



European Securities and  
Markets Authority

## **Discussion paper**

**Discussion paper on ESMA's policy orientations on possible implementing measures  
under Article 3 of the Alternative Investment Fund Managers Directive**



## **Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- indicate the type or types of AIF where appropriate to which comments relate;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **16 May 2011**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Consultations'. Contributors should identify themselves and indicate the industry sector in which they operate or in which they are interested and the extent to which that sector is already subject to regulation at a national level. Contributors are also asked to consider the costs or benefits attached to the various options and quantify these costs to the extent possible.

## **Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

## **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Disclaimer'.

## **Who should read this paper?**

This document will be of interest to asset management companies and trade associations of asset management companies managing funds falling in the scope of the Alternative Investment Fund Managers Directive.



## Table of Contents

I.	Executive Summary	5
II.	Policy orientations	7

Annex I:	Summary of questions
Annex II:	Extract from the AIFMD
Annex III:	Extract of the European Commission mandate
Annex IV:	Cost-benefit analysis



## Acronyms used

CESR	Committee of European Securities Regulators
ESMA	European Securities and Markets Authority
AIFMD	Alternative Investment Fund Managers Directive <sup>1</sup>
AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
UCITS Directive	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) <sup>2</sup>

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<sup>1</sup> References to the Directive in this paper are based on the Council text of 27 October 2010, which is available here: <http://register.consilium.europa.eu/pdf/en/10/st15/st15053-re01.en10.pdf>

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF>

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## **I. Executive Summary**

### **Reasons for publication**

On 2 December 2010 the European Commission sent a request for assistance to CESR (now ESMA) on the content of the implementing measures of the AIFMD<sup>3</sup>. ESMA is seeking the views of external stakeholders on the policy orientations it has identified in relation to certain parts of the Commission's request.

### **Contents**

This discussion paper sets out ESMA's proposed approach, including alternative options where relevant, to the issues identified in the European Commission's mandate in relation to:

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- the identification of the portfolios of AIF under management by a particular AIFM and calculation of the value of assets under management (Article 3(2));
  - influence of leverage on the assets under management (Article 3(2));
  - the determination of the value of the assets under management by an AIF for a given calendar year (Article 3(2));
  - the treatment of potential cases of cross-holding among the AIFs managed by an AIFM (Article 3(2));
  - the treatment of AIFMs whose total assets under management occasionally exceed and/or fall below the relevant threshold (Article 3(2));
  - the content of the obligation to register with national competent authorities and suitable mechanisms for gathering information set out in Article 3(3);
  - the registration requirements for entities falling below the thresholds set out in Article 3(3); and
  - the procedures for small managers to 'opt-in' to the AIFMD set out in Article 3(4).
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This document does not at this stage include any formal proposals for advice on possible implementing measures.

The relevant text from Level 1 is set out in Annex II of this paper.

### **Next steps**

Responses to this discussion paper will help ESMA in narrowing down its policy approach. In light of the feedback received, ESMA will develop a consultation paper in the summer of 2011 setting out formal

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<sup>3</sup> [http://ec.europa.eu/internal\\_market/investment/docs/alternative\\_investments/level2/mandate\\_en.pdf](http://ec.europa.eu/internal_market/investment/docs/alternative_investments/level2/mandate_en.pdf)



proposals for possible implementing measures of the AIFMD. That consultation paper will also be subject to a public consultation, the results of which will be used by ESMA to finalise its advice to the European Commission.

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## **II. Policy orientations**

### **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**

ESMA is requested to advise the Commission on how to identify the portfolios of AIF under management by a particular AIFM and the calculation of the value of assets under management by the AIFM on behalf of these AIFs.

It is the responsibility of the AIFM to establish whether it must obtain authorisation under the AIFMD or whether it can benefit from the exemption under Article 3(2).

In accordance with Article 3(2)(a) the calculation of the value of assets under management means assets under management in total, including any assets acquired through leverage. The exemption set out in Article 3(2)(b) only applies to non-leveraged AIFs.

For most open-ended AIFs where the gross and net asset value is calculated on a relatively frequent basis i.e. at least quarterly, it would seem appropriate that the current gross or net asset value could be used to calculate the assets under management, taking into account assets that have been acquired through leverage.

For other types of AIF the net or gross asset value may not adequately represent the size of the fund in relation to the specific moment of its life (for instance, closed-ended funds at the beginning of their life may have a very large capital commitment, but only small amounts actually invested). Moreover, different types of AIF will apply different methodologies to the valuation of their underlying assets for the purposes of calculating gross and net asset value. This may include value by reference to market value, mark to model or some other means of assessing fair value. Some AIFs may value assets by reference to cost (for example venture capital funds), while others may require valuation to be carried out by prescribed experts (for example real estate funds).

ESMA has considered what factors could be taken into account in assessing the value of portfolios of AIFs, including closed-ended AIFs where the value is calculated less frequently or those AIFs which do not produce a gross or net asset value. In the case of these AIFs it would be useful to consider industry practice taking into account, for example, the basis on which fees are calculated or whether these AIFs (or the assets which compose their portfolio) are subject to an annual audit.

Some respondents to the call for evidence published by CESR in December 2010 (Ref. CESR/10-1459) on possible implementing measures for the AIFMD stressed that AIFMs should be responsible for the confirmation of the identity of the portfolios of AIFs under their management and the calculation of the value of assets under management.

Also, it was suggested that there may be a need for differentiation between open-ended funds and closed-ended funds for the calculation of the value of assets under management. For the latter, the net asset value may not be relevant and perhaps other methods could be used, such as acquisition cost of assets held, or commitments less realisations at cost for private equity and venture capital AIFs.

### **Policy orientations identified by ESMA**



In order to avail of the exemption set out in Article 3(2) the AIFM must carry out the following procedure:

- Identify the AIF as defined in the AIFMD for which it is the AIFM or the appointed AIFM, in accordance with Article 5;
- Calculate the value of the assets under management, including assets acquired through leverage, of each AIF to establish whether the assets under management of all AIFs exceed the threshold.

