

Luxembourg, 4 February 2013

**ALFI's response to ESMA discussion papers of 19 December 2012 on guidelines on key concepts of the Alternative Investment Fund Managers Directive and draft regulatory technical standards on types of AIFMs**

ALFI represents the Luxembourg investment management and fund industry. It counts among its membership asset management groups from various horizons and a large variety of service providers. According to the latest CSSF (*Commission de Surveillance du Secteur Financier*) figures, on 31 November 2012, there are 3 863 undertakings for collective investment in Luxembourg (UCITS and non-UCITS), representing 13 481 active compartments representing a total, in terms of net asset value EUR 2 359.722 billion.

ALFI welcomes the clarifications that ESMA is seeking to bring to the appropriate interpretation of the Directive, and we recognise the complexity involved in this attempt.

However, we would like to draw ESMA's attention to the following essential points.

**1. Q 2 point 17 of ESMA consultation paper regarding the guidelines on key concepts of the AIFMD in relation to the concept of raising of capital**

- We welcome ESMA's clarification in paragraph 14 that *"the investment in an undertaking by a member of a group of persons connected by a close familial relationship that pre-dates the establishment of the undertaking, for the investment of whose private wealth the undertaking has been exclusively established, is not likely to be within the scope of raising capital"*. However, it should be clarified that the scenario described above should not be considered as the only situation where we may consider that there is no raising of external capital. Recital (7) of the AIFMD is clear on the fact that investment undertakings such as family offices which invest the private wealth of investors without raising external capital should not be considered AIFs, without imposing a condition of exclusivity or of a familial relationship which pre-dates the establishment of the undertaking.
- Furthermore, ESMA considers that *"the fact that an investor being one of the persons mentioned in paragraphs 14 or 15 above invests alongside an investor not being one of the persons mentioned in paragraphs 14 or 15 above does not have the consequence that the criterion "raising capital" is not fulfilled and the undertaking therefore does not qualify as AIF. Whenever such situation arise, no distinction should be made between the investor not being one of the persons mentioned in paragraphs 14 or 15 and the one being one of the persons mentioned in paragraphs 14 or 15 above and the latter should enjoy full rights under the AIFMD."*

We do not share this conclusion. Indeed, in such a case, it would mean that there would be no raising of capital from the person being one of the persons mentioned in paragraphs 14 or 15

but only capital raising from the single investor not being one of the persons mentioned in paragraphs 14 or 15. The conclusion reached by ESMA is therefore simply not exact as only one investor should be counted in this scenario. There is no raising of capital from a number of investors in such a case.

- Finally, we share EFAMA's view that the proposed treatment of the "legal person managing the undertaking" is not very clear. Indeed, according to paragraph 15 of the consultation paper, capital provided by such person shall not be considered for the purpose of "raising capital", whereas paragraph 16 suggests that it should be relevant in this respect.

**2. Q 5 point 20 of ESMA consultation paper regarding the guidelines on key concepts of the AIFMD in relation to the concept of collective investment undertaking**

ESMA considers that *"one of the characteristics which should show that an undertaking is a collective investment undertaking for the purposes of the AIFMD is that the undertaking pools together capital raised from investors and has the purpose of generating a pooled return for its investors from the pooled risk generated by acquiring, holding or selling investment assets as opposed to an entity whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity."*

We fail to understand what "an entity whose purpose is to manage the underlying assets *as part of a commercial or entrepreneurial activity*" means. What would be the difference with what ESMA further refers to as an ordinary company with general commercial purpose? Or does it refer to an undertaking for collective investment as opposed to a holding company? The absence of clarity as to these terms creates confusion. Furthermore, to the extent that a holding company is already defined in the AIFMD, the above definition (*"entity whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity"*) might unduly limit the scope of activities of a holding company which do not necessarily imply a commercial or entrepreneurial activity.

We further believe that the criteria of the collective investment of the funds raised from investors with the purpose of generating or giving the investors the benefit of the results of the management of their assets are sufficient in order to define what a collective investment undertaking is.

**3. Point 26 to 28 of ESMA consultation paper regarding the guidelines on key concepts of the AIFMD in relation to the number of investors**

We share EFAMA and ESMA's view that the applicable restrictions on raising capital should be the decisive criterion and that an undertaking which is not prevented in a legally binding manner from raising capital from more than one investor should be considered collective for the purpose of the AIF definition.

**4. Q 4 regarding the redemption period for the AIFs of ESMA consultation paper regarding the draft regulatory technical standards on types of AIFMs**

No further criteria such as any possibility to redeem that AIF's units/shares on the secondary market and not directly from the AIF should as, suggested in Q 4, be taken into consideration for the purpose of defining closed-ended and open-ended AIFs.

However, the proposed article 1(1) of the RTS should be amended in order to clarify that an AIFM may manage at the same time both open-ended and closed-ended AIFs.

Furthermore, regarding the proposed article 1(2) c), we refer to the reference in the AIFMD to AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments (Articles 3(2) b) and 21 (3) third subparagraph) which distinguishes closed-ended AIFs from open-ended AIFs. Therefore ESMA should consider the relevant provisions of the AIFMD when defining closed-ended AIFs.