore by reference to objective conceptual criteria, which is why we have inserted reference to a 'defined investment policy' in Section VI. We accept that this approach is slightly circular, but feel that it is necessary to reconcile the evolving use of the term 'UCI' under EU law. See Q9 below.

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

The key characteristic that differentiates an ordinary commercial vehicle from an AIF lies in the existence of a defined investment policy (which may exist in tandem with a generally stated commercial object). AIF, unlike general commercial vehicles, will be subject to an ongoing restriction over how investor monies are applied by way of investment and are not free to conduct business in a general manner as the board deem appropriate.

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.

Agreed; however, the application of the look-through approach in paragraph 15(b) of the proposed guidance should only be applied where vehicles have been specifically used to repackage a single investor interest (at the initiative of the AIFM).

A broader approach could prove difficult to define and restrict the proper operation of EU-based funds of funds (in contrast to third country funds).

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.

Please refer to the end of this letter.

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.

Agreed. The indicative criteria provided in paragraph 16 are helpful in determining whether a policy exists and the suggested guidelines are helpful in understanding the requisite level of detail.

It may also be helpful if the proposed guidelines clarified that a defined investment does not include:

- the strategic statements that an ordinary commercial vehicle may make in a prospectus (or other offering document) published on a listing; and
- contractual investment commitments entered into by a commercial vehicle in the ordinary course of business.

As already suggested in Q5, it is more appropriate to differentiate an AIF from an ordinary commercial vehicle (whether or not listed) using Section IX (defined investment policy) rather than Section VI (collective investment undertaking) because it provides an objective conceptual basis for this.

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.

Please refer to the end of this letter.

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?

This could have a limiting effect on the construction of Section IX.

Cost benefit analysis

AIFMD

We take the view that the key concepts of AIFMD identified by this Consultation Paper are absolutely clear under EU law (even if EU law itself has become a little messy with AIFMD), but that the proposed guidelines and explanatory text do not describe them clearly enough. The political fears represented by paragraph 11 are all too clear.

If ESMA cannot explain the meaning of Article 4(1)(a) in accordance with EU law however, then it is most unlikely that AIFMD will be transposed in a 'common, uniform and consistent' manner across the EU with all the problems that ESMA rightly identifies. We are particularly concerned that national authorities could confuse 'legal' funds (in the EU sense) with the 'virtual' pooling arrangements shown in Annex II (often referred to commercially as 'funds') and other business ventures. While this may be expedient politically, such an approach would:

- render the scope of AIFMD indefinable which could lead to (i) inexpert and costly speculation in industry and (ii) random application by competing authorities resulting in political disputes;
- burden the EU funds' industry with the costs of disproportionate and inappropriate regulation targeting functions and risks that simply do not exist;
- give rise to the significant systemic risks indicated in Annex II, where none currently exist;

- permit extensive profit-taking by the financial services industry through added complexity and reduced transparency;
- give rise to worrying competition issues that could well facilitate abuse; and
- undermine confidence in the EU rulebook and European financial products more broadly.

The result of all this is likely to be a collapse in the number of EU-domiciled funds which will impact inward investment in the EU at a delicate time. Current market data is not at all encouraging in this regard.

Tax

A precise conceptual definition of an 'AIF' is also necessary to avoid inconsistent tax policies further distorting the proper operation of the single market. This could arise for example, because tax efficient AIF (i.e. real capital pools with varying taxable status and treaty rights) could become confused with tax transparent virtual pooling arrangements (i.e. with no physical form or any relevance from a tax perspective). An AIF should not ordinarily be considered tax transparent unless this is achieved functionally by its bye-laws. Another obvious example would be the inconsistent application of the VAT exemption to the management of 'special investment funds' which again should not necessarily apply to tax transparent, virtual pooling arrangements. After all, there is no 'fund' to manage in this situation and any 'management services' would be supplied directly to investors (wherever located). VAT exemption in the domicile of the manager is simply incorrect therefore, and would divert proper rights of taxation under EU law.