The gross or net asset value of open-ended funds, as appropriate should be included in the calculation of the threshold.

The gross or net asset value of closed-ended funds, as appropriate and where available, should be included in the calculation of the assets under management. Where such values cannot be produced on a regular basis with reasonable efforts and costs, closed-ended funds should use appropriate values of their portfolios taking into account the nature of the underlying assets. For example, private equity funds could consider the use of commitment values less realisation.

The data used to calculate the total assets under management does not need to be available to the public or to investors. However, competent authorities must be able to verify that the AIFM's calculations are accurate and must have access to this data if requested.

#### **Questions to stakeholders:**

- 1. Do you agree with the proposed approach in relation to the procedure to identify the AIFs 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? Should ESMA consider the extent to which AIFs which produce gross and net asset values apply different valuation methodologies to the underlying assets?**
- 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?**
- 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? 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?**
- 5. Do you have any other suggestions in relation to the procedure for calculating the total assets under management, including leverage?**

#### **➤ Influences of leverage on the assets under management**



ESMA is invited to consider how the use of different forms of leverage influences the assets under management by an AIF and how this should best be taken into account in the calculation of assets under management.

The AIFMD provides that the threshold must be calculated taking into account assets under management acquired through use of leverage. Leverage is defined in the AIFMD as 'any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means'. In this regard ESMA is carrying out work in the context of other parts of its advice on the AIFMD that could be useful in establishing the methods of calculating the leverage employed and the method by which this leverage can be captured. It might also be useful to take into account the risk measurement guidelines developed by CESR for the calculation of global exposure for UCITS (Ref. CESR/10-788), where the standard commitment methodology converts financial derivative positions into the market value or notional value of the equivalent underlying asset.

Recital 14 of the AIFMD suggests that leverage includes any financial and/or legal structure involving third parties controlled by the AIF, where the structures referred to are structures specifically set up to directly or indirectly create leverage at the level of the AIF. The Recital provides that for private equity and venture capital AIFs, where leverage exists at the level of the portfolio company it is not intended to be included when referring to such financial or legal structures.

Some respondents to the call for evidence were of the view that the responsibility for determining the influence of leverage on the AIF's assets should rest on the AIFM in accordance with the relevant national law.

For real estate funds it was suggested that – irrespective of the use of different forms of leverage – assets under management should relate to the relevant valuations for the underlying real estate investments.

Stakeholders also pointed out that the issue of leverage was addressed in Issue 19 of the Commission's request, that there were a number of different measures used and that it may be problematic to include a leverage measure in the calculation of assets under management. Reference was made to UCITS that may use leverage but that do not take it into account in the calculation of assets under management.

### **Policy orientations identified by ESMA**

ESMA would like to seek stakeholders' views on the proposal that AIFs which use gross asset value for the purposes of calculation of the threshold should be considered to have appropriately taken account of the effect of leverage. Other AIFs which do not produce gross asset values might have to adjust the value of their portfolios to take account of the effect of leverage where required.

In this context, stakeholders are invited to note that ESMA will consider the outcomes of the work it is carrying out in relation to definition and calculation of leverage, although it may ultimately be more appropriate to use simpler methods than those that arise from the parallel workstream. In this regard, consideration will be given as to how leverage generated through entities controlled by AIFs (other than portfolio companies of private equity funds, in line with Recital 14 of the AIFMD) will be treated.

### **Questions to stakeholders:**

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

**7. Can you suggest an alternative measure of leverage?**

**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?**

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

The advice should identify options on how to determine the value of the assets under management by an AIF for a given calendar year. It should indicate the method or methods ESMA regards as preferable.

In assessing whether the AIFM can avail of the exemption on an ongoing basis, ESMA considered whether the assets under management should be calculated at a given point in time i.e. the end of the calendar year. An alternative approach would involve taking an average of assets under management over the period, or calculating the total value of the assets under management on a more frequent basis, for example quarterly. This would help deal with situations where the threshold is exceeded temporarily and help AIFMs to monitor their assets under management on an ongoing basis. However, ESMA must also take into account those AIFs which do not produce regular gross and net asset value calculations.

Respondents to the call for evidence felt that information included in the audited annual reports should be used, with the possibility to use a different figure for total assets under management when it has changed significantly from the last annual reports of the AIF under management.

**Policy orientations identified by ESMA**

ESMA is of the view that taking a single 'snap shot' of assets under management on a particular day in a calendar year would not be sufficient to properly assess the AIFM's position in relation to the threshold. ESMA is therefore considering the following procedure:

- The total value of the assets under management is calculated annually using the latest gross or net asset value calculation as appropriate for each AIF (this procedure assumes that all AIFs will produce a gross and net asset value calculation at least once a year).

In order to monitor the threshold on a more frequent basis the following two options are also being considered:

- The total value of the assets under management should be calculated on a quarterly basis taking the latest gross or net asset value, if available, or an appropriate value of the AIF's portfolio taking account of the effect of leverage; or
- The total value of the assets under management should be monitored on a quarterly basis taking the latest gross or net asset value, if available, or an appropriate value of the AIF's portfolio.

It could be argued that closed-ended funds should only be required to calculate the total value of the assets under management on an annual basis. However, this would introduce an unlevel playing field for different types of AIF and different types of AIFM. Moreover, AIFMs may manage both open- and closed-ended AIFs.

### Questions to stakeholders:

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

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

ESMA is requested to advise the Commission on how best to deal with potential cases of cross-holding among the AIFs managed by an AIFM e.g. funds of AIFs with investment in AIFs managed by the same AIFM.

