



On behalf of the Public Affairs Executive (PAE) of the
EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

16 May 2011

Private Equity and Venture Capital Industry Response to the Discussion Paper on ESMA's policy orientations on possible implementing measures under Article 3 of the Alternative Investment Fund Managers Directive (AIFMD, or the Directive)

We write to you on behalf of the representative national and supranational European private equity bodies. Our members cover the whole investment spectrum, from venture capital firms investing into high growth technology start-ups, to the largest global buyout funds turning around and growing mature companies, and we speak on behalf of the entire European private equity and venture capital industry.

The European private equity and venture capital (PE/VC) industry welcomes the opportunity to respond to the Discussion Paper on ESMA's policy orientations on possible implementing measures under Article 3 of the Alternative Investment Fund Managers Directive, published by ESMA on 15 April 2011.

The questions put forward by ESMA have been highlighted in bold and boxed out. The industry's responses are set out in normal type.

The European private equity and venture capital industry remains, as ever, committed to an ongoing dialogue with policy officials and interested stakeholders, and welcomes any comment on its response to the consultation. In this respect, we would particularly welcome the opportunity to meet with ESMA to explain and discuss its thoughts in more detail.

THRESHOLDS – CALCULATION AND OSCILLATION

- **Identification of the portfolio of AIF under management by a particular AIFM and calculation of the value of assets under management**

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

Response

We agree that it should be the responsibility of the AIFM to identify the AIFs under its management in accordance with Article 5 and the related assets under management.

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?

Response

As private equity funds do not generally use leverage at the fund level, their gross and net asset values as herein defined and discussed would typically be the same.

We believe that a more relevant and more consistent approach to valuing a fund's assets would be the use of cost of investment as outlined under question 4 below.

Private equity funds only draw capital from investors as and when they are making investments, or to cover costs of the fund, and they return capital to investors following divestments. This is an important difference between private equity AIF and various other types of funds. In various other types of funds, investors pay the full amount of their capital commitment into the fund at the time when they subscribe for their interest and only receive that amount back when they sell their investment in the fund.

In private equity funds, investors pay their capital into the fund as and when investments are made (typically over 3-5 years) and to meet expenses, and only receive their capital back when investments are sold. As also set out in our response to question 4 below, private equity funds do not permit for trading of units in the fund.

The valuation of illiquid unquoted investments held by the private equity AIF is somewhat subjective since there is no active market in these investments. It is also the case for some investment types, under the broad heading of "private equity", particularly venture capital investments, that the only appropriate valuation (under applicable law and regulations) of the underlying investments is acquisition cost and therefore in those cases the net asset value of the fund will equate closely to the cost of the underlying portfolio of assets.

Should ESMA consider the extent to which AIFs which produce gross and net asset values apply different valuation methodologies to the underlying assets?

Response

See the response to question 4 below where we recommend the use of acquisition cost of investment as the most appropriate basis for calculating the total value of assets under management for private equity funds. Therefore we do not, in the context of private equity and venture capital, consider it necessary to consider the extent to which AIFs apply different valuation methodologies.

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?

Response

In the context of private equity, since the underlying investments are mainly illiquid unquoted assets whose value does not fluctuate significantly on a short-term basis valuations are somewhat subjective since there is no active market in these investments and in some cases, such as venture capital investments the only appropriate valuation is acquisition cost. Therefore a more appropriate method would be the use of acquisition cost as set out under question 4 below.

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?

Response

Use of acquisition cost

Private equity funds are typically structured in such a way that commitments are secured from investors to invest up to a certain amount (the investor's commitment) over the period that the fund makes its investments (typically the initial five years of the fund's life). These funds do not permit for trading of units in the fund. This means that net asset value is not an accurate indicator of how much the investor stands to gain or lose as a result of his investment in the way that it can be for other types of funds. A better measure is acquisition cost. The acquisition cost of the current portfolio represents the actual amount that the investor has invested, and has placed at risk, in the AIF. Regardless of how often private equity funds undertake formal valuations of their portfolios (which may or may not reflect the value obtained when a portfolio company is finally sold), they will keep detailed records at all times of the acquisition cost of the underlying portfolio investments. Therefore an accurate reflection of the amount of investors' capital under management by the AIFM at any single time would be the acquisition cost of its portfolio. This approach would have the advantage that it would provide greater certainty for the AIFM at the outset of a fund as to whether it was likely to exceed the threshold during the life of that fund and as to when that was most likely to occur. This would allow the AIFM to plan accordingly for registration should that become necessary.

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?

Response

We consider that best practice in relation to the calculation of the total value of assets in the private equity context is the use of acquisition cost of investments as outlined above.

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

Response

Use of commitments less realisations

The discussion paper provides the example of the use of commitments less realisations (at cost). However, capital committed to a private equity fund is not paid by investors into the AIF until it is 'drawn down' by the fund at the point that it makes each individual investment and/or must pay expenses and fees. It is not unusual that a fund will not use 100% of the capital committed by its investors over its lifetime, with the remainder undrawn. Moreover, it must be considered that by the time the investor pays the last capital contribution into the AIF, the investor will already have received some of a previous contribution back following the sale of an investment. Whilst using commitments less realisations as a measure would have the advantage that it would provide certainty for the AIFM at the outset of a fund as to whether it would need to register or not, it would significantly overstate the assets under management in view of the fact that these commitments are generally drawn down for investments over a period of typically five years and in many cases the full commitment is never drawn and is therefore not an appropriate basis for measuring total assets under management.