The proposed guidance may indeed be a difficult balancing act politically, but many of the problems and dangers of AIFMD fall away if ESMA construes Article 4(1)(a) in accordance with its terms and established EU law as required by the ESMA Regulation.

We hope that this submission has been helpful and should you like any further information, please do not hesitate to contact James Bermingham on +352 24 616 006 or Andrew Brizell on +44 845 50 55 670.

Yours faithfully,



James Bermingham
General Counsel



Andrew Brizell
Senior Counsel

Annex I – Draft guidelines on key concepts of the AIFMD

I. Scope

Who?

1. These guidelines apply to AIFMs and competent authorities.

What?

2. These guidelines apply in relation to Article 4(1)(a) of the AIFMD.

When?

3. These guidelines apply from 22 July 2013.

II. Definitions

Unless otherwise specified, terms used in the 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 1095/20108 (AIFMD) have the same meaning in these guidelines. In addition, the following definitions apply:

pre-existing group in connection with investment in a collective investment undertaking, a group of persons connected by a close familial relationship ~~that pre-dates the establishment of the undertaking.~~

pooled return the return generated by an undertaking from the pooled risk arising from acquiring, holding or selling investment assets ~~as opposed to the activity of an entity acting for its own account and whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity,~~ irrespective of whether different returns to investors, such as under a tailored dividend policy, are generated.

III. Purpose

4. The purpose of these guidelines is to ensure common, uniform and consistent application of the concepts in the definition of 'AIF' in Article 4(1)(a) of the AIFMD by providing clarification on each of these concepts. Nevertheless appropriate consideration should be given to the interaction between the individual concepts of the definition of AIFs, which should be considered together. By way of example, undertakings which do raise capital from a number of investors, but do not do so with a view to investing it in accordance with a defined investment policy, should not be considered AIFs for the purposes of the AIFMD. The additional details provided by these guidelines in no way alter the provisions of the AIFMD.

IV. Compliance and reporting obligations

Status of the guidelines

5. This document contains guidelines issued under Article 16 of the ESMA Regulation. In accordance with Article 16(3) of the ESMA Regulation competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.
6. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants.

V. Reporting requirements

7. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA to [email address]. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.
8. AIFMs are not required to report whether they comply with these guidelines.

VI. Guidelines on 'collective investment undertaking'

9. An undertaking is a composite legal arrangement that facilitates an entrepreneurial activity, whether or not it is profit making.
10. The following characteristics, if all of them are exhibited by an undertaking or an investment compartment of it, ~~should~~ will show that ~~the~~ an undertaking is a collective investment undertaking mentioned in Article 4(1)(a) of the AIFMD. The characteristics are that the undertaking:
 - ~~(a) — is not an ordinary company with general commercial purpose;~~
 - (a) pools together capital raised from its investors through the issue of units or shares;
 - (b) has for the purpose of investing ment the capital raised with a view to generating a *pooled return* for those investors from the undertaking's assets investments (whether or not different investors receive returns on different bases); and
 - (c) the unitholders or shareholders of it have no day-to-day discretion or control over the management of the undertaking's' assets which is the responsibility of the AIFM.

An ordinary vehicle with a general commercial purpose is not a collective investment undertaking unless it exhibits an intention for collective investment through the adoption of a defined investment policy.

- ~~10. — The determination of the above characteristics showing that an undertaking is a collective investment undertaking should be without prejudice to the fact that competent authorities and market participants should not consider that the absence of all or any one of them conclusively demonstrates that the undertaking is not a collective investment undertaking.~~

VII. Guidelines on 'raising capital'

11. Capital should be construed in its broadest sense to include all asset ownership by an AIF.
112. Capital raising occurs where in response to marketing, an investor transfers or commitments to transfer capital to an undertaking in consideration for the issue of units or shares. An activity with the following characteristics when carried out by an undertaking by way of business should amount to the activity of raising capital mentioned in Article 4(1)(a)(i) of the AIFMD:
 - ~~(a) — taking direct or indirect steps to procure the transfer or commitment of capital by one or more investors to an undertaking for the purpose of investment with a view to generating a pooled return for the investors; and/or~~

