

ESMA
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Natixis Asset Management response to ESMA consultation on possible implementing measures of the Alternative Investment Fund Managers Directive

Natixis Asset Management is grateful for the opportunity to respond to ESMA's consultation on possible implementing measures of the Alternative Investment Fund Managers Directive (the AIFMD or the Directive)

Natixis Asset Management is one of Europe's leading asset managers. It offers a wide range of effective management solutions, based on extensive expertise in European and specialized asset management. Natixis Asset Management provides services to a diverse client base: institutional investors, large companies, distributors, Banque Populaire and Caisse d'Epargne clients. For more information about Natixis Asset Management, please visit www.am.natixis.fr

NAM supports AFG and EFAMA response to ESMA consultation on possible implementing measures of the Alternative Investment Fund Managers Directive.

NAM wishes to express itself on the following points :

NAM appreciates the approach adopted to ensure that the implementing measures of the AIFMD are as far as possible in line with existing regulations such as the UCITS Directive or the MiFID. We also manage UCITS funds and we provide MiFID services and it would be very difficult for us to apply inconsistent sets of rules. However, this should of course not prevent where appropriate any differentiation between UCITS and AIFs due to the partly different nature of these two types of funds.

NAM supports the implementation of the principle of proportionality throughout all level 2 measures, in particular with regards to risk and liquidity management and transparency.

We hope that some clarification may be made to measure level of implementation of the Directive (see detailed comments) and that they will be adopted in order to preserve the harmonization under the EU.

[Article 3 Exemptions](#)

[Box 1 - Calculation of the total value of assets under management](#)

- 3 – We support the **exclusion of cross-holdings in the calculation of the value of total assets under management (AUM)** as this will avoid double-counting the same assets.

5.b – “The situation should not be considered to be of a temporary nature if it is likely to continue for a period in excess of three months.” : we believe that the temporary nature of the situation should be assessed over a period longer than 3 months - depending on the frequency of the NAV calculation, i.e. **a period of at least 6 months** as some NAVs are

calculated on a monthly basis or sometimes at an even lower frequency. It would be a practical case of proportionality to be applied for this Directive.

ESMA should make clearer in its Boxes that “monitoring” does not imply “calculating”, as some NAVs are calculated at a low frequency and not on an ongoing basis.

- Q3: NAM does not consider that using the annual net asset value calculation is an appropriate measure for all types of AIF. The AIFMD will cover a very broad universe of AIF and a differentiated solution needs to be found to achieve a satisfactory result.

Box 2 - Calculation of Leverage

- For funds of hedge funds, **the leverage that exists at the level of the underlying hedge funds should not be taken into account in the calculation of the leverage**, similarly to Private Equity Funds, and as it would be very difficult to do in practice as such.

Box 3 - Information to be provided as part of registration

- 4 – **“NAM believes that the provision of updated information on a quarterly basis is too frequent** and will be too burdensome for both authorities and AIFMs. We therefore suggest that such provision should be made **annually**.
- 5 – *“Competent authorities may require the AIFM to provide the information set out in paragraph 1 and 2 on a more frequent basis.”*

We fear that a non exhaustive list of information and the discretion allowed to competent authorities regarding the frequency of such information may lead to a lack of harmonisation among the Member States and in turn create difficulties for AIFMs belonging to pan-European groups. We believe that an exhaustive list and a frequency set at EU level would be more appropriate.

General operating conditions

Box 6 - Potential risks arising from professional negligence to be covered by additional own funds or professional indemnity insurance

- Additional capital and insurance requirements should **be aligned with current practices** - e.g. potential liability risks to be covered should not include risks in relation to fraud – and should be **capped**
- 1 – *“The AIFM must be able to cover the potential liabilities arising from professional negligence.”*

We believe that the above requirement is too wide and would generate significant costs for AIFMs. Moreover, there is no reason why the latter should be subject to such an obligation, while other market participants are not. No other industry is subject to such unlimited obligation.

- Box 6 para. 2a – **NAM does not agree that potential liability risks to be covered include risks in relation to fraud. Risks in relation to fraud are not mentioned in Article 9 AIFMD.**

Box 8 - Quantitative Requirements

- 1 - **We support option 1** as it is more straightforward and less volatile than option 2, partly based on the “relevant income” which might be difficult to interpret and determine in practice and might lead to an unlevel application by national authorities. In our opinion, the requirements in terms of own funds may prove too burdensome. We therefore urge ESMA to apply proportionality in developing these measures.
- 4 – We believe that the competent authority of the home Member State of the AIFM should be allowed to increase the additional own funds requirements in exceptional circumstances only and provided it can justify such an increase is necessary. In addition, we would suggest ESMA to set a maximum amount of additional own funds that national authorities may request.