• **Influences of leverage on the assets under management**

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

Response

In most cases yes, as long as care is taken to also capture guarantees and other outstanding commitments of similar type which the AIFs in general may have made and which, in case called, could increase the exposure of the relevant AIF beyond that of its capital invested.

However, such additional measure and rules relating to leverage should typically not be relevant for private equity and venture capital for the following reason:

Leverage created at the level of an AIF controlled entity should only be captured in the cases where it increases the exposure of the AIF, i.e. either because the AIF has guaranteed the debt of the controlled entity or the lender/creditor has full recourse to the AIF for servicing the debt. This is typically not the case for private equity and venture capital. In the case of private equity and venture capital AIF the exposure is typically only the capital called from investors and invested in the relevant portfolio company.

Leverage at the level of the holding company of any portfolio company group, is completely silo-ed from the fund. It does not have the direct or indirect effect to increase exposure at the level of the AIF. The private equity backed holding company borrows on the security of its subsidiaries, its assets, its business and its revenues, which is no different than what a similar holding company without private equity backing might do in

order to raise finance. Each portfolio company group will have its respective holding company.

Lending banks further recognise that their exposure is to the operating companies in these respective structures and not to any fund which is shareholder of the holding company, and thus the banks take pledges over operating companies' shares which – subject to applicable national and EU law – may guarantee the holding company's obligations. They have no recourse against any of the other assets held by the AIF.

The only transmission mechanism for risk to the financial sector is through the lending bank or banks, which are subject to counterparty credit risk capital requirements under the Capital Requirements Directive in the ordinary way. The availability of debt capital to private equity backed companies, like any other private companies, is to be controlled by appropriate regulation on the supply side, through appropriate capital requirements and strict due diligence by the provider of the capital.

7. Can you suggest an alternative measure of leverage?

Response

Leverage created at the level of an AIF controlled entity should only be captured in the cases where it increases the exposure of the AIF, i.e. either because the AIF has guaranteed the debt of the controlled entity or the lender/creditor has full recourse to the AIF to service the debt. This is typically not the case for private equity and venture capital as stated above.

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?
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Response

Leverage created at the level of an AIF controlled entity should only be captured in the cases where it increases the exposure of the AIF, i.e. either because the AIF has guaranteed the debt of the controlled entity or the lender/creditor has full recourse to the AIF for servicing the debt. This is typically not the case for private equity and venture capital as outlined above.

Where an AIF in general has taken an action, which one way or the other increases the exposure of the AIF, this should be captured by way of all types of AIF being asked to in their reporting, in addition to stating their AUM¹, also stating the other outstanding obligations in the form of guarantees etc. they may have and which will be made whole out of the investment capital at its disposal. This would normally be captured in an audited balance sheet as forms part of the reporting entity's outstanding obligations.

¹ For private equity and venture capital AUM would most accurately be defined as aggregate cost of investments under management (i.e. acquisition and follow-on investment cost of all portfolio companies held). See also our response to question 4.

As also further stated in e.g. the De Larosière Report and several other independent reports private equity and venture capital do not constitute systemic risk. Private equity and venture capital AIF are typically not leveraged, invest in the real economy (in companies with underlying assets) and are typically closed ended with no early redemptions allowed and with a long fund term (typically 10 years plus) to match the underlying assets. Hence there is no credit transformation in private equity because the value of an investor's current exposure to an AIF is the actual cash drawn down to undertake investments.

The only transmission mechanism for risk to the financial sector is through the lending bank or banks of portfolio companies, which are subject to counterparty credit risk capital requirements under the CRD in the ordinary way. The availability of debt capital to private equity backed companies, like any other private companies, is to be controlled by appropriate regulation on the supply side, through appropriate capital requirements and strict due diligence by the provider of the capital based on the underlying company's ability to generate cash-flow to service its debt.

- **Determination of the value of the assets under management by an AIF for a given calendar year**

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

Response

We support the proposal for annual calculations of net asset values, and believe that for private equity funds the calculation should be undertaken annually using the audited annual accounts. These would be used to provide the acquisition cost of the fund's assets.

Any requirements on reporting imposed by the Directive are on an annual basis, and it would not be appropriate to subject funds on the margins of the threshold to more frequent reporting than other funds. This has particular relevance in terms of the proportionality that the Directive recognises should be applied.

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.
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Response

For closed-ended funds such as private equity (and where in addition fees are not paid on the basis of valuations), particularly where the value of the underlying assets does not fluctuate significantly on a short-term basis, there is generally no requirement (neither regulatory nor from investors) to value assets frequently and most funds only do so on an annual or bi-annual basis. We feel that a quarterly monitoring requirement would therefore be excessive. Any move to a quarterly monitoring basis would add significant burdens to closed-ended funds without adding any significant benefit from a regulatory point of view. See also our response to question 16 below.

