



European Securities and
Markets Authority

Discussion paper

Key concepts of the Alternative Investment Fund Managers Directive and types of AIFM





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:

- indicate the specific question to which the comment relates and respond to the question stated;
- contain a clear rationale, clearly stating the costs and benefits; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **23 March 2012**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

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 under the heading 'Legal Notice'.

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.

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Acronyms used

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 ¹
ESMA	European Securities and Markets Authority
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) ²

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>.

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

I. Executive Summary

Reasons for publication

ESMA sees merit in working to ensure the alignment of supervisory practices among European national competent authorities in the interpretation of certain key concepts of the Alternative Investment Fund Managers Directive (AIFMD). ESMA is seeking the views of external stakeholders on the policy orientations it has identified in order to progress its work to achieve a harmonised application of the Directive, and might consider developing some additional convergence tools for this purpose in future. Feedback to this paper will also be helpful in view of the draft regulatory technical standards (RTS) required by Article 4(4) of the Directive (see Annex II to this paper for the full text of this Article), which provides that ESMA shall develop draft RTS to determine types of AIFM, where relevant in the application of the AIFMD, and to ensure uniform conditions of application of the AIFMD.

Contents

Definition of AIFM

This section of the discussion paper provides some clarifications on the range of functions that an AIFM must carry out according to the provisions of the AIFMD and to what extent it may delegate these functions to third parties.

Definition of AIF

This section proposes some guidance on the criteria which may be extracted from the definition of AIFs in Article 4(1)(a) of the AIFMD and which may be relevant to the national competent authorities and financial market participants when determining whether or not an entity falls within the definition of AIF and, therefore, the entity managing it is within or outside the scope of the AIFMD.

Treatment of UCITS management companies

This section provides ESMA's interpretation on the interaction between the AIFMD and the UCITS Directive, in particular on the services that entities authorised under one of these two directives may provide under the other.

Treatment of MiFID firms and Credit Institutions

This section of the discussion paper is intended to clarify that MIFID firms and credit institutions may not be authorised as AIFMs, but may provide investment services such as individual portfolio management in respect of AIFs without falling within the scope of the AIFMD.

Next steps

Responses to this discussion paper will help ESMA in finalising its policy approach. In light of the feedback received, ESMA will develop a consultation paper in Q2 2012 setting out formal proposals for draft regulatory technical standards on Article 4(4) of the AIFMD. The results of that public consultation will be used by ESMA in finalising the draft regulatory technical standards to be submitted to the European Commission for endorsement by the end of 2012.

II. Background

1. Article 4 of the AIFMD includes definitions of some of the terms used in the Directive. Article 4(4) requires ESMA to develop regulatory technical standards to determine types of AIFM, where relevant in the application of the AIFMD, and to ensure uniform conditions of application of the AIFMD.
2. The different types of AIFM will manage a variety of AIF legal structures and a variety of asset classes. Potential AIFMs can also be firms which are currently subject to authorisation under the UCITS Directive; this paper also considers questions in relation to the interaction between the AIFMD and the UCITS Directive, including circumstances where there could be dual authorisations, and the interaction between the AIFMD and Directives 2004/39/EC ('MiFID') and 2006/48/EC ('CRD').
3. ESMA recognises that some of the issues related to the topics covered by the regulatory technical standards to be developed under Article 4(4) of the AIFMD may merit the development of further guidelines and recommendations or other convergence tools (e.g. Q&A) that ESMA may decide to develop in the future.

III. Definition of AIFM

4. In order to determine types of AIFM, where relevant in the application of the AIFMD according to Article 4(4), it is necessary to first consider the definition of 'AIFM' contained in Article 4(1)(b). In this context, the AIFM means any legal person whose regular business is managing one or more AIFs. Pursuant to Article 6(5)(d) an AIFM cannot be authorised to provide the functions referred to in point 1(a) of Annex I without also providing the functions referred to in point 1(b) of Annex I. 'Managing AIF' is defined in Article 4(1)(w) as performing at least the investment management functions referred to in point 1(a) or (b) of Annex I of the Directive, for one or more AIFs. These investment management functions are:
 - Portfolio management
 - Risk management
5. Whereas Article 6(5)(d) states that, in order to be authorised under the AIFMD, AIFMs have to provide portfolio management functions and risk management functions, Article 4(1)(w) defines the activity of managing AIFs as performing at least portfolio management functions or risk management functions.
6. ESMA considers that this means that an entity performing either of the two functions (i.e. portfolio management or risk management) is to be considered as managing an AIF according to Article 4(1)(w). Such entity must therefore seek authorisation as an AIFM under Article 6, it being understood that no such authorisation as an AIFM is required when the performance of either the portfolio management or the risk management function is done under a delegation arrangement with an AIFM in accordance with Article 20 of the AIFMD. Article 20 requires, in particular, that the entity to which the portfolio management or risk management functions are delegated is authorised or registered for the purpose of asset management and subject to supervision or, where that condition cannot be met, that the competent authorities of the home Member State of the AIFM must give their prior approval to the delegation arrangement. Article 6(5)(d) should be interpreted as requiring an AIFM to be capable of providing, and take responsibility for, both portfolio management and risk management functions in order to obtain an AIFM authorisation in accordance with the AIFMD.

