



ASSOGESTIONI
associazione del risparmio gestito

Rome, 23 March, 2012

ESMA
European Securities and
Market Authority
103 Rue de Granelle
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Prot. N. 207/12

Response to the Discussion Paper concerning key concepts of the Alternative Investment Fund Managers Directive and types of AIFM

Assogestioni, the Italian association of asset management companies, welcomes the opportunity to comment on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM.

We deem it really outstanding to promote a uniform interpretation in respect of such primary aspects of the directive. Once clarification on the scope of the directive is made, through specification of the minimum contents of management activity and the extent of the category of AIF, it will be possible to work towards harmonization across Member States in the application of the directive.

We generally agree with the content of the discussion paper. However, we deem that some points could be better specified.

Before answering your questions, we would like to express our view on the first issue treated in the discussion paper, which is, in our opinion, very important, although it is not object of a specific question.

Comment on Paragraph 6

An ambiguity seems to arise from paragraph 6 and paragraph 7 of the discussion paper, where the AIFM is allowed to perform only one of the two functions and to delegate the other one. The fact that the AIFM delegates one of the two functions (risk management or portfolio management) does not mean that it is not performing both functions according to article 4(1)(w). Performing a function means primarily to have the liability of that function, even if, *de facto* it is delegated to a third party. Therefore, in order to avoid any ambiguity, it should be specified that an AIFM authorized under AIFMD should be considered as performing both functions, even if the AIFM delegates one of the two functions.



Comment on Paragraph 7

We agree that an AIFM should not delegate its functions to such an extent that it becomes, in essence, a letter-box entity, but we do not agree that an AIFM cannot delegate both functions (risk management and portfolio management) in whole at the same time. The fact that the AIFM delegates both functions in whole does not directly imply that it becomes a letter-box entity. According to the definition of letter-box entity contained in the ESMA “technical advice on possible implementing measures on Alternative Investment Fund Manager Directive” an AIFM which maintains the necessary expertise and resources to supervise the delegated tasks and has the power to take decisions in key areas which fall under the responsibility of senior management could still be considered to be the manager of the AIF. Therefore, it should be clarified that an AIFM is not forbidden to delegate both functions in whole at the same time if it maintains the control over the delegated activity. In particular, AIFMs should hold adequate resources, structures and procedures which enable them to define general characteristics of each product, risk-profile, maximum risk level, and to check how investments are coherent with the defined investment strategies.

Comment on Paragraph 10

Furthermore, we do not agree with the ESMA’s view on the additional functions set out in Annex 1 of the AIFMD. In our opinion, when the additional functions are performed by a third party, these functions should not directly be considered as having been delegated to a third party. In fact, it is possible that an AIF may appoint third parties for other functions, such as distribution or administrative tasks.

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

We deem that ESMA could better specify the notion of family office through the following criteria:

1. The vehicle does not raise capital from investors other than the family office investors. It is still considered family office when it raises external capital such as bank loans;
2. The presence of a family relationship between the investors;
3. The business relationship between the investors is likely to pre-date the relationship between the investors and the vehicle.

Question 2. Do you see merit in clarifying the terms “insurance contracts” and “joint ventures”? If yes, provide your suggestions.

In our opinion, one possible way to specify the difference between an AIF and a joint venture could be to focus on the role of investors. As stated in the ESMA discussion paper, investors don’t have any role in the management of the fund. Therefore,



when investors are directly involved in the day-to-day management of the portfolio, the vehicle could be considered a joint venture, rather than an AIF.

Question 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 your suggestions.

No, the “holding company” concept is clear.

Question 4. Do you see merit in elaborating 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.

It would be opportune to clarify whether SPAC (Special purpose acquisition company) and SIV (Structured investment vehicle) are excluded from the scope of the directive.

Question 5. Do you agree with the orientation set out above on the content of these criteria extracted from the definition of AIF?

We generally agree with the orientation set out by ESMA on the content of the criteria extracted from the definition of AIF.

In particular, with regard to the reference to “a number of investors”, ESMA states that AIF’s rules or instruments of incorporation cannot contain provisions which restrict the sale of units/shares to a single investor. In our view, in order to be considered an AIF, the presence of a number of investors should remain *de facto* during the life of the fund.