The requirement that the yearly valuations should be audited would ensure that the test for the threshold is accurate. However, a more frequent audited valuation requirement would add significant burden to the fund, particularly where it is closed-ended.

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?

Response

See response to question 4 above where we suggest the use of the acquisition cost of the current portfolio as the most appropriate procedure for the calculation of the total value of assets under management.

- **Treatment of potential cases of cross-holding among the AIFs managed by an AIFM**

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)?

Response

Our view is that the methodology adopted should avoid double-counting because it is illogical, and it would distort the true picture for investors and regulators. We therefore believe that ESMA's option 2 is the preferred methodology, and that any leveraged exposure should be taken into account in arriving at the assets under management of any relevant (but not all) AIF.

We cannot think of any circumstance in which option 2 would result in a particular AIFM escaping the need for authorisation under the Directive. If that AIFM manages the Master vehicle, and the assets of the Master exceed the threshold for authorisation, the AIFM must obtain authorisation irrespective of whether the assets of the Feeder are ignored or double-counted. Putting it another way the assets of the Feeder, even if increased by leverage (which is not normal for private equity and venture capital) will automatically increase the assets under management of the Master and ensure that the AIFM will require authorisation if the threshold is crossed.

It is necessary that the meaning of cross-holdings is clearly understood in this context as there are several potential scenarios where cross-holdings may be deemed to be present.

1. A Master-Feeder structure where the Feeder is an investor in the Master;
2. A Fund of Funds holding several commitments to one underlying fund of a manager who is not connected with the FoF AIFM via the FoF manager's own fund programmes;

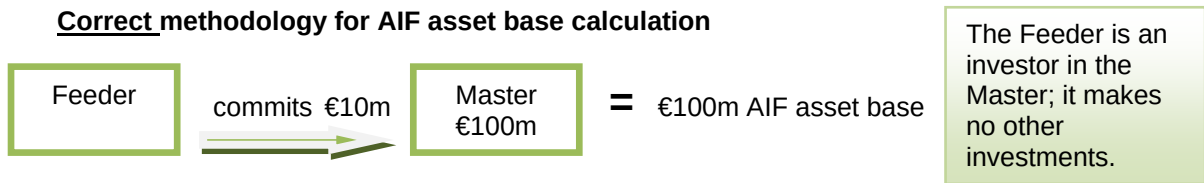
3. A publicly listed investment company managed by an AIFM which commits only or principally to private funds managed by that AIFM.

For completeness, we do not consider the situation in which a "Feeder" invests in parallel alongside a Master to be an example of cross-holding. In this scenario, assuming that the Feeder is itself an AIF, the correct methodology for calculating the assets under management by the AIFM would be to calculate the sum of the commitments made by the investors in each of the Master and "Feeder".

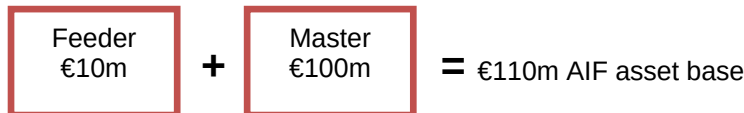
In **scenario 1**, the employment of Master-Feeder structures is a long-standing and widely implemented structural solution that is commonly used to resolve the particular taxation, transparency or internal investment policy needs of professional investors. Investors rarely, if ever, commit to a private equity manager via both the Master and the Feeder structure of a fund programme. There should be no double-counting applied. Even if the Master and Feeder apply different fees and have different investors, that does not influence the total assets that have been raised by the AIFM.

Scenario 1

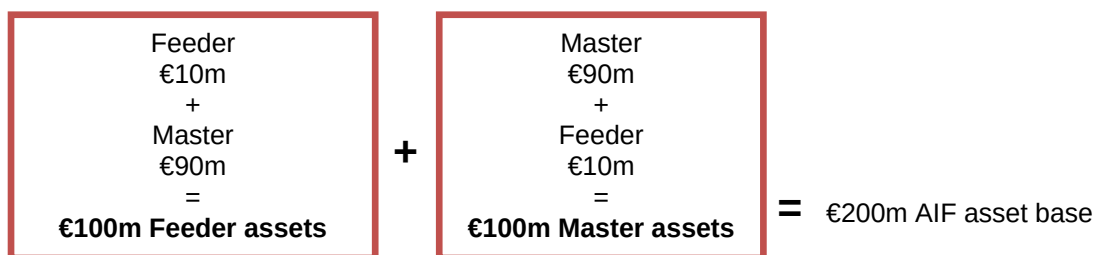
Correct methodology for AIF asset base calculation