7. Notwithstanding that the AIFM must be able to provide both functions in order to be authorised, it may choose to delegate the portfolio management and/or the risk management function. In such cases, and as set out above, the delegation of these functions should comply with the rules set out under Article 20 of the AIFMD and the relevant Level 2 measures. Therefore, the liability of the AIFM will not be affected by the fact that the AIFM has delegated the portfolio management and/or risk management functions to a third party, or by any further sub-delegation. Furthermore, neither of these functions may be delegated to such an extent that the AIFM becomes, in essence, a letter-box entity and can no longer be considered to be the manager of the AIF.
8. Subject to the requirements mentioned above, 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.
9. The above also means that, in order to be appointed as the AIFM for an AIF, it is not necessary for the AIFM to perform the additional functions set out in Annex I.
10. Notwithstanding 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 in relation to the functions set out under Annex I of the AIFMD, in compliance with both the rules on liability in case of delegation set out under Article 20(3) of the AIFMD and the principle expressed under Article 5(1) of the Directive according to which the single AIFM appointed for an AIF is responsible for the compliance with the AIFMD (i.e. also for the additional functions under Annex I).

IV. Definition of AIF

1. Types of AIF

11. It is not possible to define the types of AIFM without considering the types of AIF for which they act and, in particular, the different asset classes which are managed within these AIFs. Therefore, in order to determine the types of AIFM, one should look at the definition of AIF contained in the AIFMD. Notwithstanding that the AIFMD refers to “alternative investment funds”, the scope of the AIFMD is extremely wide-ranging in the context of the types of AIF covered.
12. The recitals to the Directive further clarify that AIFs can be open or closed ended, can take any legal form and can be admitted to trading on a regulated market. The definition does not limit AIFs in terms of the types of assets in which they invest. Assets can include, for example, traditional assets (equity, equity related, debt etc), private equity, real estate and also other non-traditional asset classes such as ships, forests, wine etc and any combination thereof.
13. It is likely that there are many different types of AIF established in Member States which are currently both regulated and unregulated and which will fall within the scope of the AIFMD. Most Member States currently authorise and supervise non-UCITS funds under their national legislation. This includes funds with a variety of legal structures and underlying assets and which are both open and closed ended, usually for public participation. However, due to the broad definition of ‘AIF’, there are almost certainly fund structures managed by potential AIFMs in Member States which are not currently subject to regulation and on which competent authorities have limited information.

2. Vehicles which are not AIFMs or AIFs or are exempted from the AIFMD

14. Article 2(3) of the Directive describes a series of entities that fall outside of its scope, whereas Article 3 provides for certain exemptions applying to entities which do not fall under Article 2(3) and that, therefore, would otherwise be within the scope of the Directive if they were not exempted.
15. As for the entities which fall outside the scope of the Directive, in accordance with Article 2(3)(a), holding companies are not AIFMs. Holding companies are defined as companies with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company: (i) operating on its own account and whose shares are admitted to trading on a regulated market in the European Union; or (ii) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents.
16. ESMA considers that the explicit exclusion of holding companies should not be used as a means to circumvent the provisions of the Directive.
17. Pursuant to the same article, the AIFMD does not apply to:
 - institutions for occupational retirement provision mentioned under Article 2(3)(b) of the AIFMD;
 - employee participation or savings schemes;
 - supranational institutions and national central banks;
 - national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems; and
 - securitisation special purpose entities.
18. Article 3(1) provides that AIFMs that manage one or more AIFs whose only investors are the AIFM or the parent undertakings or subsidiaries of the AIFM or other subsidiaries of those parent undertakings shall be exempted from the application of the Directive, provided that none of those investors is itself an AIF.
19. Finally, recital 7 of the AIFMD clarifies that investment undertakings, such as family office vehicles which invest the private wealth of investors without raising external capital, should not be considered to be AIFs, while recital 8 excludes insurance contracts and joint ventures.