- (b) ~~commercial communication between the undertaking seeking capital or a person or entity acting on its behalf (typically, the AIFM), and the prospective investors, which aims at procuring the transfer of investors' capital.~~

12. ~~In construing this, it is immaterial whether:~~

- (a) ~~this these activities takes place only once (as in the case of the initial subscription to a closed-ended fund), on several occasions or on an ongoing basis (as with certain open-ended funds); or~~
- (b) ~~an investor other than the AIFM, subsequently transfers units or shares to another natural or legal person or body of persons at its own initiative.~~

13. As an exception to paragraph 12 (and without prejudice to paragraph 14), when capital is raised by invested in an undertaking from 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 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; or
- (d) a person acting as nominee of or otherwise in close concert with any of the foregoing;

then it will not be deemed 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 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.

VIII. Guidelines on 'number of investors'

15. ~~An collective investment undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an AIF collective investment undertaking which raises capital from a number of investors in accordance with if the other elements of Article 4(1)(a)(i) of the AIFMD are met. This should be the case even if:~~

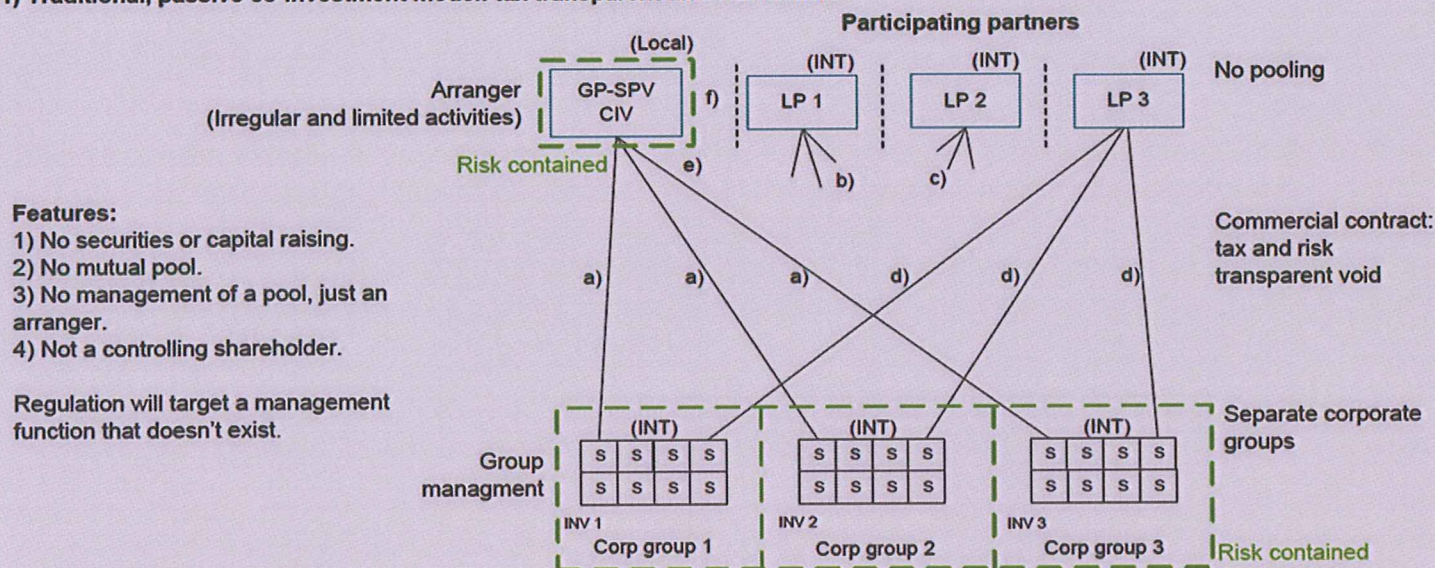
- (a) it has in fact only one investor; or
- (b) if a sole investor invests funds capital which it has raised from more than one ~~legal or natural or legal~~ person for the purpose of investing in that AIF. ~~benefit of those persons as in the case of nominee arrangements, feeder structures or fund of fund structures that have more than one investor for the purposes of the AIFMD.~~

