

Ref: AJB/AB

Online Submission

ESMA
CS 60747
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30 January 2013

Dear Sirs,

ESMA/2012/844: Draft regulatory technical standards on types of AIFMs (the Consultation Paper)

Thank you for inviting responses to the Consultation Paper published on 19 December 2012, which we recognise is closely connected with ESMA/2012/845. It is difficult to identify the criteria for open and closed ended 'AIF' without a specific conceptual understanding of what an 'AIF' is. We put forward an explanation of this in our response to ESMA/2012/845 that was submitted on 4 January 2013.

We only comment on Q2 in this Consultation Paper, which is of particular concern to us in our Luxembourg office because of the use of open ended vehicles such as SICAV's and FCP's in a closed ended context.

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, imprecisely transposed, AIFMD is counter-productive in economic terms as well as in its stated objectives of increasing transparency and mitigating systemic risks. It could also undermine the single market.

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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?

Broadly we agree, however, we would clarify the draft regulatory technical standards as follows:

2. An AIFM of open-ended AIF(s) shall be considered to be an AIFM which manages AIF(s), or AIF compartments, 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) marketing of the AIF was intended to be ongoing throughout the life of the AIF;
 - (b) ordinary rights in the AIF are represented by units or shares (rather than contractual commitments to subscribe and hold units or shares for a defined period);
 - (a)(c) the right to redeem may be exercised at least once a year;
 - (b)(d) 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;
 - (e)(e) 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~~ last 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 ~~commencement~~ commencement of activities, or at each individual unitholder/shareholder level, with reference to his or her date of subscription, shall be of no significance.

Both inserts are intended to differentiate mutual funds from private equity industry funds. The reason for the first subparagraph should be self-evident and we would explain the second subparagraph in the following terms.

A typical private equity 'fund' (or virtual pooling arrangement) consists of fixed financial commitments only, and no units or shares are separately issued where an ordinary contractual partnership is adopted (e.g. as is most common internationally). In Luxembourg however, the position up till now has been different because the industry has most often used UCI in the form of either an FCP or a corporate vehicle (instead of a normal contractual partnership etc.), that have been made up of units or shares that are subscribed and redeemed at a fluctuating 'NAV'.

Unlike a UCITS however, these units or shares are not the focus of the investment in a private equity context, but merely represented a tool to replicate an IRR-driven, cash-in/cash-out vehicle in non-partnership/non-tax transparent context. The real interest of private equity

investors is represented by the financial commitment or participation in the scheme itself and not the units or shares issued. The publication of NAV's carries no particular commercial significance to investors and largely mechanical/an accounting by-product.

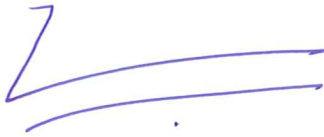
In assessing what is open and closed ended, therefore, the draft technical regulatory standards should emphasise the difference between vehicles where investor rights are represented by units or shares in the vehicle itself (whether open or closed ended) and those where investors are participating through contractual commitments (howsoever the particular cash-in/cash-out mechanism is structured). This approach will ensure accuracy when considering the question of what is really closed ended in substance, and should not be controversial. A more technical approach to classification would inevitably result in misclassification and abuse.

This distinction between investing in units or shares or in a contractual commitment/participation only may also be relevant in understanding when marketing occurs under AIFMD (i.e. what is the real subject of the financial promotion, securities or a non-negotiable participation?).

We hope that refining the concepts and definitions used in AIFMD will enhance policy options in the EU, and provide a sophisticated legal framework that can accommodate a global finance industry.

Should you like any further information, please do not hesitate to contact James Bermingham on +352 24 616 006.

Yours faithfully,



James Bermingham
General Counsel