We believe that the possibility for the competent authority of the home Member State of the AIFM to reduce the additional own funds requirements is not appropriate. Indeed, such national derogations might lead to regulatory dumping, as these reductions would only depend on the relevant AIFM and authority. **We think that such reductions should be allowed only at pan-EU level by ESMA, applicable to all EU AIFMs.**

Box 9 - Professional Indemnity Insurance

The calculation of the coverage of the insurance as proposed in points 2 & 3 seems extremely **complicated**. Moreover, it depends on the claims received by the AIFM - for instance, it is not clear what happens if the AIFM does not receive any.

No insurance policy can cover all risks with no exception.

It would therefore be appropriate to describe the risks to be covered in an exhaustive manner, with minima and maxima.

Box 10 - Duty to act in the best interests of the AIF or the investors of the AIF and the integrity of the market

There is no reason why AIFMs should be subject to such obligation while other market players are not.

Box 18 - Inducements

The proposed measures on inducements should only apply to direct marketing by the AIFM

First and foremost, we would like to clarify that the provisions in box 18 apply **in relation to the distribution of funds only**, and not in relation to discretionary mandates (which are covered by MIFID). Indeed, although the latter are not in the scope of the Directive, they might be part of the activities of an AIFM.

We understand that the proposed measures should apply to direct marketing by the AIFM only. **We strongly disagree that they should also apply to “indirect marketing”**. Indeed, we do not believe that distribution via intermediaries constitutes part of the fund management services as specified in Annex I to the AIFMD. External intermediaries who are not tied agents act in their own capacity and under their own responsibility. Their relationship to the AIFM is based upon distribution agreements which set out the duties and obligations of each party and ensure compliance with their respective legal requirements. Third-party distribution cannot be deemed part of the collective portfolio

management activities and the term “marketing” in Para. 2 (b) of Annex I of the AIFMD¹ can only refer to direct distribution by the AIFM, by its tied agents, and possibly to marketing on behalf of the AIFM by a placing agent for a closed-end investment company IPO.

We do not see why distribution fees should generate conflicts of interest; fees and commissions received by intermediaries as remuneration for the distribution service are a necessary cost and are already regulated, subject to the conditions of Art. 26 (1) (b) of the MiFID Level 2 Directive and to disclosure to investors at the point of sale. In any case, we strongly believe that the AIF or the AIFM on behalf the AIF must be able to pay retrocessions to distributors or clients. In this respect, the KIID introduced for UCITS is in our opinion a good information tool for clients that might be useful also for AIFs’ investors.

We suggest ESMA to develop rules that are in line with the UCITS directive, i.e. disclosure should be made to the AIF, not to the AIF’s investors. This would ensure consistency with existing regulations and a better harmonisation.

Finally, we would welcome clarification regarding the treatment of ongoing fees which are not distribution fees. Indeed, we doubt it would be useful to inform investors on all the different components of these ongoing fees, as investors are primarily interested in the global cost of their investment. Therefore, we believe that a further split of the fees would not be relevant. In any case, the AIFMD regulates the marketing to professional investors which may ask for further information on a tailored basis. Consequently, the Directive should leave these disclosure rules to contractual provisions.

Boxes 20 to 30 - Measures on conflicts of interest and on risk management

We strongly support the implementation of the principle of proportionality in the proposed measures on conflicts of interest and on risk management.

Regarding measures on conflicts of interest (boxes 20 to 24), we support the alignment with MiFID and UCITS Directive, as far as possible, as this approach will allow consistency among the rules applying to AIFs and UCITS and consequently not generate any additional burden for management companies managing both types of funds.

Boxes 35 to 37 - Measures on investment in securitisation positions

AIFMs can’t be required to verify that the originator, sponsor or original lender retains a net economic interest retained of at least 5%. AIFMs can only check in the documentation of the securitisation product that the originator sponsor or original lender pledges to fulfil this retention requirement throughout the life of the product. Only regulators are in a position to control that the originator sponsor or original lender complies with such obligation.

Box 42 - Introduction of new underlying exposures to existing securitisations

We urge ESMA to ensure that the requirements set in the AIFMD are consistent as far as possible with the provisions contained in CRD.

Box 44 - General requirements on procedures and organisation

We generally support the implementation of the principle of **proportionality** and the **alignment**, as far as possible, with MiFID and the UCITS directive.

¹ Marketing is defined in Article 4 (1) (x) of the Level 1 text as ‘... a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union’.

Box 63 – Delegation

We welcome the proposals by ESMA in Box 63. The Explanatory Text Para. 9 and 11 are considered very important for the understanding of the proposals in Box 63, in particular the term of “critical and important functions”. We therefore urge ESMA to include the clarifications directly into Box 63.