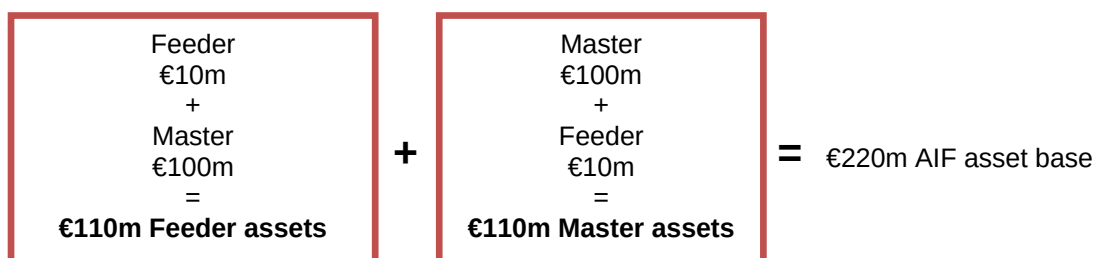
Incorrect methodology for AIF asset base calculation



Incorrect methodology for AIF asset base calculation



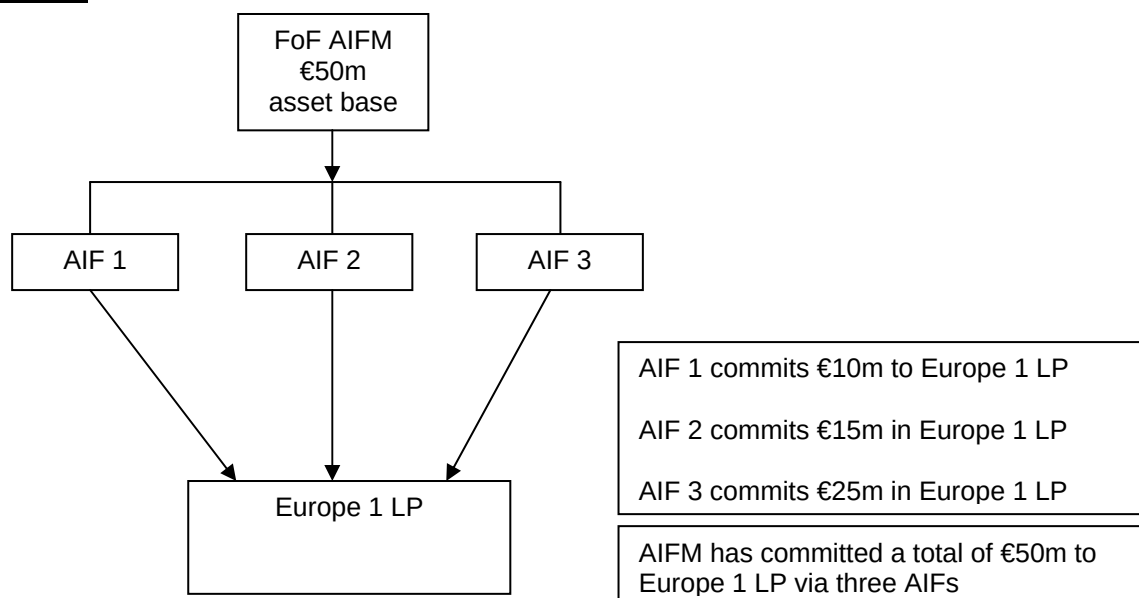
Incorrect methodology for AIF asset base calculation



Scenario 2 sets out to explain the proper methodology for calculating the assets of a Fund of Funds AIFM holding several commitments to one underlying fund of an unconnected manager via the FoF manager's own fund programmes.

The illustrated example of **scenario 2 below** shows that the AIFM has a total committed asset base of €50m. The AIFM's fees will be calculated and charged on the basis of that €50m asset base.

Scenario 2



ESMA's option 1 which proposes to include all assets under management of each AIF, including assets which represent cross-holdings in other AIFs managed by the same AIFM, suggests that the AIFM's asset base is not €50m in scenario 2, but could be considered instead to be either:

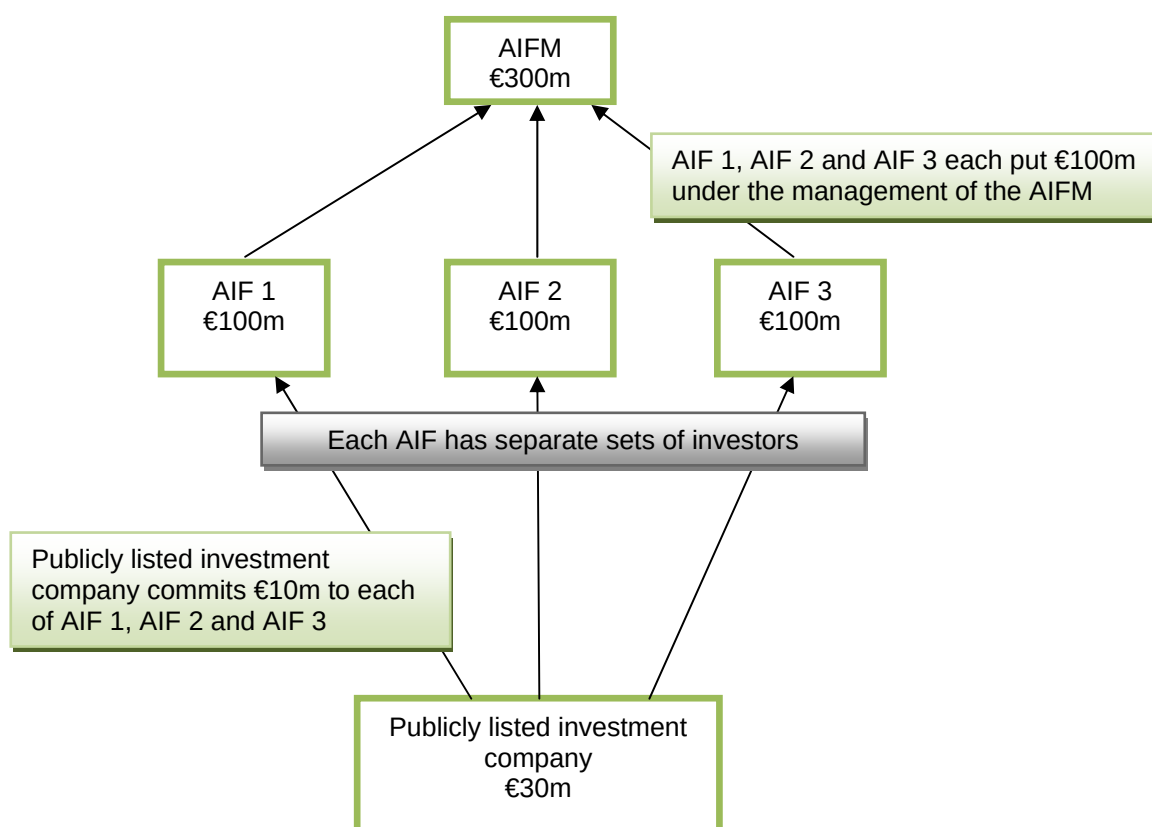
- €100m if the amount invested in the FoF is aggregated with the investment of that same sum by the underlying AIF 1, 2 and 3; or
- €150m if each of AIF 1, 2 and 3 have notionally attributed to them the sums invested by one another because the original source of their investments was the FoF AIFM (which would effectively involve triple counting).

This is clearly not the case and the correct result must be €50m.

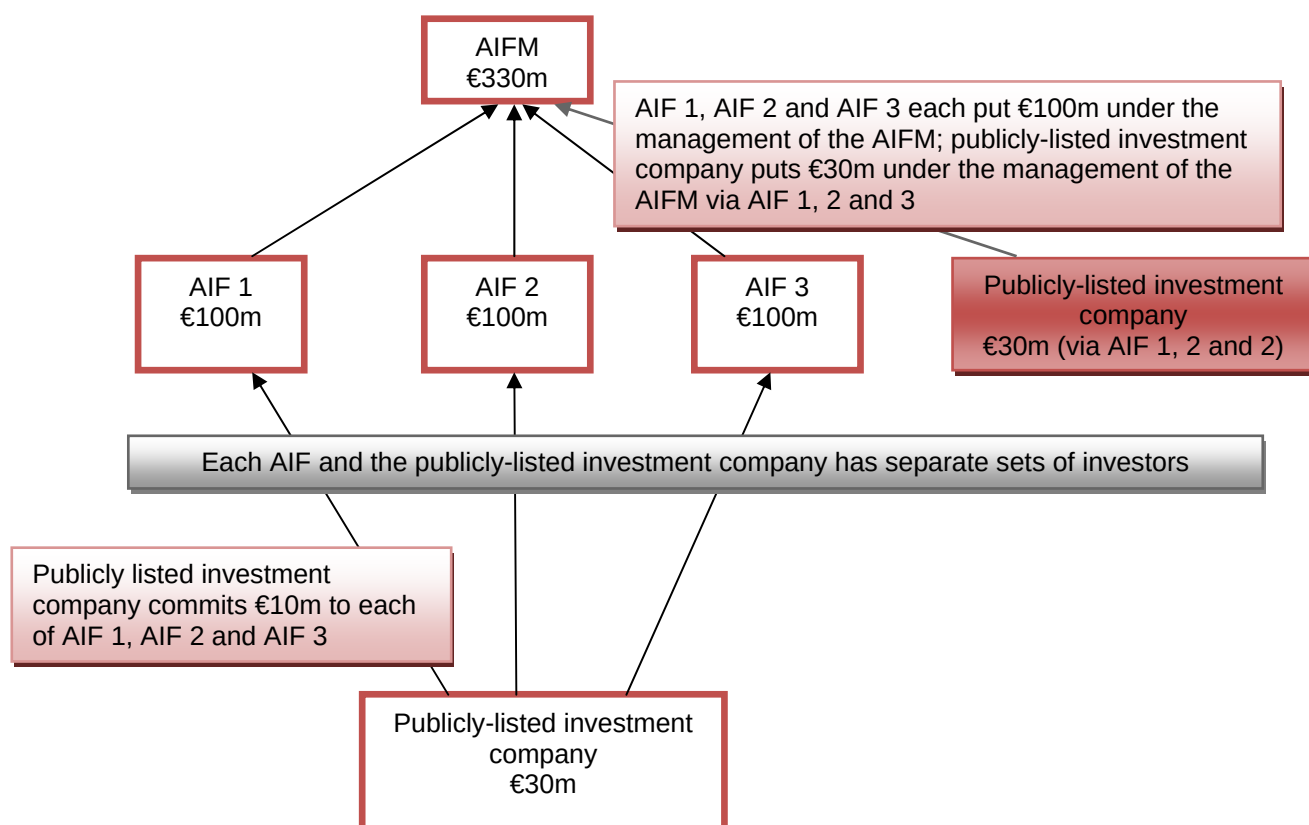
Each AIF must be able to demonstrate a clean asset base to its investors and supervisory authorities. By including cross-holdings, the overall asset base of both the AIF and the AIFM would be artificially inflated. This would serve no useful purpose to investors or supervisory authorities and would complicate not improve oversight. It would be more logical to calculate assets on a consolidated basis. It is further worth noting that each AIF has different sets of investors