ESMA has identified two options in relation to cross-holdings between AIFs under management:

1. Include all assets under management of each AIF, including assets which represent cross-holdings in other AIFs managed by the same AIFM. This has the advantage of simplicity and clarity; in addition AIFMs must manage each AIF and related portfolio separately. A fund of funds or master-feeder structure involves separate investors, fees, investments and risk management at each level. Therefore, it could be argued that it is appropriate to ignore all cross-holdings in the calculation of the threshold.
2. Alternatively, allow AIFMs to exclude investments by AIFs in other AIFs under management from the calculation of the total value of assets under management. This is because, on a look-through basis, there is only one set of underlying assets which should be included in assets under management. However, this raises issues in relation to leveraged exposure to other AIFs or exposure achieved through the use of financial derivative instruments, which should not be excluded from the calculation of the total value of assets under management.

Respondents to the call for evidence expressed a general preference for a methodology which avoids double-counting of assets.

### **Policy orientations identified by ESMA**

Two options for the treatment of cross-holdings are proposed:

1. Include all assets under management of each AIF, including assets which represent cross-holdings in other AIFs managed by the same AIFM.
2. Allow AIFMs to exclude investments by AIFs in other AIFs under management by the same AIFM from the calculation of the threshold, subject to appropriate adjustments for leveraged exposure.

These options will be considered further taking into account any impact assessment.

**Questions to stakeholders:**

**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)?**

**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.**

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

ESMA is requested to advise the Commission on how to treat AIFMs whose total assets under management occasionally exceed and/or fall below the relevant threshold in a given calendar year. As part of this work, ESMA is requested to specify circumstances under which total assets under management should be considered as having occasionally exceeded and/or fallen below the threshold in a given calendar year.

This issue is linked to the question from the Commission request set out above ('Determination of the value of the assets under management by an AIF for a given calendar year'). ESMA considers that it would not be practical if AIFMs were continually falling in and out of the scope of the AIFMD. It is nevertheless very possible that the value of each AIF's underlying assets could change constantly depending on the investment strategy, market exposure and level of leverage employed. There is a danger if AIFM calculated the threshold only once a year that this could ignore periods where the assets under management, including assets acquired through leverage, significantly exceed the threshold. AIFMs should monitor their total assets under management on a continuous basis to assess whether they can continue to avail of the exemption but it may not be practical to expect them to continuously calculate the total value of assets under management. The total value of assets under management should be calculated and/or monitored with sufficient frequency to provide ongoing information on the assets under management and should take account of small or temporary increases above the threshold.

Respondents to the call for evidence expressed mixed views on this issue. Some felt that the AIFMD should also apply to AIFMs which temporarily exceed the threshold but that there should be a possibility for these AIFMs to ask competent authorities to waive this obligation, provided there is a common approach across Member States. Other respondents suggested that only AIFMs which exceed the threshold over a given period of time (for example over 3 or 6 months) by more than a given percentage (for example 10%) should be required to comply in full with the Directive.

**Policy orientations identified by ESMA**

The following procedure could be considered:

- The total assets under management could be calculated annually using the latest gross or net asset value figures, as appropriate, and also calculated/monitored on a quarterly basis using latest gross or net asset values, where available, or other appropriate portfolio valuations taking into account the effect of leverage;

- The AIFM should monitor its assets under management (including subscription and redemption activity) on an ongoing basis and should where necessary (i.e. when the total value might come close to the relevant threshold) calculate the value more frequently;
- The AIFM should assess situations where the value of total assets exceeds or falls below the threshold and, if it considers that the situation is not likely to be of a temporary nature, seek authorisation under Article 7 of the AIFMD;
- Competent authorities should have the ability to check that the AIFM is correctly calculating and monitoring the total assets under management, including occasions when assets under management temporarily exceed the threshold.

#### **Questions to stakeholders:**

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

**15. Do you have any alternative suggestions?**

#### **Registration procedures**

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

ESMA is requested to advise the Commission on the content of the obligation to register with national competent authorities for the entities described in Article 3(2). Furthermore, ESMA is requested to advise the Commission on suitable mechanisms for national competent authorities to gather information from these entities in order to effectively monitor systemic risk as set forth in Article 3(3). To that end, ESMA is requested to specify the content, the format and modalities of the transmission of the information to be provided to competent authorities.

As part of the registration process, an AIFM must contact its home competent authority and provide information on the following at the time of registration, in accordance with Article 3(3)(b) and (c) :

- its own identity;
- the AIFs it manages; and
- the investment strategies of those AIFs.

The AIFM must also provide its competent authority on a regular basis, in accordance with Article 3(3)(d), with information on:

- the main instruments in which it is trading;
- the principal exposures; and



- the most important concentrations of AIFs it manages in order to enable the competent authorities to effectively monitor systemic risk.

As the information referred to in Article 3(3)(d) is collected in order to monitor systemic risk, it is proposed that the information could be shared between competent authorities and provided to ESMA where necessary in accordance with the provisions of Article 48. It would also be useful to consider the work ESMA is carrying out in parallel in relation to reporting to supervisors, in considering the format and type of information to be provided by registered AIFMs. However, given that these AIFMs will be managing smaller amounts of assets under management it is important that the information collected is relevant from a systemic risk perspective and that its provision is not overly burdensome.

The AIFMD does not specify how regularly the information set out in Article 3(3)(d) should be provided. ESMA is considering whether it would be sufficient to provide this information at least on an annual basis.

According to some respondents to the call for evidence, no different or additional authorisation requirements beyond those specifically required under Article 3(3) should be imposed on AIFMs.

### **Policy orientations identified by ESMA**

In relation to the information provided to competent authorities as part of the registration process, the following is proposed:

- Article 3(3)(b): The total value of assets under management should be included with the identity of the AIFs under management;
- Article 3(3)(c): In order to provide information on the investment strategies of the AIFs, the AIFM may provide the offering document or a relevant extract from the offering document or a general description of the investment strategy. The description of the investment strategy should at least include the following information:
  - The main categories of asset in which the AIF will invest;
  - Any industrial, geographic or other market sectors or specific classes of asset which are the focus of the investment strategy;
  - A description of the AIF's borrowing or leverage policy.