Box 65 - Objective Reasons

NAM supports option 2. Indeed, option 1 implies subjective criteria (“a more efficient conduct”) and is redundant (principle already set at in the Directive at Level 1).

Option 2 is in line with the criteria for best selection in the MiFID. However, we would like to clarify that the criteria proposed in option 2 are not cumulative and re-word as follows: “Objective reasons for delegating tasks include but are not limited to one or several of the following criteria”

Box 66 – Sufficient resources and experience and sufficiently good reputation of the delegate

We feel that these proposed requirements are too detailed and burdensome, and go far beyond what is required under the UCITS directive. We therefore ask for a closer alignment between the approach taken under the AIFMD and the one followed for the UCITS framework.

Box 67 - Types of institution that should be considered to be authorised or registered for asset management and subject to supervision

We think that authorising management companies to delegate to credit institutions will lead to regulatory arbitrage and a stretch of the directive's rules. It could fully void the aim of AIFMD if its requirements can be easily circumvented through the use of a credit institution. **Therefore, we strongly believe that delegations should be allowed to entities authorised for investment management only.**

It is even more crucial here as we have to bear in mind the fact that the Directive will also apply to entities located in third countries.

Depositories

Box 74 – Contract appointing the depositary

We have not identified the law applicable to contracts. We understand that this is the law of the AIF. We hope that a clarification will be made on this point

Box 78 – Definition of financial instruments to be held in custody - Article 21(8) (a)

All financial instruments that are held in custody within the depositary's network and “registered” in an account open in the name of the custodian should be considered as **kept in custody**, as the only one which can claim these assets is the depositary itself (box 78 p.21)

Box 79 - Treatment of collateral

We prefer option 2.

However, in order to clarify that the instruments posted as collateral may be held in custody by the entity that receives them, we suggest re-wording as follows: “Financial instruments **provided** as collateral should not be held in custody **by the collateral provider's depositary**”

Moreover, the draft advice does not explicitly deal with collateral received by the depositary or any sub-custodian for the benefit of the AIF. We are of the view that any financial instruments received as collateral should be regarded as having been “entrusted to the depositary for safe-keeping” within the meaning of Art. 21(8) AIFMD.

Besides, we strongly believe that the obligation to return the assets should not be restricted to assets that are not pledged. Indeed, the amount of the AIF's assets pledged by the bank may be more than the value of the loan contracted by the AIF.

We have the opinion that, while the depositary should be able to re-use a collateral, the legal ownership to the relevant financial instruments should not be transferred to it **without prior consent of the AIFM**.

Box 89 – Segregation

Assets should be segregated in three parts at the level of the depositary or sub-custodian: apart from the own depositary's (or own sub-custodian's) assets, **client assets should be split in two parts**, between an account open for funds' assets and another account for the rest of the clients' assets in order to ensure the right protection of fund investors in case of depositary bankruptcy, to transfer easily and promptly the fund assets to another depositary thanks to an easy identification of fund assets in the bankrupted depositary – as already successfully tested in real cases in the past

Possible implementing measures on methods for calculating the leverage of an AIF and the methods for calculating the exposure of an AIF

Box 93 -General Provisions on Calculating the Exposure of an AIF

The methods to be used to measure the exposure of an AIF should be in line with the methods applicable to UCITS (i.e. commitment or VaR, at the choice of the AIFM). The gross method of calculation is highly misleading and is not relevant

- 4. *“To comply with its obligations with respect to Article 25(3) of Directive 2011/61/EU, AIFM may in addition to calculating exposure under the Gross Method and Commitment Method, and upon notification to the competent authorities of its home Member State, calculate the exposure of an AIF under its management in accordance with the Advanced Method set out in Box 97”.*

We believe that the number of methods to be used to calculate the exposure of the AIF should be proportionate to the size and type of the AIF, i.e. to the type of assets in its portfolio and the purpose of the leverage. For instance, the use of a single methodology would reduce the burden on asset management companies that manage both UCITS and “UCITS like” funds. In other words, **the choice of the calculation method should be up to the manager, which will be in a position to pick for each AIF it manages the calculation method most suitable to the profile of the AIF.**

The methods to be used should be in line with the methods applicable to UCITS (i.e. commitment or VaR, at the choice of the AIFM). Indeed, most AIFs are “UCITS like funds”. For instance in France, nationally regulated “general purpose” funds represent an AUM of EUR 560 Billion (French investment funds in the scope of the AIFMD total AUM = EUR 712 billion). The same proportion is true throughout Europe. However, if an AIF uses borrowing (which is not allowed for UCITS), it should of course be taken into account in the calculation.

