

## Memorandum

By e-mail only

For discussion purposes only

To: The European Securities and Markets Authority  
Copy to: Hugo Oppelaar - FMLA Financial Markets Lawyers  
From: Jean-Clément Meignen  
Our reference: JM/2012/0006  
Date: 7 March 2012  
Subject: Discussion paper on key concepts of the AIFMD and types of AIFM (ESMA/2012/117)

### 1 Introduction

Thank you for providing us with the opportunity to respond to the ESMA discussion paper (the “**Paper**”) on certain key concepts of the Alternative Investment Fund Managers Directive (“**AIFMD**”). In this memorandum we describe certain potential interpretation issues we have identified regarding the determination of the Alternative Investment Fund Manager (“**AIFM**”) (section III. of the Paper), which we believe could be addressed through the provision of additional policy guidance by ESMA regarding the “defined investment policy” of an Alternative Investment Fund (“**AIF**”) (paragraph 30 and further of the Paper). Our submission relates to questions 6.

Our comments are triggered by certain crucial differences we have identified between the AIFMD framework and the current Netherlands regulatory framework for AIFs. Nevertheless, we believe the issues raised below may be of relevance in other jurisdictions.

### 2 Concept of AIFM

In the AIFMD, “managing AIFs” is defined as performing at least the functions referred to in point 1(a) or (b) of Annex I of the AIFMD for one or more AIFs. Neither the AIFMD nor the Paper provides clarity as to whether the function of “portfolio management” includes the determination of the investment policy of an AIF. None of the provisions of the AIFMD seems to suggest that to be the case. Particularly, we believe that if the function of “portfolio management” included the actual determination of the investment policy of an AIF, it would have been appropriate for the AIFMD to include a provision prohibiting delegation of such determination. We also noted that ESMA’s technical advice to the European Commission on possible implementing measures of the AIFMD does not refer to such delegation as resulting in the AIFM: (i) becoming a letter box entity; (ii) no longer being able to “*take decisions in key areas which fall under the responsibility of the senior management*”; or (iii) no longer having the “*power to perform senior management functions, in particular in relation to implementation*” [NOTE: the word “*determination*” is not mentioned in that context] *of the general investment policy and investment strategies.*”

Therefore, an entity that manages the portfolio of an AIF by executing the investment policy of such AIF will be considered as the AIFM of such AIF, regardless of whether such investment policy has been established by the AIF itself or by another party (e.g. the AIFM). In that connection we note that it is not uncommon in the

market for the 'AIFM to be' to be involved in the incorporation/set-up of an AIF and/or the determination of such AIF's investment policy. Nevertheless, this is not necessarily the case.

### **3 Delegation of AIFM functions**

In light of paragraph 2 above, it seems that the determination of an AIF's investment policy does not fall under the scope of the AIFMD. We believe this has to do with the facts that (i) the AIFMD regulates AIFMs, not AIFs –at least not directly, and (ii) in many instances the investment policy of an AIF is established by the AIF itself or by the AIF and the AIFM conjointly. Therefore, apparently, the AIFMD focuses on the (management and other) activities that are subsequent to the determination of an AIF's investment policy, notwithstanding the fact that material changes to such policy do trigger certain requirements under the AIFMD.

As a consequence of the above, the AIFMD rules on delegation do not apply to delegation of the determination of an AIF's investment policy. Therefore the AIFMD does not prevent an AIFM from delegating to –for instance– a licensed investment firm the (further) determination of the investment policy of an AIF managed by such AIFM. We believe such delegation would be both undesirable and likely to jeopardise an AIFM's key role and responsibility under the AIFMD. We note that, under current Dutch regulations for non-UCITS regulated collective investment schemes, the determination of the investment policy of a collective investment scheme is viewed as a crucial matter, which (the manager of) a such scheme may not delegate to a third party.

### **4 Clarification required**

In light of the foregoing, we believe it would be appropriate for ESMA's final version of the Paper to contain further clarifications on the issues described above. In any event, we suggest the following matters should be clarified:

- (i) depending on the circumstances under which an AIF has come into existence, its "defined investment policy" (p. 10 of the Paper) may or may not have been determined by the AIFM managing such AIF;
- (ii) if an AIFM has been involved in the determination of an AIF's investment policy, such AIFM may not delegate the (further) determination of the investment policy of such AIF to a third party; and
- (iii) such delegation should be clearly listed as resulting in the AIFM becoming a letter box entity, or at least in the AIFM no longer being able to take decisions in key areas which fall under the responsibility of the senior management or to perform senior management functions.

Please do not hesitate to contact us, should you require further clarifications.

Yours sincerely,



Jean-Clément Meignen