



Alternative Investment Management Association

European Securities and Markets Authority (ESMA)
103 Rue de Grenelle
75007 Paris
France

Submitted electronically

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Dear Sirs,

The Alternative Investment Management Association (AIMA)¹ appreciates the opportunity to comment on the European Securities and Markets Authority's (ESMA) discussion paper (ESMA/2012/117) on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM ('the Discussion Paper'). Although we appreciate the need to clarify some of the concepts in the Directive, we believe that the discussion on some of the issues in the Discussion Paper may be premature and that a more useful debate on these issues could be had once the Level 2 measures have been finalised. We also believe that there are a number of inconsistencies in the discussion paper which would benefit from further analysis.

Delegation of portfolio and risk management

In paragraph 8 of the Discussion Paper ESMA states that "ESMA considers that an AIFM may delegate the two functions (i.e. portfolio management or risk management) either in whole or in part, in the understanding that an AIFM may not delegate both functions in whole at the same time". However, Paragraph 47 of the Discussion Paper states that an AIFM can "perform one or both of these functions under a delegation arrangement". This appears contradictory.

We strongly believe that an AIFM may delegate both portfolio and risk management functions at the same time without becoming a letter-box entity, as the concept has been developed by ESMA in its final advice², where ESMA states that "it is ESMA's position that there are two situations under which an AIFM should be considered as a letter-box entity. Firstly, when the AIFM is no longer able to effectively supervise the delegated tasks and to manage the risks associated with the delegation. Secondly, when the AIFM no longer has the power to take decisions in key areas that fall under the responsibility of the senior management or to perform senior management functions."³ It is not stated anywhere in the Level 1 text that an AIFM may not delegate both functions at the same time.

Again, it is unclear to us whether the wording "in whole" as included in paragraph 8 of the Discussion Paper only intends to clarify that these functions may not be delegated to the extent that the AIFM becomes a letter-box entity or if something else is intended. Should something else be intended we believe this to be in conflict with the Alternative Investment Fund Managers Directive (AIFMD) and also contrary to ESMA's final advice. It would, amongst other things, mean that there could rarely, if ever, be self-managed AIFs since it is unlikely that a governing body will have the capacity itself to perform risk management or portfolio management.

As this statement in paragraph 8 of the Discussion Paper may result in uncertainties as to what extent delegation is allowed we believe that it should be clarified in ESMA's policy approach that an AIFM may delegate both portfolio and risk management functions at the same time as long as the requirements in the AIFMD are fulfilled.

¹ AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector - including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,300 corporate bodies in over 40 countries.

² Final report ESMA's technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive (ESMA/2011/379) (ESMA's final advice)

³ ESMA's final advice Pg 121 paragraph 8



Definition of AIFM

In paragraph 6 of the Discussion Paper ESMA states that "Article 6(5)(d) should be interpreted as requiring an AIFM to be capable of providing [...] both portfolio management and risk management functions in order to obtain an AIFM authorisation in accordance with the AIFMD".

We believe that Article 6 should not be used to define an AIFM since Article 6 regulates the technicalities of authorisation of AIFMs, while many AIFMs may be third country AIFMs not subject to the authorisation requirements. Also, the functions that an entity is authorised to carry out are not necessarily the same as the functions it actually carries out, as delegation of tasks is allowed.

In addition, the requirement that an AIFM should be "capable of providing" both portfolio management and risk management in paragraph 6 of the Discussion Paper goes far beyond what has been stated on letter-box entities in ESMA's final advice. Such a requirement would introduce a requirement that is not consistent with Level 1.

Delegation by the AIF

In paragraph 10 of the Discussion Paper ESMA states that "[n]otwithstanding the fact that the AIFM may choose not to perform itself the additional functions set out in Annex I of the AIFMD, ESMA believes that in such a case these functions should be considered as having been delegated by the AIFM to a third party. Therefore, the AIFM should be responsible for the activities carried out by the delegated entity [...]".

We believe that ESMA's view as expressed in paragraph 10 of the Discussion Paper goes beyond the Level 1 text of the AIFMD. Paragraph 2 of Annex I of the AIFMD states that the listed functions "may" be performed by an AIFM. In general, market practice is for these services to be performed under a contract between the AIF (when the AIF is a corporate entity) itself and a third party and there is no justification for ESMA's statement that they "should be considered as having been delegated by the AIFM to a third party".