Questions to stakeholders

- 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.**
- 2. Do you see merit in clarifying the terms ‘insurance contracts’ and ‘joint ventures’? If yes, please provide suggestions.**
- 3. Do you see merit in elaborating further on the characteristics of holding companies, based on the definition provided by Article 4(1)(o) of the AIFMD? If yes, please provide suggestions.**

4. Do you see merit in clarifying further the notion of any of the other exclusions and exemptions mentioned above in this section? If yes, please explain which other exclusions and exemptions should be further clarified and provide suggestions.

3. Mapping Exercise

20. ESMA carried out a mapping exercise among competent authorities of Member States to establish to the extent possible the types of AIF which currently exist in the EU. Based on the results of this mapping exercise, ESMA is aware that the following categories of AIF currently exist in the European market:

- a) Non-UCITS funds that invest in asset classes similar to those in which UCITS invest but which do not respect UCITS diversification or leverage requirements.
- b) Non-UCITS funds that invest in financial instruments that are not eligible assets for UCITS.
- c) Private equity funds which invest predominantly in unlisted equities of existing or mature companies.
- d) Venture capital funds which invest predominantly in unlisted equities of start-up or small firms.
- e) Real estate funds.
- f) Alternative investment funds investing in a wide variety of assets including ships, art, wine, patents/rights, forestry, coins, precious metals, endowment policies, carbon instruments, life sciences (pharmaceuticals and biotechnology) and commodities.

21. These AIFs may be regulated or unregulated and may be open or closed ended.

22. The categories above do not refer specifically to hedge funds, but funds which are typically referred to as hedge funds will fall, in particular, under categories a), b) and f).

23. While the mapping exercise was useful, it does not give a definitive guide in relation to determining the types of AIF in existence. Moreover, AIFs may consist of one or more asset classes or a combination of many. ESMA has determined that concentrating on the asset classes of AIFs or the investment strategies applied to those assets classes is not the correct approach in determining the type of fund that would constitute an AIF, not least because, as previously stated, the definition in Article 4(1)(a) does not limit AIFs in terms of types of asset or investment strategy. Consideration of the investment strategies employed, for example, is more of relevance to competent authorities in the context of their regulation of the AIF. In this regard, ESMA sees merit in developing other criteria to identify AIFs with a view to establishing a harmonised application of the AIFMD.

4. Proposed Criteria to identify an AIF

24. Pursuant to Article 4(1)(a) of the AIFMD, AIFs are collective investment undertakings, including investment compartments thereof, which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors. The following criteria can be extracted from that definition.

Raise Capital

25. Raising capital for the purpose of collective investment is an activity which could take place in many situations. A group of people could make arrangements to buy property so that they and their successors in title can share in the use or enjoyment of that property, or make it available to others on a non-

commercial basis, rather than seeking to make a profit from the investment. For example, a group of householders might purchase a piece of neighbouring land in order to preserve or develop it as an amenity and prevent it from being used for housing or commercial exploitation. Such cases should not be considered as AIFs since the capital raising and the investment are primarily undertaken for non-commercial purposes and are not intended to deliver an investment return or profit. It is also conceivable that such arrangements do not involve the raising of external capital, although that would seem to depend on the particular circumstances of the case.

26. It therefore seems that capital raising for the purposes of the AIFMD definition must involve some kind of communication by way of business (which may or may not constitute marketing within the meaning of the AIFMD) between the entity seeking capital or a person acting on its behalf, and the prospective investors, which results in the transfer of investors' cash or other assets to the AIF. This activity might take place only once (as in the case of the initial subscription to a closed-end fund) or on an ongoing basis (as with certain open-ended funds).
27. It would not however be sufficient to say that the absence of capital raising is conclusive evidence that an entity is not an AIF. For example, where an AIF (which itself originally raised capital from investors) is liquidated and some or all of its assets are transferred to become the first property of another newly-constituted entity, it would be wrong to argue that the new entity cannot itself be an AIF because it did not raise its capital directly from investors.

Collective Investment

28. An AIF for the purposes of the Article 4 must be a collective investment undertaking which pools together capital raised from investors. A collective investment undertaking should have the purpose of generating a return for its investors through the sale of its investments as opposed to an entity acting for its own account and whose purpose is to manage the underlying assets with a view to generating value during the life of the undertaking.