ESMA is considering this approach because not all types of AIFM may have an up-to-date offering document and may find it more practical to specify the required information. For example, private equity or venture capital funds often raise money through negotiations with potential investors.

- Article 3(3)(d): While ESMA will consider the outcome of the work being carried out in parallel in relation to information on the main instruments traded, principal exposures and important concentration, it is considered that:
  - Information collected in accordance with this article should be subject to the provisions of Article 48 of the AIFMD in relation to exchange of information between authorities;

- The information referred to in this Article should be provided on an annual basis.

### Questions to stakeholders

- 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.**
  - 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?**
  - 18. Do you agree that the information referred to in Article 3(3)(d) should be provided at least annually?**
  - 19. Are there any other matters which should be considered?**
- **Notification to national competent authorities for AIFMs that no longer comply with the exemptions granted in Article 3(2)**

ESMA is requested to advise the Commission on the obligations of AIFMs to notify competent authorities in the event that they no longer comply with the exemptions granted in Article 3(2).

Respondents to the call for evidence did not address this point.

### Policy orientations identified by ESMA

- AIFMs should monitor their total assets under management (including subscription and redemption activity) on a continuous basis to assess whether they can continue to avail of the exemption.
- If the number of AIFs and/or assets under management has increased materially since the total value of assets under management was last calculated, the AIFM should recalculate this figure immediately. Alternatively, if the AIFM is satisfied that the threshold has been exceeded it is not necessary to carry out the calculation and the AIFM should make an application for authorisation.
- Otherwise it would be sufficient to require each AIFM to calculate the total value of assets under management annually, using the latest gross or net asset value figures as appropriate, and also calculate/monitor the total value of assets under management on a quarterly basis using gross or net asset values, where available and appropriate, or other appropriate portfolio valuations taking into account the effect of leverage.
- If, following the calculation of the total value of assets under management, the assets under management exceed the limits set out in Article 3(2) and the AIFM is satisfied that the situation is not of a temporary nature, the AIFM must immediately notify its home competent authority that it will apply for authorisation in accordance with Article 7 of the AIFMD within 30 calendar days.

ESMA is considering this approach since it provides AIFMs with a flexible way to monitor the threshold and to notify the competent authorities when the threshold is exceeded. This proposal is in line with ear-

lier proposals regarding the frequency of monitoring and/or calculation of the value of assets under management.

### **Questions to stakeholders**

**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?**

**21. Do you have any alternative suggestions?**

### **Opt-in procedure**

ESMA is requested to advise the Commission on the procedures for AIFMs which choose to opt-in under the Directive in accordance with Article 3(4). ESMA should consider whether there are specific reasons not to use the same procedure that applies to AIFMs that do not benefit from this exemption.

Article 7 of the AIFMD requires that each AIFM must apply to its home competent authority for authorisation and provide information relating to the AIFMs and the AIF under management specified in this Article. Article 7(4) provides that in the case of UCITS management companies, the competent authorities cannot require information or documents already submitted.

Subject to Article 3(3), which allows Member States to apply stricter rules, the decision to ‘opt-in’ to the AIFMD under Article 3(4) with respect to AIFMs falling below the thresholds rests solely with the AIFM. There appears to be no additional requirements with which the AIFM should be obliged to comply in order to opt-in to the AIFMD.

Most of the respondents to the call for evidence were of the view that the procedure for AIFMs which choose to opt-in under the Directive should be the same as for AIFMs that must comply with the AIFMD. However, some stakeholders believed that the procedure should allow some flexibility and should be proportionate to the size of the AIFs.

### **Policy orientations identified by ESMA**

AIFMs that benefit from the exemption set out in Article 3 and that elect to seek authorisation under the AIFMD should contact their home competent authority and follow the procedure outlined in Articles 7 and 8. There is no need for these AIFMs to follow an alternative procedure. AIFMs which were previously registered with a competent authority in accordance with the requirements of Article 3(2) and which elect for authorisation should submit all documents set out in Article 7, including those which may have previously been submitted for registration purposes. This is without prejudice to the position of UCITS management companies, to which the provisions of Article 7(4) apply as set out above.

While the submission of a full set of documents avoids any discussion about the potential need for updating information, it can also be taken into account that there may be different competent authorities for registration and authorisation under the AIFMD. ESMA recognises that the submission of information and documentation previously provided by the AIFM could potentially introduce additional regulatory costs.

### **Questions to stakeholders**



- 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?**
- 23. Do you agree that AIFMs previously registered under Article 3(2) of the AIFMD should submit all documents required under Article 7?**
- 24. Alternatively, should AIFMs only be required to submit information not previously provided for registration purposes and to update information previously provided?**
- 25. Please provide justification for your preferred choice between the two alternatives set out under questions 23 and 24.**

## **Annex I - Summary of questions**

### **Thresholds – calculation and oscillation**

- 1. Do you agree with the proposed approach in relation to the procedure to identify the AIFs 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? Should ESMA consider the extent to which AIFs which produce gross and net asset values apply different valuation methodologies to the underlying assets?**
- 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?**
- 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? 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?**
- 5. Do you have any other suggestions in relation to the procedure for calculating the total assets under management, including leverage?**
- 6. Do you agree that gross asset value, when available, is an appropriate measure of the leverage generated by the AIF?**
- 7. Can you suggest an alternative measure of leverage?**
- 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?**
- 9. Do you support the proposal for AIFs to calculate the total value of assets under management at least annually?**
- 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.**
- 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?**
- 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)?**

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.
14. Do you agree with the proposed approach to addressing circumstances where the threshold occasionally exceeds the limits?
15. Do you have any alternative suggestions?

### **Registration procedure**

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.
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?
18. Do you agree that the information referred to in Article 3(3)(d) should be provided at least annually?
19. Are there any other matters which should be considered?
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?
21. Do you have any alternative suggestions?