With regard to the changes to the investment policy, we deem that this should not be considered as one of the elements of the definition of “investment policy”. The regulation of the consequences for the investors arising from changes to the investment policy is a matter of the contractual provisions rather than part of the definition of the investment policy.

Furthermore, ESMA could underline the importance of the reference to the obligation for AIFs to “conform to other restrictions designed to provide risk diversification”. This could help to distinguish AIFs from other types of vehicles, which collect capital from investors with the purpose of investing in one specific business. Investment diversification is a particular characteristic of an AIF that should be highlighted in the investment policy.

In our opinion, the “particular geographic region” is not an essential element which qualifies the investment policy.

With regard to Paragraph 29, we deem that ESMA could specify that a pension fund, which is acting in the interest of its investors, should not be considered as a single



investor. It should be the same for insurance companies and for firms performing portfolio management which buy AIF on behalf of their clients.

Question 6. Do you have any alternative/additional suggestions on the content of these criteria?

No, we do not have any other suggestions regarding the content of these criteria.

Question 7. Do you agree with the details provided above on the notion of raising capital? If not, please provide explanations and an alternative solution.

Yes, we agree with the definition of “raising capital” proposed by ESMA.

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

We agree that co-investments of the manager should be taken into account to determine that capital was raised from a number of investors, especially in case of a new open-ended fund, which starts its activity simply by using the capital of a single investor, usually the manager (“seed money”), with the purpose of investing it in a diversified portfolio and to propose itself to investors with an effective track record.

Question 9. Do you agree with the analysis on the ownership of underlying assets in an AIF? Do other ownership structures exist in your jurisdiction?

Yes we agree with the analysis on the ownership of underlying assets proposed by ESMA.

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

We generally agree with the analysis ESMA developed to extract identifying criteria of AIFs from article 4(1)(a) of the Directive and in particular with the concept that investors do not have any control on underlying assets; nonetheless, with regards to the necessary absence of any investor discretion or control on the underlying assets in an AIF, we would see merit in clarifying that this provision doesn't affect the right of the investors to exercise control over the managing activity of the Fund Manager. We deem, therefore, that ESMA could better specify the difference between controlling the assets and controlling the AIFM activity. In some cases investors have the possibility to exercise influence over manager activity without being able to dispose of the assets directly (such as the assembly and the advisory committee's powers in real estate funds).

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



considered as closed-ended?

With regard to the definition of open-ended and closed-ended funds, we believe that the definition should not be based on the frequency at which a fund gives investors the possibility to repurchase or redeem the units/shares: if the repurchasing/redemption process has to be considered in order to define closed-ended funds, we suggest that no reference to the frequency is made.

For this purpose we suggest rewording the first sentence of paragraph 41 as follows: “(...) 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.” This definition does not prevent the asset manager from repaying the clients at fixed terms according to the funds rules.

Furthermore, we deem that a fund should still be considered open-ended even if applying side pockets, gates or suspension of liquidity under special circumstances.

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

We would see merit in a clarification of the concept of “Leveraged/ employs substantial leverage”, in order to define which AIFs will fall under the additional reporting duties under Article 24 (4).

Furthermore, some doubts could arise from the considerations proposed by ESMA in its Level 2 advice. In particular, it is not clear how “the type of AIF under management including its nature, scale and complexity” shall allow any conclusions for the level of leverage employed by the fund.

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

We agree with the analysis on the interaction between the authorization under AIFMD and the authorization under UCITS directive. However, in order to avoid any doubts on the concrete application of the discipline we deem that ESMA, with regard to the content of article 7(4), could better specify which information or documents the AIFM is not required to provide to competent authorities.

Furthermore, as well as the case of UCITS management company managing AIFs, it could be useful to clarify the regulation for AIFMs authorized under AIFMD managing UCITS.

We also agree with the content of paragraph 51 that AIFMs which are also UCITS management companies should be able to provide receipt and transmission of orders under their AIFMD authorization.



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

We strongly agree with the ESMA analysis on the inability for MiFID firms and credit institution to obtain the AIFMD authorization. We deem it crucial for the asset management industry that only certain entities are allowed to promote and manage collective undertakings. Investment firms, authorized under MiFID, can manage AIFs performing an “investment service” and can be appointed to perform the “additional” functions set out in Annex I of the AIFMD. MiFID firms and credit institutions can never be appointed as AIFM to perform the two core investment management functions of the AIFM (portfolio management and risk management).

General Director