Number of Investors

29. It follows from the reference to 'a number of investors' that the AIF's rules or instruments of incorporation cannot contain provisions which restrict the sale of units/shares to a single investor. Where the AIF's rules or instruments of incorporation do not restrict the sale of units/shares to a single investor, the AIF is considered to be raising capital from a number of investors. However, where a single investor represents a number of underlying beneficial owners e.g. in the case of nominee arrangements or feeder/fund of fund investments, the fund falls within the definition of AIF for the purposes of the AIFMD.

Defined investment policy

30. The AIF invests in accordance with the investment policy of the AIF. As noted above, assets can include traditional asset classes, private equity, real estate and other non-traditional asset classes such as ships, forests, wine etc.
31. The following indicative criteria could be taken into account in determining whether or not an entity has a defined investment policy:

- the final form of the investment policy is fixed, at the latest, by the time that investors' commitments to the entity become binding on them;
- the investment policy is likely to be set out in a document which becomes part of, or which is incorporated in, or is referenced in, the constitutional documents of the entity;
- a contractual relationship between the entity and the investor binds the entity to follow the investment policy (as it may be further amended);
- the investment policy contains a series of investment guidelines. For example, only to:
 - invest in certain categories of asset, or conform to restrictions on asset allocation;
 - pursue certain strategies;
 - invest in particular geographical regions;
 - conform to restrictions on leverage;
 - conform to minimum holding periods; and/or
 - conform to other restrictions designed to provide risk diversification.

These guidelines may be relatively broad or narrow, but by their nature they determine more precise criteria than the ones followed by an ordinary company which simply has a “business strategy” or in certain cases (depending on the nature of its commercial activities) an ‘investment strategy’.

- the investment policy is clearly set out and disclosed to investors;
 - any change to the investment policy is disclosed to the investors and in many cases investors provide their consent to such change; in cases where the prior consent of investors is not required in order to change the investment policy and the fund is open-ended, the investors may be offered the opportunity to redeem their holdings within a given period of time free of charge;
32. Beyond the criteria set out above, further factors could be relevant in determining whether an entity is an AIF, such as those set out below.

Ownership of underlying assets

33. Investors in AIFs are generally not the registered holders of the underlying assets and do not individually directly own the underlying assets, but rather their ownership of the assets is represented by shares/units in the AIF. Indeed, some Member States draw a distinction between beneficial and legal ownership, such that the beneficial owner enjoys the benefits of ownership with legal title held by another person (for example, a trust or a nominee company). In cases of beneficial ownership, investors usually have beneficial entitlement to profits or income arising from their investment in the assets held by the AIF.

Control of Underlying Assets

34. The AIFM or internally-managed AIF must have responsibility for the management of the AIF’s assets. Investors have day-to-day no discretion or control over these assets.

Questions to stakeholders

5. **Do you agree with the orientations set out above on the content of the criteria extracted from the definition of AIF?**
 6. **Do you have any alternative/additional suggestions on the content of these criteria?**
 7. **Do you agree with the orientations set out above on the notion of raising capital? If not, please provide explanations and an alternative solution.**
 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?**
 9. **Do you agree with the analysis on the ownership of the underlying assets in an AIF? Do other ownership structures exist in your jurisdiction?**
 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.**
5. **Proposed criteria to determine the application of the AIFMD to certain types of AIF**
35. Article 4(4) requires the development of regulatory technical standards by ESMA to determine types of AIFM for the purposes of consistent harmonisation and uniform application of the conditions of the AIFMD. Many of the articles apply equally to all types of AIFM but others will be applied differently, in most cases with respect to the types of AIF under management. These are as follows:
- Article 9 imposes different initial capital requirements to internally-managed versus externally-managed AIFs.
 - Article 13 (by reference to Annex II, paragraph 3) requires AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities to establish a remuneration committee.
 - Article 14 applies specific requirements in relation to conflicts of interest management where the AIFM on behalf of an AIF uses the services of a prime broker.
 - The provisions of Article 16 in relation to liquidity management do not apply to unleveraged, closed-ended AIFs.
 - Article 19(3) applies different requirements in relation to the frequency of valuation for open-ended and closed-ended AIFs.
 - Article 21(3) allows different types of entity to be eligible as depositary for those AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which invest in specific types of asset.
 - Article 24(4) imposes additional requirements on reporting to competent authorities on AIFMs managing AIFs that employ leverage on a substantial basis.
36. ESMA's Level 2 advice to the Commission acknowledges that the principle of proportionality should be respected. In this regard it is acknowledged that other differences may be applied depending on the nature, scope and complexity of the activities of the AIFM and the AIF it manages. It is noted that proportionality does not apply to all articles.