### **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?
23. Do you agree that AIFMs previously registered under Article 3(2) of the AIFMD should submit all documents required under Article 7?
24. Alternatively, should AIFMs only be required to submit information not previously provided for registration purposes and to update information previously provided?
25. Please provide justification for your preferred choice between the two alternatives set out under questions 23 and 24.

## **Annex II – Extracts from Level 1**

### **Article 3(2)**

*Without prejudice to the application of Article 44, for the following AIFM, the application of the Directive shall be limited to the provisions set forth in paragraphs 3 and 4 below:*

- (a) AIFM which either directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or*
- (b) AIFM which either directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF whose assets under management, in total do not exceed a threshold of EUR 500 million when the portfolio of AIF consists of AIF that are not leveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.*

### **Article 3(3)**

*Member States shall ensure that AIFM referred to in paragraph 2 shall at least:*

- (a) be subject to a registration with the competent authorities of its home Member State;*
- (b) at the time of registration identify itself and the AIF managed by it to the competent authorities of its home Member State;*
- (c) at the time of registration provide information on the investment strategies of the AIF managed by it to the competent authorities of its home Member State;*
- (d) provide regularly the competent authorities of its home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of AIF they manage in order to enable the competent authorities to effectively monitor systemic risk, and*
- (e) notify the competent authorities of its home Member State in the event that they no longer comply with the conditions referred to in paragraph 2.*

*Paragraphs 2 and 3 of this Article shall apply without prejudice to the stricter rules adopted by Member States with respect to AIFM falling under one of the exemptions set forth in paragraph 2.*

*Member States shall take the necessary steps to ensure that where the conditions set out in paragraph 2 are no longer fulfilled, the AIFM concerned seeks authorisation within 30 calendar days in accordance with the relevant procedures laid down in this Directive.*

### **Article 3(4)**

*AIFM referred to in paragraph 2 do not benefit from any rights granted under this Directive, unless the AIFM chooses to opt-in under this Directive in which case the entire Directive, subject to the exceptions set forth herein, shall be applicable to those AIFM.*

### **Article 3(5)**

*The Commission shall, in accordance with the regulatory procedure referred to in Article 57(2), adopt implementing measures with a view to specifying the procedures for AIFM which choose to opt-in under this Directive in accordance with paragraph 4.*

**Article 3(6)**

*The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

- (a) how to calculate the thresholds referred to in paragraph 2 and to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold*
- (b) the obligations to register for the entities set forth in paragraph 2 and to provide information in order to effectively monitor systemic risk as set forth in paragraph 3, and*
- (c) the obligations to notify competent authorities referred to in paragraph 3.*

## **Annex III – Extract from the European Commission’s provisional request**

### **Issue 1 – Article 3 Exemptions**

#### **Issue 1 a) – Opt-in procedure for AIFM below the threshold**

##### **I. Scope of the Commission's implementing powers**

5. The Commission shall, in accordance with the regulatory procedure referred to in Article 57(2), adopt implementing measures with a view to specifying the procedures for AIFM which choose to opt-in under this Directive in accordance with paragraph 4

##### **II. Level 1 text**

4. AIFM referred to in paragraph 2 do not benefit from any of the rights granted under this Directive, unless the AIFM chooses to opt-in under this Directive in which case the entire Directive, subject to the exceptions set forth herein, shall be applicable to those AIFM.

##### **III. Questions**

1. CESR is requested to advise the Commission on the procedures for AIFM which choose to opt-in under this Directive in accordance with Article 3(4). CESR should consider whether there are specific reasons not to use the same procedure that applies to AIFM that do not benefit from this exemption.

2. This advice should include procedures specific to the case of AIFM from third countries seeking to opt in after the phasing-in of the third country regime; in particular the determination of the Member State of reference.

#### **Issue 1 b) – Thresholds – calculation, oscillation, obligations below thresholds**

##### **I. Scope of the Commission's implementing powers**

6. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

(a) how to calculate the thresholds referred to in paragraph 2 and to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold.

(b) the obligations to register for the entities set forth in paragraph 2 and to provide information in order to effectively monitor systemic risk as set forth in paragraph 3, and

(c) the obligations to notify competent authorities referred to in paragraph 3.

##### **II. Level 1 text**

2. Without prejudice to the application of Article 44, for the following AIFM, the application of the Directive shall be limited to the provisions set forth in paragraphs 3 and 4 below:

(a) AIFM which either directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or

(b) AIFM which either directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF whose

assets under management, in total do not exceed a threshold of EUR 500 million when the portfolio of AIF consists of AIF that are not leveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

3. Member States shall ensure that AIFM referred to in paragraph 2 shall at least:

- (a) be subject to a registration with the competent authorities of its home Member State;
- (b) at the time of registration identify itself and the AIF managed by it to the competent authorities of its home Member State;
- (c) at the time of registration provide information on the investment strategies of the AIF managed by it to the competent authorities of its home Member State;
- (d) provide regularly the competent authorities of its home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of AIF they manage in order to enable the competent authorities to effectively monitor systemic risk, and
- (e) notify the competent authorities of its home Member State in the event that they no longer comply with the conditions referred to in paragraph 2. Paragraphs 2 and 3 of this Article shall apply without prejudice to the stricter rules adopted by Member States with respect to AIFM falling under one of the exemptions set forth in paragraph 2. Member States shall take the necessary steps to ensure that where the conditions set out in paragraph 2 are no longer fulfilled, the AIFM concerned seeks authorisation within 30 calendar days in accordance with the relevant procedures laid down in this Directive.