In **scenario 3**, an AIFM might manage a publicly invested investment company (which may or may not itself be an AIF) which commits to the AIFM's own private funds as part of or as its investment strategy. In this scenario, the publicly listed investment company is acting in the capacity of a professional investor in the AIFM's private funds, and the assets it commits to its AIFM's private funds should not be double-counted, as the example below demonstrates.

Scenario 3: Correct methodology: AIFM assets are €300m



Scenario 3: Incorrect methodology: AIFM assets are €330m



The three scenarios shown suggest clearly that the proper methodology should be to ignore cross-holdings in the calculation of the threshold.

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.

Response

We believe that the methodology adopted should be logical and should allow for the cleanest assessment of an AIFM's assets. The basis on which assets calculation should be made is the total asset base on which an AIFM calculates its fees. If the total asset base was calculated as if its related fund entities were consolidated, then that would provide for a reasonable methodology. This approach would also remove any double-counting from the calculation.

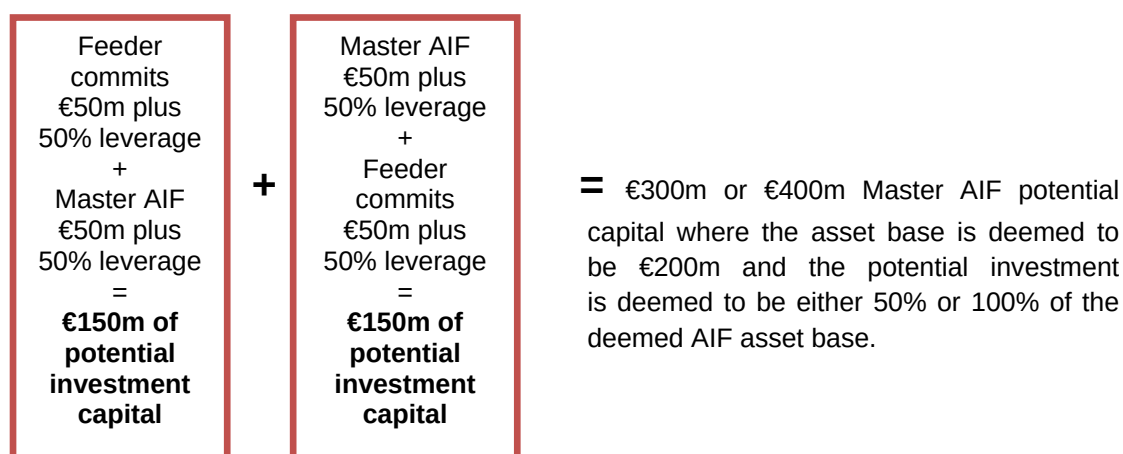
Sometimes, rarely, a private equity manager may choose to employ leverage within a fund, and this may be applied to only or both the master and feeder vehicles where such vehicles are used. Where leverage has been employed, this does not inflate the value of assets committed by investors, nor does it inflate the fees that would be payable by investors; but it may inflate the available investment capital. As such, we believe it is a valid argument that leverage should be taken into account in arriving at the assets under management of the relevant AIF (i.e. at the level of each vehicle) but not attributed to multiple AIF where there are cross-holdings.

The threshold calculation should reflect the total assets that have been drawn down for investment from investors, plus leverage to the extent it is present.

Correct methodology for calculating leverage exposure and impact on assets

Feeder commits €50m plus 50% leverage = €75m of total potential investment capital	+	Master AIF €75m drawn down from Feeder plus 50% leverage = €112.5m of potential investment capital	= €112.5m Master AIF potential investment capital on the assumption that the Master does not raise funds from other sources but has a further leverage power of 50%. The permitted total leverage is not 100% of the AIF assets. If the Master did not have leverage powers itself the correct figure would be €75m, in line with Scenario 1 under Q 12 above. If, on the other hand, the Master had raised and drawn down, in addition to the €75m drawn from the Feeder, a further €25m and the Master also had and exercised a further leverage power of 50% then the correct AUM would be €150m.
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Incorrect methodology for AIF asset base calculation



We do not believe that calculating a correct number will be an administrative burden, provided that the methodology is sound and practical. The most transparent and useful methodology which achieves the objectives of the Directive would be to report the leverage exposure as a separate number to supervisory and to maintain separation between that number and the threshold calculation. However, as noted above, where leverage at the level of the Feeder has in fact increased the assets under management at the Master level this is automatically reflected.

