



ESMA's Discussion paper on Key concepts of the AIFMD and types of AIFM – Opinion of the SMSG

The SMSG has been asked by ESMA to comment on the discussion paper on key concepts in the AIFMD. The ESMA consultation ended on 23 March, 2012 and while the SMSG was given the possibility of an extended period for responding given that the SMSG was only able to meet on April 26, 2012 as a body, comments are limited to a few key points as outlined below.

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1. ESMA again has a balancing act of on the one hand providing additional clarity as to what entities are to be considered AIFs and AIFMs while on the other hand avoiding to becoming too descriptive (and narrow, as the reality is already out there; in existence) and looking at defining more commercial terms like e.g. family offices and joint ventures. There is no need to do the latter.

Key elements of the AIF definition in the view of the working group are:

- the raising of capital from external, unaffiliated/third parties (i.e. you are managing other people's money)

- it needs to be an enterprise with a commercial reason of generating profits for investors

- there needs to be a business communication by or behalf of the entity seeking capital which results in the transfer of cash or assets to the AIF

-there should be an express linking of the capital raising with the defined investment policy

-the capital raising should be done by or on behalf of a "sponsor" which plans (itself or through a group member) to make a profit out of the management of the capital raised from third party/external sources

2. Proportionality needs to be applied to all articles and not only some, as proportionality is a general principle of law and regulation. It must also be borne in mind that size is not the only relevant factor
- others mentioned already in the Level1 text are, nature, scope and the complexity of activities as well as internal organisation. This will be especially important for the Remuneration discussion paper as well.

3. Dual registration. Due to the high number of managers which are currently MIFID firms (in particular for carrying out reception and transmission of orders and investment advice) the possibility of dual registration needs to be considered. Otherwise firms in some member states (where MIFID authorisation is demanded today) may need to restructure their activities while firms in other MS (where MIFID authorisation currently is not demanded) need not.
4. Delegation. Two aspects on delegation should be clarified by ESMA: Firstly, just because an AIFM itself does not perform certain of the functions in paragraph 2 of Annex 1 of the AIFMD, it does not automatically imply that they should be considered as delegated as these are not mandatory functions to be performed by an AIFM nor are they functions for which an AIFM needs to have responsibility. Secondly, an AIFM must be able to delegate both portfolio management and risk management as long as the delegation is not to such an extent that the AIFM becomes a letter-box-entity.
5. This opinion will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 26 April 2012

Guillaume Prache

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