### **III. Questions**

1. CESR is requested to advise the Commission on how to identify the portfolios of AIF under management by a particular AIFM and the calculation of the value of assets under management by the AIFM on behalf of these AIF.
2. The advice should identify options on how to determine the value of the assets under management by an AIF for a given calendar year. It should indicate the method or methods CESR regards as preferable.
3. CESR is invited to consider how the use of different forms of leverage influences the assets under management by an AIF and how this should best be taken into account in the calculation of assets under management.
4. CESR is requested to advise the Commission on how best to deal with potential cases of cross-holdings among the AIF managed by an AIFM, e.g. funds of AIF with investments in AIF managed by the same AIFM.
5. CESR is requested to advise the Commission on how to treat AIFM whose total assets under management occasionally exceed and/or fall below the relevant threshold in a given calendar year. As part of this work, CESR is requested to specify circumstances under which total assets under management should be considered as having occasionally exceeded and/or fallen below the relevant threshold in a given calendar year.
6. CESR is requested to advise the Commission on the content of the obligation to register with national competent authorities for the entities described in Article 3(2).
7. CESR is requested to advise the Commission on suitable mechanisms for national competent authorities in order to gather information from these entities in order to effectively monitor systemic risk as set forth in Article 3(3). To that end, CESR is requested to specify the content, the format, and modalities of the transmission of the information to be provided to competent authorities. CESR is invited to consider the consistency with its advice regarding the Issue 25 (reporting obligations to competent authorities).
8. CESR is requested to advise the Commission on the obligation of AIFM to notify competent authorities in the event they no longer comply with the exemptions granted in Article 3(2)

## **Annex IV – Cost-benefit analysis**

### **Opt-in procedures**

#### **Proposal**

AIFMs that benefit from the exemption set out in Article 3 and that elect to seek authorisation under the AIFMD should contact their home competent authority and follow the procedure outlined in Articles 7 and 8. There is no need for these AIFMs to follow an alternative procedure. AIFMs which were previously registered with a competent authority in accordance with the requirements of Article 3(2) and which elect for authorisation should submit all documents set out in Article 7, including those which may have previously been submitted for registration purposes. This is without prejudice to the position of UCITS management companies, to which the provisions of Article 7(4) apply as set out above.

While the submission of a full set of documents avoids any discussion about the potential need for updating information, it can also be taken into account that there may be different competent authorities for registration and authorisation under the AIFMD. ESMA recognises that the submission of information and documentation previously provided by the AIFM could potentially introduce additional regulatory costs.

#### **Market Failure Analysis/Regulatory Failure Analysis (MFA/RFA) addressed**

Inter alia, micro-prudential risks and investor protection issues to ensure symmetric information.

#### **Scope issues**

All AIFMs are subject to appropriate authorisation and registration requirements to ensure that all AIFMs satisfy a specific set of requirements (minimum capital, fitness and propriety, transparency) before operating across the EU.

#### **Benefits**

The proposal to require small AIFMs to follow the same authorisation procedure as large AIFMs leads to a level playing field between smaller and larger AIFMs.

The requirement to submit all documents set out in Article 7 will simplify the process for the AIFM since it will not need to go through previously submitted documents in order to ensure that they are up to date. The requirement will also be beneficial for competent authorities since they will not need to go through previously submitted documents from the AIFM.

#### **Costs**

Resubmitting documents implies a burden on the AIFM seeking authorisation. AIFMs that choose to opt-in are by definition smaller entities, which means that costs relating to the authorisation process will be proportionately more burdensome than for the larger AIFM already within the scope.

#### **Evidence needed**

See questions 22-25 of discussion paper

### **Thresholds – calculation and oscillation**

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

#### **Proposal**

In order to avail of the exemption set out in Article 3(2) the AIFM must carry out the following procedure:



- Identify the AIFs as defined in the AIFMD for which it is the AIFM or the appointed AIFM, in accordance with Article 5;
- Calculate the value of the assets under management including assets acquired through leverage of each AIF to establish whether the assets under management of all AIFs exceed the threshold.

The gross or net asset value of open-ended funds, as appropriate, should be included in the calculation of the threshold.

The gross or net asset value of closed-ended funds, as appropriate and where available, should be included in the calculation of the threshold. Where such values cannot be produced on a regular basis with reasonable efforts and costs, closed-ended funds should use appropriate values of their portfolios taking into account the nature of the underlying assets. For example, private equity funds could consider the use of commitment values less realisation.

The data used to calculate the total assets under management does not need to be available to the public or to investors. However, competent authorities must be able to verify that the AIFM's calculation is accurate and must have access to this data if requested.

ESMA is considering this approach since the AIFM needs to identify the AIFs for which it will be the manager in order to apply for authorisation if the assets under management of the relevant AIFs are above the threshold set out in the Directive. In order to calculate whether the assets under management exceed the threshold or not the AIFM needs to calculate the value of the funds under management.

#### **MFA/RFA addressed**

The failure of an AIFM to properly identify its AIFs and its assets under management could lead to a number of risks being ignored since it will not be authorised. For example, data will not be collected in a proper way which may lead to systemic risks, while investor protection may also be adversely affected.

#### **Scope issues**

The wide range of AIFs covered by the Directive makes it necessary to differentiate between how the different types of fund calculate the assets under management. For example, calculating a quarterly NAV which is routine for many open-ended funds could be a costly and time-consuming activity for many closed-ended funds.

#### **Benefits**

The proposed approach minimises the burden on the AIFM through allowing for current practices in valuation where applicable.

The approach also takes into account the different types of funds e.g. private equity.

#### **Costs**

Some AIFMs that do not calculate NAV will be required to do so annually.

AIFMs must allow for the competent authorities to access the data used to calculate assets under management.

No transparency vis-à-vis investors and the public required on the assets under management data.

#### **Evidence needed**

See questions 1-5 of discussion paper

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

**Proposal**

ESMA is of the view that taking a single ‘snap shot’ of assets under management on a particular day in a calendar year would not be sufficient to properly assess the AIFM’s position in relation to the threshold. ESMA is considering the following procedure:

- The total value of the assets under management is calculated annually using the latest gross or net asset value calculation as appropriate for each AIF (this procedure assumes that all AIFs will produce a gross and net asset value calculation at least once a year).