IX. Guidelines on 'defined investment policy'

16. An undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a *pooled return* for the investors from whom it has been raised should be considered to have a defined investment policy for the purposes of the AIFMD. The factors that could, singly or cumulatively, tend to indicate the existence of such a policy are the following ones:
- (a) the investment policy is determined and fixed, at the latest by the time that investors' commitments to the undertaking become binding on them;
 - (b) the investment policy is set out in a document which becomes part of or is referenced in the rules or instruments of incorporation of the undertaking;
 - (c) the undertaking or the entity managing it has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it;
 - (d) the investment policy specifies investment guidelines, with reference to criteria including the following:
 - (i) to invest in certain categories of asset, or conform to restrictions on asset allocation;
 - (ii) to pursue certain strategies;
 - (iii) to invest in particular geographical regions;
 - (iv) to conform to restrictions on leverage;
 - (v) to conform to minimum holding periods; or
 - (vi) to conform to other restrictions designed to provide risk diversification.
17. In paragraph 16(d), any guidelines given for the management of an undertaking which determine investment criteria for purposes other than those set out in the business strategy followed by an ordinary ~~vehicle company~~ with a general commercial purpose should be regarded as 'investment guidelines'.
18. The fact that an ordinary vehicle with a general commercial purpose publishes a prospectus (or other offering document) or enters into investment commitments as part of its ordinary business shall not be taken as constituting a defined investment policy.
19. The determination of factors tending to indicate the existence of a defined investment policy should be without prejudice to the fact that competent authorities and market participants should not consider that the absence of all or any one of them conclusively demonstrates that no such policy exists.

Annex II – Tax, regulatory and risk analysis of private equity partnerships and AIF

1) Traditional, passive co-investment model: tax transparent and risk remote



Features:

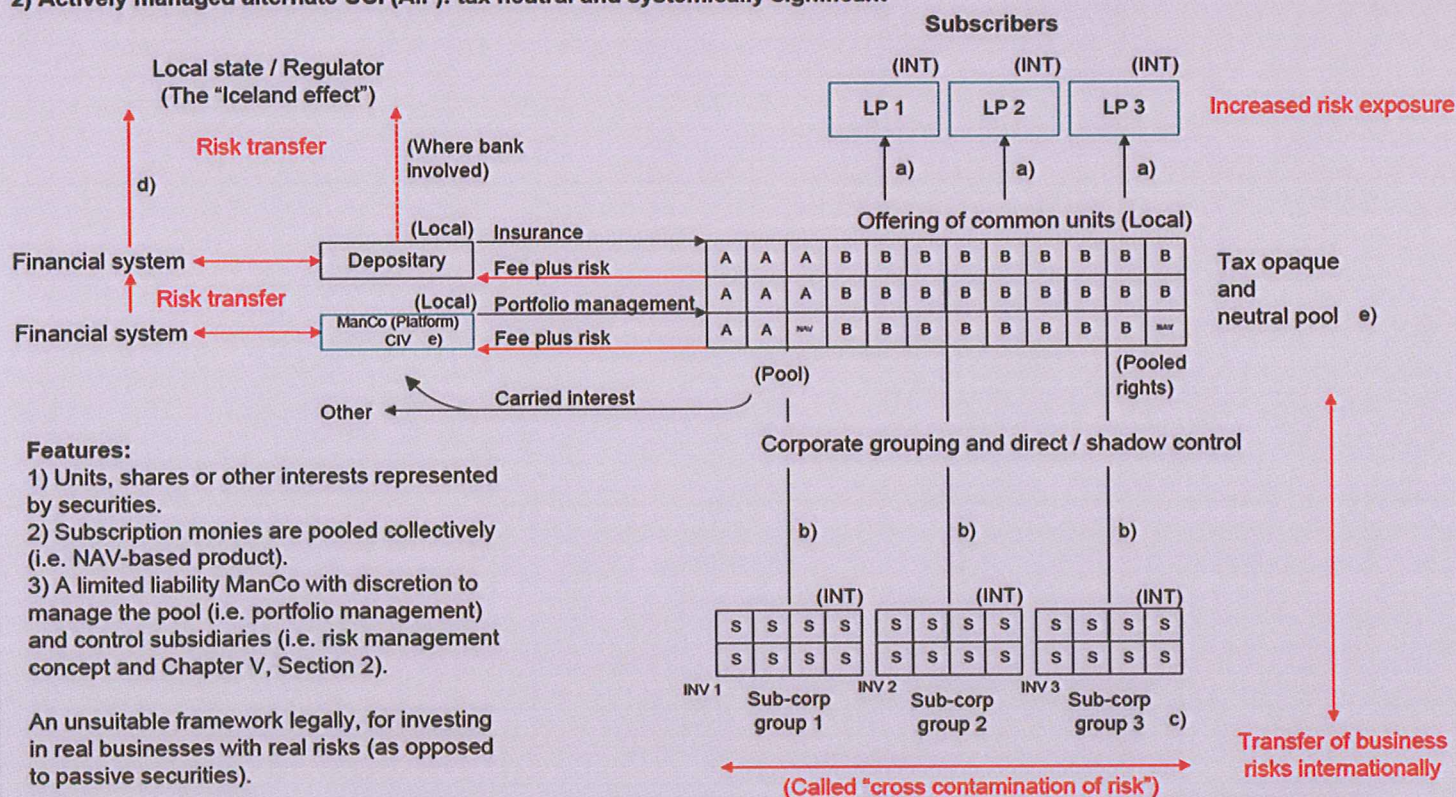
- 1) No securities or capital raising.
- 2) No mutual pool.
- 3) No management of a pool, just an arranger.
- 4) Not a controlling shareholder.

Regulation will target a management function that doesn't exist.

- a) Pre-agreed contractual returns, including (a) a priority profit share; and (b) a carried interest share.
 b-d) Pre-agreed returns from the investee companies: investor by investor (no mutuality). Pre-agreement is necessary for tax transparency.
 e) No management fee is payable as no "management" (so exemption irrelevant / unhelpful).
 f) It is the tax efficiency of the GP which is important, not the fund.

Important: Tested risk architecture with no systemic risks attaching.

2) Actively managed alternate UCI (AIF): tax neutral and systemically significant



Features:

- 1) Units, shares or other interests represented by securities.
- 2) Subscription monies are pooled collectively (i.e. NAV-based product).
- 3) A limited liability ManCo with discretion to manage the pool (i.e. portfolio management) and control subsidiaries (i.e. risk management concept and Chapter V, Section 2).

An unsuitable framework legally, for investing in real businesses with real risks (as opposed to passive securities).

- a) Distributions of income / capital from the fund at the discretion of ManCo.
 b) Returns paid to fund, not investors. This is why the withholding tax analysis can differ.
 c) Various examples of catastrophic risk could be given: SANDOS (86), SEVESO (76), BHOPAL (84) etc.
 d) In contrast to ordinary group holding companies, AIF are risk conductors that are linked to the local financial system.
 e) Not tax efficient in a private equity context.

Important: Each fund could result in the transfer of business risks to the local financial system/state. This is the regulatory paradox that can only be addressed with a special regime for private equity.

AIFMD Note: Partnerships investing in self-managed assets need little other management. In contrast, UCI investing in passive securities need a management company. Once this differential becomes clear, the futility of introducing manager-based regulation in a private equity context can be understood.