37. Therefore, for the abovementioned articles of the AIFMD their application depends on whether the AIF is:

- open or closed-ended – Article 16 and Article 19(3);
- significant in size – Article 13;
- leveraged / employs substantial leverage– Article 16, 24(4);
- internally or externally-managed – Article 9; or
- contracts with a prime broker – Article 14.

38. When a particular AIFM falls within the scope of the AIFMD, a determination must be made as to whether the AIF it manages is to be regarded as open-ended or closed-ended, of a significant size or is leveraged (including whether leverage is employed on a substantial basis).

Application of Articles 16 and 19(3)

39. AIFs may be open or closed-ended. It is important to distinguish between open- and closed-ended AIFs wherever this distinction is relevant for the application of the AIFMD (i.e. to apply the provisions on liquidity management in Article 16 of the AIFMD and on valuation in Article 19).

40. An open-ended fund is generally considered to be one which provides redemption facilities to investors, while a closed-ended fund does not provide such a right. If no consideration is given to AIFs which are only nominally open-ended (i.e. they provide redemption facilities at very infrequent intervals, such as less than annually or after a period of five years), such funds will be subject, for instance, to the liquidity management requirements of Article 16 and the future implementing measures. In order to avoid taking a disproportionate approach, there may be grounds for considering such AIFs as closed-ended for the purposes of the AIFMD.

41. Therefore, ESMA is of the view that open-ended funds are those funds the units/shares of which may be, at the holder's request, repurchased or redeemed without any limitation, directly or indirectly, out of the assets of these undertakings at least annually. This interpretation is relevant only in the context of the AIFMD and is without prejudice to equivalent definitions in other pieces of EU legislation.

Application of Article 13 and Annex II

42. In order to apply the provisions of Article 13 and Annex II on remuneration, consideration needs to be given as to what constitutes an AIF of significant size. As ESMA has commenced work on guidelines on sound remuneration policies required under Article 13(2), it is proposed to address this issue in that context.

Questions to stakeholders

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?

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

V. Appointment of AIFM

43. Article 5 of the AIFMD requires Member States to ensure that each AIF shall have a single AIFM with responsibility for compliance with the requirements of the AIFMD.
44. Article 5 recognises that, depending on the structure of the AIF, there may be more than one legal entity which could be appointed as AIFM to that AIF. For example, the AIFM might be:
- the AIF itself where the legal form permits internal management, as in the case of corporate AIFs (and possibly that of limited partnerships); or
 - another entity acting on behalf of the AIF, who is responsible for portfolio management and risk management functions for the AIF and is appointed by it as the AIFM for the purposes of the AIFMD.
45. However, Article 5(1) is clear that only one of these entities can actually be appointed as AIFM and be subject to the requirements of the AIFMD. There are no provisions in the AIFMD which impose conditions or criteria on the AIF for the appointment or selection of the AIFM. Therefore, the AIF is free to appoint any legal person as AIFM provided this entity is authorised under the AIFMD.
46. Article 20 of the AIFMD sets out requirements where an AIFM intends to delegate to third parties the carrying out of functions on its behalf. The AIFM can delegate the performance of investment management and/or risk management to a third party subject to the conditions set out in Article 20 and the future Level 2 implementing measures on delegation. It is important to distinguish between circumstances where a legal entity is performing investment management functions for an AIF under a delegation arrangement and situations where the legal entity is the appointed AIFM for the AIF.
47. It should be noted that a company which performs portfolio management or risk management functions for an AIF can be the appointed AIFM or it can perform one or both of these functions under a delegation arrangement. The agreement entered into between the AIF and the third party should be clear regarding the nature of the relationship and the responsibilities of each party.

VI. Treatment of UCITS management companies

48. Article 6(2) provides that an AIFM may also act as a management company for UCITS provided the AIFM is authorised in accordance with UCITS Directive for that activity. The UCITS Directive currently permits UCITS management companies to manage non-UCITS collective investment schemes. After the entry into force of the AIFMD, a UCITS management company which manages AIFs and which is appointed as the AIFM for the purposes of the AIFMD will no longer be subject to the UCITS Directive for that activity and will instead be required to obtain an additional authorisation under the AIFMD.
49. It will also be possible for a UCITS management company to provide services, including investment management services, to AIFs but not to be the appointed AIFM – this is because, for example, the AIF is internally managed or the UCITS management company provides administration services and the selected AIFM is the investment manager to the AIF. In this case all of the UCITS management company's activities will continue to be covered by its authorisation under the UCITS Directive and it will not need to seek authorisation under the AIFMD.