The effect of ESMA's view would be to make the AIFM strictly liable for non-performance of services which the AIFM is under no contractual, legal or regulatory obligations to perform. This is not something that follows from the AIFMD and would contradict recital 11 of the AIFMD, which states that "[s]everal provisions of this Directive require AIFMs to ensure compliance with requirements for which, in some fund structures, AIFMs are not responsible. An example of such fund structures is where the responsibility for appointing the depositary rests with the AIF or another entity acting on behalf of the AIF. In such cases, the AIFM has no ultimate control over whether a depositary is in fact appointed unless the AIF is internally managed". Recognition of such fund structures in the AIFMD is essential and is already the case within the UCITS sphere, in particular for fund structures in a number of important EU fund domiciles.

Passporting

Finally, we agree with ESMA's analysis of the treatment of MiFID firms and credit institutions. An AIFM authorised under AIFMD can additionally provide the non-core "MiFID activities" listed in Article 6(3) under their AIFMD authorisation. AIMA's view is that such non-core activities are also passportable under the AIFMD. However, this is not entirely clear from chapter VI of AIFMD as this chapter relates to marketing of AIFs. It is however clear from the UCITS directive that non-core services can be passported. Article 6 of the AIFMD is very similar to Article 6 of the UCITS directive and according to our understanding the intention was not to create differences between the AIFMD and the UCITS directive in this respect. We would welcome a clarification from ESMA that an AIFM would be allowed to passport all activities for which it is authorised.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Jiří Król".

Jiří Król
Director of Government and Regulatory Affairs



Question 1: Do you see merit in clarifying further the notion of family office vehicles? If yes, please clarify what you believe the notion of 'investing the private wealth of investors without raising external capital' should cover.

Initially we would like to emphasise that recital 7 of the AIFMD focuses on investment undertakings "without raising external capital". Family offices are merely an example thereof.

When characterising the "family relationship", it is important to ensure that this relationship encompasses all recognised forms of family and does not inadvertently exclude relationships such as civil partnerships or adopted or foster children. It should also extend to former family members. In our view, maintaining a broad, high level description of family relationships rather than trying to prescribe all relationships which might fall within this grouping should circumvent this problem. Nonetheless, any rule of this nature is likely to require detailed guidance to clarify the full spectrum which it is seeking to describe. It is equally important that, when considering the identity or relationships of investors in a family investment vehicle, any definition covers other investment vehicles such as trusts, estates, charities or vehicles through which family members may hold, invest or donate their assets.

Another indicator of a family investment vehicle is the lack of placement or marketing to obtain capital from third party, non-familial, investors. This is a core feature of family offices. While this would clearly include all types of family relationship or investment, it must be clear that it does not exclude persons such as employees of the family office, whose expertise is essential to the efficient management of the family investment vehicle, from participating as investors. Such employees are highly likely to be investing their own assets together with and alongside the family they are working for (whether as a result of their own wealth, or as some form of compensation or reward for their services). This clarification is important to ensure that such family offices are not inadvertently considered as AIFMs as a result. Former employees may also retain stakes.

Question 8: Do you consider that any co-investment of the manager should be taken into account when determining whether or not an entity raises capital from a number of investors?

No, we do not believe that co-investment of the manager should be taken into account when determining whether or not an entity raises capital from a number of investors, since this would not constitute raising external capital. Equally, we believe that this approach should also be taken to co-investment by an affiliate of the AIFM, a third party funded by the AIFM and a service provider to the AIF (such as the general partner of a limited liability partnership which may be required to make a nominal investment as part of the organisational requirements of the vehicle).

Question 10: Do you agree with the analysis on the absence of any investor discretion or control of the underlying assets in an AIF? If not, please explain why.

We agree that investors have day-to-day no discretion or control over these assets (although certain high level decisions may require prior approval by the investors).

Question 11: Do you agree with the proposed definition of open-ended funds in paragraph 41? In particular, do you agree that funds offering the ability to repurchase or redeem their units at less than an annual frequency should be considered as closed-ended?

There may be cases where there are reasons for redemption to be allowed less frequently than annually, as this will apply to a wide universe of funds there should be flexibility in this aspect. However, as the definition has relevance only to liquidity management and valuation, we believe the definition to be reasonable.

Question 12: Do you see merit in clarifying further the other concepts mentioned in paragraph 37 above? If so, please provide suggestions.

We agree that the AIF should be free to appoint any legal person as AIFM provided this entity, to the extent required, is authorised under the AIFMD and that both portfolio management and risk management functions can be performed under a delegation arrangement.