In any case, **we strongly believe that the gross method of calculation is highly misleading and is not relevant** with regards to ESMA's objectives. In any case, **it makes no sense to aggregate different notional values.**

Box 95 - Gross Method of Calculating the Exposure of the AIF

We believe that gross leverage is a highly misleading proxy for the risks ESMA aims at measuring. This measure is indeed too simple and is not relevant to ESMA's objectives, in particular because it includes the leverage attached to derivatives and exchange rates.

Paragraph 3 – In the same way the exposure that exists at the level of a portfolio company is not intended to be included in the calculation of the exposure of a private equity or venture capital fund, we would like to introduce an exemption for funds of funds i.e. the exposure at the level of the underlying hedge funds should not be taken into account in the calculation of the exposure of the fund of funds.

Indeed, in the case of funds of funds, it is impossible to aggregate the leverage of underlying funds, as the latter is calculated differently for each underlying fund: it is as a consequence too complicated to consolidate it (in particular, it would be difficult in practice to make real time calculations: underlying funds might change their leverage often, making the calculations quickly outdated). Besides, this is the approach applied to UCITS funds of funds.

Box 96 -Commitment Method of Calculating the Exposure of an AIF

The commitment method is preferable to the gross method, as it allows excluding the leverage attached to derivatives and exchange rates.

The wording of paragraphs 1 and 2 and paragraphs 1 and 4 is not consistent. We suggest rewording this box in line with CESR's Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS (dated July 2010).

We suggest deleting paragraph 1b and replacing it by paragraph 2.

Box 99 – Exposures involving third party legal structures

First and foremost, we would like to highlight that it does not make sense to include the counterparty risk in the exposure calculation, as there are different ways to limit that risk (margin calls, diversification of risks etc).

NAM is in favour of option 3, as it allows a more precise calculation of the exposure.

- Q60: Notwithstanding the wording of recital 78 of the Directive, do you consider that leverage at the level of a third party financial or legal structure controlled by the AIF should always be included in the calculation of the leverage of the AIF? No

Transparency requirements

Box 106 - Content and Format of Remuneration Disclosure

We generally support the proposed approach. We strongly believe that the requirements in terms of remuneration disclosure should be proportionate so as not to generate significant additional costs.

We support a presentation of remuneration at an aggregated level, i.e. **at the level of the AIFM**. Indeed, it would be neither relevant nor possible to present remuneration at the level of the AIF. Moreover, in order to ensure confidentiality of the data, remuneration has to be disclosed in an aggregated manner, in particular for small sized AIFM. Furthermore, AIFMs do not necessarily have information available to allow all the different elements of remuneration to be allocated to individual AIFs.

In our opinion, the proportionality principle is a key point to define the general framework of the remuneration policies for AIFM. It implies that each management company has a great flexibility to set up all the components of its remuneration policy, in accordance with the general principles established for the sector. In this respect, **we would like to highlight one of the strong differences between the asset management industry and other financial activities: by nature, a management company does not take any risks affecting its own balance sheet or its assets.**

Regarding the content of the information to be disclosed, we consider that the remuneration disclosures should be subject to **similar exemptions as are available to firms under Directive 2006/48/EC, which effectively allows information which is immaterial, confidential or proprietary to not be disclosed.**

Box 109 - Format and Content of Reporting to Competent Authorities

We believe that a disclosure on a quarterly basis would be too burdensome and often not relevant. Indeed, a large part of AIFs are “UCITS like” funds for which a quarterly reporting would generate significant initial and ongoing costs. Moreover, detailed quarterly reporting would certainly exceed what is necessary to monitor systemic risk.

One of our members estimates that the cost of implementing a quarterly reporting would be of one person over the first year (in particular in order to set in place the required processes and procedures) and half a person the following years.

We think that an annual basis would be more appropriate. Additionally, we urge ESMA to apply the principle of proportionality based on the size of the AIFM and the types of AIFs it manages.

Box 110 - Use of Leverage on a ‘Substantial Basis’

We believe that the reference to **the gross calculation method should be removed and the choice of the calculation method left up to the AIFM (please refer to our previous comments of the methods of calculating the exposure of an AIF).**

In our opinion, the criteria set out in order to assess whether leverage is employed on a substantial basis are highly judgmental and subjective and could be interpreted very differently by competent authorities and AIFMs. We therefore wonder whether the proposed definition will lead to a consistent approach to leverage. This is particularly the case as the list is noted as being “non exhaustive”.

Moreover, we believe that to perform the assessment required under the points d) to f), the AIFM would have to consider consolidated information on the markets and information about investees/counterparties that are not under its control or accessible to it but rather only to the regulators. These points create an obligation that is difficult to discharge effectively.