50. It will be possible for a single entity to hold both a UCITS and AIFMD authorisation. Moreover, both Directives (Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive) permit firms to be additionally authorised to provide discretionary portfolio management, including investment advice and safe-keeping and administration of units in collective investment undertakings.
51. Article 6(4) of the AIFMD additionally allows AIFMs to be authorised to provide receipt and transmission of orders. This is not an additional activity which is permitted for UCITS management companies in the UCITS Directive. ESMA is of the view that AIFMs which are also UCITS management companies should be able to carry out this additional activity under their AIFMD authorisation, provided conflicts of interest are taken into account.

Questions to stakeholders

13. Do you agree with the above analysis? If not, please provide explanations.

VII. Treatment of MiFID firms and Credit Institutions

52. Article 6(8) of the AIFMD states that investment firms authorised under Directive 2004/39/EC (MiFID) and credit institutions authorised under Directive 2006/48/EC (the Banking Consolidation Directive) are not required to obtain authorisation under the AIFMD to provide investment services such as individual portfolio management to AIFs. This allows MiFID firms and credit institutions to continue to provide services to AIFs under delegation arrangements, subject to the rules set out under Article 20 of the AIFMD and the relevant Level 2 measures.
53. Article 6(2) states that no external AIFM can engage in activities other than those referred to in Annex I of the AIFMD and the additional management of UCITS. By way of derogation, Article 6(4) permits an AIFM to provide portfolio management services to clients including AIFs where it is not the appointed AIFM. The AIFM may also provide non-core services to clients i.e. investment advice, safe-keeping and administration and receipt and transmission of orders.
54. A firm which is authorised under 'MiFID' or the Banking Consolidation Directive "cannot be the appointed AIFM for an AIF nor obtain authorisation under the AIFMD. The AIFMD allows dual authorisation only in the case of AIFMs and UCITS management companies. However, according to Article 6(8) of the AIFMD, MiFID firms and credit institutions may provide investment services such as individual portfolio management in respect of AIFs. In this respect, the thresholds in Article 3(2) are not relevant since in any case the entity concerned – be it a MiFID firm or a credit institution – would not be considered as an AIFM under the Directive.

Questions to stakeholders

14. Do you agree with the above analysis? If not, please provide explanations.

Annex I - Summary of questions

IV. Definition of AIF

- 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.**
- 2. Do you see merit in clarifying the terms ‘insurance contracts’ and ‘joint ventures’? If yes, please provide suggestions.**
- 3. Do you see merit in elaborating further on the characteristics of holding companies, based on the definition provided by Article 4(1)(o) of the AIFMD? If yes, please provide suggestions.**
- 4. Do you see merit in clarifying further the notion of any of the other exclusions and exemptions mentioned above in this section? If yes, please explain which other exclusions and exemptions should be further clarified and provide suggestions.**
- 5. Do you agree with the orientations set out above on the content of the criteria extracted from the definition of AIF?**
- 6. Do you have any alternative/additional suggestions on the content of these criteria?**
- 7. Do you agree with the details provided above on the notion of raising capital? If not, please provide explanations and an alternative solution.**
- 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?**
- 9. Do you agree with the analysis on the ownership of the underlying assets in an AIF? Do other ownership structures exist in your jurisdiction?**
- 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.**
- 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?**
- 12. Do you see merit in clarifying further the other concepts mentioned in paragraph 37 above? If so, please provide suggestions.**

VI. Treatment of UCITS management companies

- 13. Do you agree with the above analysis? If not, please provide explanations.**



VII. Treatment of MiFID firms and Credit Institutions

14. Do you agree with the above analysis? If not, please provide explanations.



Annex II – Legislative mandate to develop technical standards

The Regulation (EU) No 1095/2010 establishing ESMA, empowered the latter to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU.

Article 4(4) of the AIFMD provides that: *‘The European Supervisory Authority (European Securities and Markets Authority) (ESMA) shall develop draft regulatory technical standards to determine types of AIFMs, where relevant in the application of this Directive, and to ensure uniform conditions of application of this Directive.*

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010’.