- **Treatment of AIFMs whose total assets under management occasionally exceed and/or fall below the relevant threshold**

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

Response

We agree that the AIFM should assess whether the value of total assets exceeds or falls below the threshold. For closed-ended funds such as private equity the audited accounts on a yearly basis should be used by the AIFM to determine whether the AIFM is within the scope of the Directive. We agree that the AIFM is best placed to determine whether the threshold has been exceeded temporarily or otherwise, and to communicate with the competent authority accordingly.

15. Do you have any alternative suggestions?

Response

No.

REGISTRATION PROCEDURE

- **Content of the obligation to register with national competent authorities and suitable mechanisms for gathering information**

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.

Response

Information to be provided in this context to the competent authorities should be provided in order to enable the competent authorities to effectively monitor systemic risk. Firstly, we repeat that private equity and venture capital does not pose systemic risks – reference is made to e.g. the De Larosière Report. If there is a connection with systemic risks for private equity and venture capital, it comes from the banks lending to the portfolio companies, which is also where the supervision from a systemic risk perspective should be implemented. In private equity and venture capital, portfolio companies (i.e. the portfolio company groups) are typically financed on a stand-alone basis, so any liquidity issues with one portfolio company do not have a domino effect on the AIF or its other portfolio companies and such other portfolio companies' lenders and creditors. Secondly, for private equity and venture capital, valuations are of significantly lesser importance than is typically the case with many other types of AIF, e.g. since fees due to private equity and venture capital AIFM are typically not based on valuations (although downward adjustments of fees are sometimes applied on the basis of valuations which are lower than cost as a result of investor negotiations), and since profit sharing is not based on valuations but only on proceeds actually distributed. Nor are there, as previously mentioned, any redemption rights. Since investors cannot require redemption, there will be no trading that is impacted by valuations and which could necessitate a private equity and venture capital AIF to sell (in a fire sale) any assets held by it.

While, based on the above, we question the general usefulness of gathering information on value of assets for private equity and venture capital AIF for purposes of monitoring systemic risk, we have no objection in principle to providing the competent authorities with annual reports for our AIF for the purposes of sharing information on the value of assets. However, any obligations to produce additional valuations and reports are unduly burdensome from a time (staff of AIFM, staff of portfolio companies) and cost (professional advisers, such as auditors, of an AIF and of its portfolio companies) perspective while providing no additional value to, nor serving the interests of, investors in private equity and venture capital AIF as these AIF typically do not constitute systemic risk. For valuation of the assets of a private equity and venture capital AIF, audited accounts of underlying portfolio companies (which are obviously typically produced on an annual basis), and related discussions with such portfolio company management and board members (and sometimes also the auditors) are critical. It is the sum of the individual valuations of each of the underlying portfolio companies (and any cash drawn down but not yet invested) and as reported in the AIF's Annual Report that constitutes the overall asset value of a private equity and venture capital AIF. These valuation procedures, as carried out by the AIFM, are further reviewed by the AIF auditors for compliance with established industry valuation guidelines as outlined under question 2. Having to produce additional valuations (which serve no practical purpose) would unavoidably have an impact on the reporting functions and obligations of portfolio

companies, with corresponding costs attached. To put the above into further perspective we note that:

- (i) With closed-ended private equity and venture capital AIF, the maximum potential risk for systemic or other purposes is fixed and known at the final closing as the commitment of investors to such AIF, as is the corresponding maximum exposure of the AIF. Valuations over time will not affect this, irrespective of whether these show positive or negative temporary fluctuations.
- (ii) while some early drafts of the AIFMD did include more burdensome provisions on valuations these were removed in the final version for private equity and venture capital AIF, inter alia on the cost and other grounds specified above. We would be very averse to any re-introduction of a heavier regime as that would be contrary to the intentions of Level 1 and to the interests of investors.

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?

Response

For private equity and venture capital AIF the investment strategy will typically be set out in the Investment Memorandum/Private Placement Memorandum. This forms the basis of the negotiations with the respective investors on the agreement constituting and/or governing the AIF. Copies of the preliminary documents can be filed with the national competent authority as part of the authorization process and final documents can be filed once the AIF has had its final close. Negotiations with investors typically do not significantly affect the strategy but focus on terms and conditions, fees, key man clauses and general matters of corporate governance including the Investor Advisory Committee. However we agree that if for some reason there is no such Memorandum or equivalent document the AIFM could as an alternative provide a brief statement of its investment strategy.

With respect to the specified focuses, we think that these can serve as sensible examples, but we also strongly underline that they be listed expressly as just that - examples, so that information on specific focus need only be provided 'if applicable'. Not all funds will have market sectors or industries as a specific focus; it can very well be that a fund has no specific industry or sector focus, but rather on e.g. 'innovation' in general, or on 'distressed companies' as such. The added value that a private equity and venture capital AIFM brings to its portfolio companies can be of a widely varying nature; sector knowledge could be just one of these, and for example capital markets' know-how or specific technical or operational expertise more generally applied across the board can be others. Also the AIF's Annual Report can be provided to the competent authorities showing how the strategy is being executed.