In order to monitor the threshold on a more frequent basis the following two options are also being considered:

- The total value of the assets under management should be calculated on a quarterly basis taking the latest gross or net asset value, if available, or an appropriate value of the AIF’s portfolio taking account of the effect of leverage; or
- The total value of the assets under management monitored on a quarterly basis taking the latest gross or net asset value, if available, or an appropriate value of the AIF’s portfolio

It could be argued that closed-ended funds should only be required to calculate the total value of the assets under management on an annual basis. However, this would introduce an unlevel playing field for different types of AIF and different types of AIFM. Moreover, AIFMs may manage both open- and closed-ended AIFs.

ESMA is considering this approach since this reduces the possibility that the AIFM can manipulate the assets under management on a specific date i.e. 31 December. However, the approach may pose problems for AIFs that currently do not calculate NAV at the required frequency.

**MFA/RFA addressed**

The failure of an AIFM to properly calculate its assets under management on a regular basis could lead to a number of risks being ignored since it will not be authorised. For example, data will not be collected in a proper way which may lead to systemic risks, investor protection may suffer etc.

**Scope issues**

The wide range of AIFs covered by the Directive makes it necessary to differentiate between how the different types of funds calculate the assets under management. For example, calculating a quarterly NAV which is routine for many open-ended funds could be a costly and time consuming activity for many closed-ended funds.

**Benefits**

The proposal allows for the use of existing procedures since it is based on the NAV.

The requirement to monitor the thresholds reduces the risk of manipulation of assets under management in order to avoid being required to seek authorisation under the Directive.

The advantage of the first option on monitoring is to have an exact level of the assets under management.

The advantage of the second option on monitoring is that it is a less burdensome requirement for those AIFs that currently do not calculate NAV on a quarterly basis i.e. it takes into account different types of AIF.



### **Costs**

For AIFMs that do not calculate or monitor their assets under management on quarterly basis, this new requirement will lead to additional costs.

Not requiring more frequent monitoring or calculation of NAV could lead to AIFMs not seeking authorisation in due time.

### **Evidence needed**

See questions 9-11 of discussion paper.

### ➤ **Influences of the leverage on the assets under management**

#### **Proposal**

ESMA would like to seek stakeholders' views on the proposal that AIFs which use gross asset value for the purposes of calculation of the threshold should be considered to have appropriately taken account of the effect of leverage. Other AIFs which do not produce gross asset values might have to adjust the value of their portfolios to take account of the effect of leverage where required.

In this context, stakeholders are invited to note that ESMA will consider the outcomes of the work it is carrying out in relation to definition and calculation of leverage, although it may ultimately be more appropriate to use simpler methods than those that arise from the parallel workstream. In this regard, consideration will be given as to how leverage generated through entities controlled by AIFs (other than portfolio companies of private equity funds, in line with Recital 14 of the AIFMD) will be treated.

#### **MFA/RFA addressed**

The failure to properly account for leverage when calculating the assets under management could lead to a number of risks being ignored. For example, data may not be collected in a proper way which may lead to systemic risks, while investor protection may be adversely affected.

#### **Scope issues**

Different types of AIF use leverage in different ways and through different structures which needs to be accounted for.

#### **Benefits**

Using gross asset value is a simple and practical process for open-ended AIFs and other AIFs calculating net asset value since the data should be readily available.

The use of gross asset value gives a better picture of the 'foot print' of the AIF on the economy than the traditional measure of net asset value.

For other types of fund than open-ended this analysis will have to wait until a proposal is put forward.

#### **Costs**

Using different methods of calculating the effect of leverage could lead to different results and a non-level playing field between similar types of AIF.

Using measures of assets under management previously not used requires revised procedures within the AIFM.

#### **Evidence needed**

See questions 6-8 of the discussion paper.

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

### **Proposal**

Two options for the treatment of cross-holdings are proposed:

1. Include all assets under management of each AIF, including assets which represent cross-holdings in other AIFs managed by the same AIFM.
2. Allow AIFMs to exclude investments by AIFs in other AIFs under management from the calculation of the threshold subject to appropriate adjustments for leveraged exposure.

ESMA is considering the first option for its simplicity and consistency with the Directive's capital requirements. The second option is considered in order to avoid the double calculation of assets, which might lead to an AIFM being required to seek authorisation which it would not otherwise need to do.

### **MFA/RFA addressed**

The failure of an AIFM to properly calculate its assets under management could lead to a number of risks being ignored since it will not be authorised. For example, data will not be collected in a proper way which may lead to systemic risks, while investor protection may be adversely affected.

### **Scope issues**

When managing a fund of funds and the underlying funds there is only one set of underlying assets, though each fund must be managed separately.

### **Benefits**

The benefits of option 1 are that of simplicity and clarity. The approach is in line with Article 9(4) of the Directive. The same approach is used in the UCITS Directive (see article 7(1)(a)(ii)).

The benefit of option 2 is that it will only consider the underlying assets under management.

### **Costs**

The cost of option 1 is that it will double-count any assets managed through funds of funds or master-feeder structures, potentially requiring an AIFM to be authorised and therefore be subject to the obligations of the Directive (and their costs).

The costs of option 2 are that it is more complicated to separate the underlying assets and any leveraged exposure. Option 2 will also deviate from the standard set in Article 9(4) of the Directive and in Article 7(1)(a)(ii) of the UCITS Directive.

### **Evidence needed**

See questions 12-13 of the discussion paper.

## ➤ **Treatment of AIFM whose total assets under management occasionally exceed and/or fall below the relevant threshold**

### **Proposal**

The following procedure could be considered:

- The total assets under management could be calculated annually using the latest gross or net asset value figures, as appropriate, and also calculated/monitored on a quarterly basis using latest gross or net asset values, where available, or other appropriate portfolio valuations taking into account the effect of leverage;
- The AIFM should monitor their assets under management (including subscription and redemption activity) on an ongoing basis and should where necessary (i.e. when the total value might come close to the relevant threshold) calculate the value more frequently;
- The AIFM should assess situations where the value of total assets exceeds or falls below the threshold and, if they consider that the situation is not likely to be of a temporary nature, seek authorisation under Article 7 of the AIFMD;
- Competent authorities should have the ability to check that the AIFM is correctly calculating and monitoring the threshold including occasions when assets under management temporarily exceed the threshold.