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

Response

For private equity and venture capital funds, once closed, there are typically no changes to the investment strategy. Any change to an AIF's investment strategy would typically require an amendment of the agreed governing documents to be agreed with the investors. For private equity and venture capital funds, the concept of 'instruments in which they are trading' has no meaning, since there is no regular trading. A private equity and venture capital AIF on average has ownership stakes in between 10 and 20 portfolio companies over the life cycle of the AIF, which is typically 10 years (or longer). Given this relatively very low number of unique investments held, and further given the lack of relevance of systemic risk impact, we do not see an objective cost-benefit reason for reporting more regularly than annually. The Investor Advisory Committee of a private equity and venture capital AIF (made up of the largest or most influential investors) typically meets at least semi-annually to review the activities of the fund. In addition most private equity and venture capital AIF hold an Annual Investor Meeting and provide their Investors with Annual Audited Accounts including full reviews of activities. Hence annual reporting should be sufficient. We further believe that the concepts of 'principal exposure' and 'most important concentrations' in connection with trading, for the reasons specified above, are not relevant to private equity and venture capital as the negotiated agreement governing the AIF will anyway state the allowed maximum exposure of the AIF to any single portfolio company, which is also then reported in the Annual Accounts, and investors are at all times aware of that their equity investment is at risk – we again stress that the typical private equity/venture capital investor is a professional [institutional] investor who understands the risk profiles of asset classes. As the AIFM will share this equity risk proportionally there is a true alignment of interest. The principal exposures of a private equity and venture capital AIF are, that the investments into individual and stand-alone portfolio companies lose all or part of their value. The overall exposure of a private equity and venture capital AIF is typically capped at the aggregate commitments made by investors to that fund; there is typically no leverage at the level of the AIF, and theoretically the maximum exposure of investors in such fund does not fluctuate. In practical terms it typically rather means that, as a result of realisations of underlying portfolio companies and subsequent return of funds to investors, towards the end of the life of a fund the exposure gradually decreases.

We would generally, from a cost-benefit point of view, like to encourage that information to be provided to competent authorities be provided in formats already produced and shared with investors, such as annual reports. Given the context in which this provision of information must be seen, namely monitoring of systemic risks, we think that this is both feasible and proportionate.

19. Are there any other matters which should be considered?

Response

Where practical we would strongly encourage tailoring for types of AIF(M), in order to avoid disproportionate burdens on AIF(M)s and their investors as well as on the

competent authorities. Ineffective and inefficient regulation that serves no interest (of the AIFMD) should be avoided to the extent possible. The costs of regulation, from a stand-alone perspective and in light of lack of corresponding benefits, are a threat to attractiveness of AIF to investors. Professional investors invest on a global basis. A potential shift of future allocations of investors to areas other than the EU is a serious threat to fund raising capabilities of European private equity and venture capital AIF, and consequently a threat to possibilities of European companies to attract financing necessary for innovation and growth. We refer to the Commission's twelve projects in relation to the Single Market Act, as announced on 13 April 2011, one of which is 'access to finance for SMEs'. Competitiveness of the EU, as a driving force of its economic growth, prosperity and employment, should in our view function as a strong argument against unnecessary regulation, including unnecessary regulation of smaller or systemically non-important AIF/AIFM caused by lack of tailoring.

- **Notification to national competent authorities for AIFMs that no longer comply with the exemptions granted in Article 3(2)**

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?
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Response

We do not think that there is any need to be more prescriptive. It should be for the AIFM to assess whether a breach is of a permanent or temporary nature, as the circumstances that can cause a temporary breach will vary between funds. In particular the use of the acquisition cost basis to measure assets under management for closed-ended private equity funds would enable the AIFM to identify with reasonable certainty whether the threshold is likely to be breached over the coming twelve month period.

21. Do you have any alternative suggestions?

Response

No.

OPT-IN PROCEDURE

22. Do you agree that all AIFMs which are obliged to be authorised, or which choose to be authorised under the opt-in procedure, should be subject to the same authorisation procedure under Article 7?

Response

To the extent legally possible we would appreciate a proportionate application of the authorization procedure under Article 7.

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

Response

No, it should only submit what it has not yet submitted previously.

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

Response

Yes.

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

Response

Smaller AIFM may be forced to opt-in in order to be competitive in fund raising. However, it will be extremely difficult for such smaller AIFM to comply with the Directive due to the lack of proportionality of the rules which seem to apply irrespective of the size of AIFs managed. Hence, one should try to minimise the burden of such AIFMs as far as possible and not require them to submit documentation which they have submitted already. Even if the regulatory authority / department responsible for registration differs from the regulatory authority / department which controls the authorisation it should still be possible for regulators to exchange documentation and information, especially if they are provided and/or filed in electronic formats.

END

About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About EVCA

The European Private Equity and Venture Capital Association is the voice of European private equity and venture capital, representing more than 1,300 members. In addition to promoting the industry among key stakeholders, such as institutional investors, entrepreneurs and employee representatives, EVCA develops professional standards, research reports and holds professional training and networking events.