ESMA is considering this approach since it would not be practical if AIFMs were continually falling in and out of the scope of the Directive.

#### **MFA/RFA addressed**

The failure of an AIFM to properly monitor its assets under management on a regular basis could lead to a number of risks being ignored since it will not be authorised. For example, data will not be collected in a proper way which may lead to systemic risks, while investor protection may be adversely affected.

#### **Scope issues**

This issue is linked to the general issue of calculation of the assets under management. It is necessary to establish the appropriate frequency of calculation/monitoring of the assets under management and how to deal with the oscillation above and below the thresholds.

#### **Benefits**

AIFMs managing AIFs with temporarily fluctuating values will be able to take that into account.

AIFMs will be able to use existing procedures to calculate NAV.

The requirement to monitor the thresholds reduces the risk of manipulation of assets under management in order to avoid being required to seek authorisation under the Directive.

#### **Costs**

The continuous monitoring of assets under management could lead to increased costs for closed-ended funds.

Not having a clear definition of 'temporary' leads to uncertainty which in turn could lead to increased costs for AIFMs as well as competent authorities.

Specific types of AIF may be burdened with new requirements on more frequent NAV calculations.

Not requiring more frequent monitoring or calculation of NAV could lead to AIFMs not seeking authorisation in due time.

## **Evidence needed**

See questions 14-15 of the discussion paper.

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

## **Proposal**

In relation to the information provided to competent authorities as part of the registration process the following is proposed:

- Article 3(3)(b): The total value of assets under management should be included with the identity of the AIFs under management;
- Article 3(3)(c): In order to provide information on the investment strategies of the AIFs, the AIFM may provide the offering document or a relevant extract from the offering document or a general description of the investment strategy. The description of the investment strategy should at least include the following information:
  - The main categories of assets which the AIF will invest in;
  - Any industrial, geographic or other market sectors or specific classes of assets which is the focus of the investment strategy;
  - A description of the AIF's borrowing or leverage policy.

ESMA is considering this approach because not all types of AIFM may have an up-to-date offering document and may find it more practical to specify the required information. For example, private equity or venture capital funds often raise money through negotiations with potential investors.

- Article 3(3)(d): While ESMA will consider the outcome of the work being carried out in parallel in relation to information on the main instruments traded, principal exposures and important concentration it is considered that:
  - Information collected in accordance with this article should be subject to the provisions of Article 48 of the AIFMD in relation to exchange of information between authorities;
  - The information referred to in this Article should be provided on annual basis.

## **MFA/RFA addressed**

The proposal addresses macro- and micro-prudential risks as well as investor protection issues through ensuring that all AIFMs satisfy a specific set of requirements before operating across the EU and through ensuring that relevant macro-prudential data is shared at European level.

## **Scope issues**

Many AIFMs do not produce an offering document as such for the AIFs they manage. For example a private equity fund often raises funds through negotiations with potential investors. Therefore, it is necessary to specify the content of the information to be provided to the competent authorities.



### **Benefits**

The proposal allows for the use of information already produced by the AIFM in relation to its clients when registering with the competent authorities.

A specification simplifies the production of the information for AIFs that currently do not have an adequate offering document available.

The proposed approach does not create a requirement on AIFs to produce an offering document, since it focuses on the specific information instead of naming a document.

### **Costs**

Depending on the type of AIF and jurisdiction the information required may not currently be available; the production of this information could therefore lead to costs for the AIF.

### **Evidence needed**

See questions 16-19 of the discussion paper.

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

### **Proposal**

- The AIFMs should monitor their total assets under management (including subscription and redemption activity) on a continuous basis to assess whether they can continue to avail of the exemption.
- If the number of AIFs and/or assets under management has increased materially since the total value of assets under management was last calculated the AIFM should recalculate this figure immediately. Alternatively if the AIFM is satisfied that the threshold has been exceeded it is not necessary to carry out the calculation and the AIFM should make an application for authorisation.
- Otherwise it would be sufficient to require each AIFM to calculate the total value of assets under management annually using the latest gross or net asset value figures as appropriate and also calculate/monitor the total value of assets under management on a quarterly basis using gross or net asset values, where available and appropriate, or other appropriate portfolio valuations taking into account the effect of leverage.
- If, following the calculation of the total value of assets under management, the assets under management exceed the limits set out in Article 3(2) and the AIFM is satisfied that the situation is not of a temporary nature, the AIFM must immediately notify its home competent authority that it will apply for authorisation in accordance with Article 7 of the AIFMD within 30 calendar days.

ESMA is considering this approach since it provides the AIFM with a flexible way to monitor the threshold and to notify the competent authorities when the threshold is exceeded. This proposal is in line with earlier proposals regarding the frequency of monitoring and/or calculation of the value of assets under management.

### **MFA/RFA addressed**

The failure of an AIFM to properly monitor its assets under management and to fail to notify the competent authorities could lead to a number of risks being ignored since it will not be authorised. For example, data will not be collected in a proper way which may lead to systemic risks, while investor protection may be adversely affected.

**Scope issues**

To ensure a harmonised implementation it is necessary to be as clear as possible on when an excess is of permanent nature.

**Benefits**

The proposal does not require AIFMs to seek authorisation immediately after an excess, which avoids unnecessary costs.

The requirement to monitor on a quarterly basis ensures that an AIFM which increases its assets will need to seek authorisation.

Allowing monitoring rather than requiring calculation intra-year for relevant funds ensures that this does not change current practices in an unreasonable way.

**Costs**

The process of monitoring assets under management intra-year is a burden on the AIFM, as stated in earlier proposals.

Allowing for monitoring rather than calculation between the yearly calculations could lead to an AIFM not being authorised even when its total assets under management exceed the threshold.

**Evidence needed**

See questions 20-21 of the discussion paper.